Mens Rea and State Crimes

By John S. Baker, Jr.

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The public understanding of what is and is not a crime has eroded over time. The common law was clear: a crime requires the union of a prohibited act or actus reus and a guilty mind or mens rea.[1] Increasingly, however, "strict liability" offenses requiring no proof of a mens rea are becoming more common. This article briefly reviews this development and proposals for addressing the trend at the state level.

"PUBLIC WELFARE OFFENSES" AND STRICT LIABILITY

In the mid-nineteenth century, some states for the first time enacted police regulations which punished certain conduct without proof of a mens rea. In a law-review article that became a classic, Professor Sayre coined the term "public welfare offenses" to describe these strict-liability offenses.[2] The article distinguished these "regulatory offenses" from "true crimes."[3] Although some strict-liability offenses carried possible imprisonment, Professor Sayre wrote: "To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure. Crimes punishable with prison sentences, therefore, ordinarily require proof of a guilty intent."[4]

Like many exceptions to a rule, the exception for "public welfare offenses" grew considerably. Professor Sayre concluded his article by endorsing "public welfare offenses involving light penalties," but cautioned that "courts should scrupulously avoid extending the doctrines applicable to public welfare offenses to true crimes. To do so would sap the vitality of the criminal law."[5] By that criterion, Sayre would conclude today that the criminal law has been sapped of much of its vitality.

Professor Sayre may have unintentionally contributed to the growth of strict-liability offenses. The undefined term "public welfare offense" expanded in the process of justifying other strict-liability statutes. Also, the claim that strict-liability offenses had "rapidly spread throughout the United States" made additional such statutes seem less objectionable. Both claims have become a matter of dispute in an effort to show that the principle of mens rea is not an optional element of a crime.[6]

Prior to about 1970, federal criminal law played a relatively minor role in the overall picture of criminal law in the United States. Nevertheless, important U.S. Supreme Court decisions contributed to the erosion of mens rea. In 1909, the Supreme Court approved a fundamental break from the common law when in *New York Central & H. R Co. v. United States*[7] it held that a corporation could be guilty of a crime. The Court did so on the basis of an evolving notion of utilitarian legal policy even though, as a legal entity distinct from its employees and shareholders, a corporation is de facto incapable of having a mens rea. In 1922, the Supreme Court in *United States v. Balint*[8] upheld an indictment under the Narcotics Act despite the lack of a requirement of a mens rea. In 1943, the Court in *United States v. Dotterweich* relied on *New York Central* and *Balint* to uphold strict, vicarious liability of the president of a company convicted of a public welfare offense.[9]

Following World War II, the Court seemed to be less willing to allow criminal liability without moral fault. Notably, in the 1952 case *Morrissette v. United States*, the Court construed a federal theft statute, which did not include a mens rea, to include one. The opinion assumed that unless Congress clearly stated a contrary intent, federal statutes that are similar to common-law crimes should be construed to have a mens rea requirement. Justice Jackson re-affirmed in the strongest of terms the fundamental nature of the mens rea requirement.

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. . . .

> Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, 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. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law.[10]

Although the Court has not laid down a clear rule, some cases have also demonstrated a willingness to narrow the scope of the "public welfare" exception. *United States v. International Minerals & Chemical Corp.* characterized *Balint* and similar cases as involving statutes regulating "dangerous or deleterious devices or products or obnoxious waste materials."[11] Although machine guns fit that description, according to the Government, *Staples v. United States*[12] "conclude[d] that the background rule of the common law favoring mens rea should govern interpretation of" the National Firearms Act.[13]

It is significant that the Supreme Court has yet to lay down a clear rule regarding construction of criminal statutes lacking a mens rea requirement. As federal crimes have grown rapidly since 1970,[14] new offenses and "crimes" lacking a mens rea element have also increased. A report by The Heritage Foundation and the National Association of Criminal Defense Lawyers has demonstrated that during the 109th Congress (2005-06) "[o]ver 57 percent of the offenses introduced—and 64 percent of those enacted into law—contained inadequate guilty-mind requirements, thereby putting the innocent at risk of criminal punishment."[15]

Although they are not as inclined as Congress is to erode mens rea, many state legislatures have drifted away the common-law meaning of crime. The states vary considerably in the degree to which they support the principle of mens rea. They range from those whose criminal statutes more or less clearly adhere to the common-law meaning of crime to those whose statutes suggest that a mens rea requirement is optional. (See the Survey of State Mens Rea Requirements for a categorization of the states.[16]) Understanding the erosion of mens rea at the state level requires attention to the impact of the Model Penal Code ("MPC").

THE MODEL CODE

The MPC has influenced codification in at least thirty-four states.[17] When work on the MPC began, only Louisiana had a modern criminal code. So-called criminal codes in other states were not "codes," but merely collections of statutes. Both Louisiana's Criminal Code and the MPC systematically organized the substantive criminal law, beginning—like a European criminal code—with a "General Part," separate from the specific crimes. Both codes abstracted and placed in the "General Part"[18] those elements in the definitions of particular crimes that are common to all the crimes, notably those related to mens rea.

While the MPC's overall, national influence has been tremendous, that influence has varied from state to state. Apparently, no state has adopted the MPC in its entirety. Only a handful of states have accepted most of the MPC.[19] This paper is specifically focused on the extent to which the MPC influenced the states to preserve the essence of mens rea. On the one hand, the MPC's reduction of the number of mental states in statutes to four terms—"purposely," "knowingly," "recklessly," and "negligently"—is considered by some to be its greatest achievement.[20] On the other hand, the MPC's attempt to require every crime to include a culpable state of mind has been followed by only a few states.

Although the MPC deliberately chose not to use the term "mens rea," it attempts to preserve the core of the common-law definition of crime as requiring culpability. To do so, it includes a default rule of construction and definitions distinguishing "crimes" from "violations." As stated in The Comments to Section 1.04, it is "the position of the Code that penal sanctions are justified only with respect to conduct warranting the moral condemnation implicit in the concept of a crime."[21] Section 2.02 specifies that "[e]xcept as provided in Section 2.05, 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."[22] Subsection (3) adds a default provision: "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."[23] Note that the default provision does not include "negligently."

The exception provided in Section 2.05 to the normal minimal culpability requirements is actually an exclusion of strict- or "absolute"-liability offenses from the classification of "crime." As defined in Section 104(5), a "violation does not constitute a crime." Section 105 provides that a violation need not, but may, have a culpability requirement.[24] It also classifies offenses outside the Code, which lack a requirement of culpability, i.e., a mens rea, as violations.[25] Unfortunately, only eight states have adopted both the default provision in 2.02(3) and the exclusion of "violations" (or something similar designated an "infraction") from the definition of crime.[26] Another six states have only the default rule.[27]

THE IMPACT OF CODIFICATION

Despite its drafters' intentions, the MPC actually has had the unintended consequence of eroding the principle of mens rea in state criminal law. Understanding this paradox may assist with any attempt to assess the future of mens rea in the states. At least three reasons seem to help to explain the paradox. 1. The MPC "purposely" stripped culpability of its normative quality. 2. Codification freed state legislatures from a sense of obligation to common-law principles. 3. Those states that failed to follow the MPC's clear division between crime and violation opened up possibilities of interpretation by the courts.

1. The MPC's Codification of Culpability.

The MPC was drafted on the premise that U.S. criminal law was "an unprincipled mess."[28] In large part, "the mess" followed from our federalism. While all of the original states adopted the common law of England (although as of different dates), their various courts gave different interpretations to the issues common to criminal law, and their legislatures enacted different statutes that added to the criminal law of each state.

Prior to the MPC, however, the fundamental common-law principle of mens rea remained throughout the states. "Public welfare offenses," as discussed above, were understood to be the exception. Many scholars considered mens rea ambiguous, i.e., insufficiently descriptive. But that was the point: mens rea—the requirement of a guilty mind—was a matter of moral principle. As such, it constituted the genus under which several species of moral culpability fell—i.e., the particular rules.

The specific common-law mens rea identifying murder, as distinguished from manslaughter, was "malice aforethought." Pennsylvania, and later other states, added "premeditation" to the common-law meaning and thereby created confusion and controversy. The MPC, reflecting the views of Professor Wechsler and others, got rid of the term "malice aforethought" in murder.[29] The criticism was largely aimed at "premeditation." In saying that "malice aforethought" meant little more than intentional murder, the criticism was actually pointing to the term's original meaning, but stripping it of its moral significance.

"Malice aforethought" apparently derived from Aristotle's *Nicomachean Ethics*. Aristotle related injury to the type of injustice committed by the wrongdoer:

> When however an injury is done from choice, the doer is unjust and wicked. Hence acts due to sudden anger are rightly held not to be done of malice aforethought, for it is the man who gave the provocation that began it, not he who does the deed in a fit of passion.[30]

The MPC's simplification of culpability by reducing the terms to four had much to recommend it, but the simplification had a further purpose. "These definitions strove to simplify not only by radically reducing the number of mental states, *but also by stripping the definitions of these mental states of normative significance*."[31] Thus:

> Talk of "malice aforethought" and even "premeditation" was replaced by presumably testable phenomena such as "conscious object" or "knowledge." In its zeal to clarify the law, the

> Model Code even excised the words "intent" and "intention" from its terminology, concepts that in spite (or perhaps partly because) of their ambiguity had assumed a central place in the criminal law of the United States, as well as of many other countries.[32]

The MPC offered language of culpability that was descriptive, not normative. Most states influenced by the MPC did adopt the four terms of culpability. Some preferred in part to retain familiar terminology, such as "intent."[33] Stripping the language on culpability of its normative significance freed legislatures from a sense of moral obligation to preserve the principle of mens rea. It should not have been surprising then that many states chose not to adopt the MPC's view that crime must have some form of culpability.

Indeed, by including negligence as a culpable state of mind, the MPC severed the meaning of culpability from the principle of mens rea. On the one hand, the MPC provided a valuable clarification by distinguishing recklessness and negligence. Courts had constantly confused the two terms. On the other hand, as insisted by "the leading American criminal law theorist of the time, Jerome Hall,"[34] negligence has no place in criminal law because it does not constitute a mens rea.[35]

Professor Hall had no role in drafting the MPC.[36] Moreover, Professor Wechsler "ignored Hall's work in drafting the Code."[37] That was hardly surprising, given Wechsler's "scathing review"[38] of Hall's book and its focus on the fundamental nature of mens rea.

Wechsler deemed Jerome Hall's suggestion, made in the first edition of *General Principles of Criminal Law* in 1947 that "the proper role of criminal law is to provide a proper punishment for a person who causes legally prescribed social harms and to do so voluntarily, i.e., either intentionally or recklessly," to be so unsupportable as not to require serious consideration, never mind refutation. Of course, Hall's view has long since carried the day against the treatment orthodoxy to which Wechsler subscribed.[39]

2. Codification and Legislatures.

Professor Jerome Hall understood better than draftsmen of the MPC the challenges of introducing codification into a common-law system. Hall and others had been "invited [in the mid-thirties] to reorganize the [LSU] law school on the basis of an experiment to wed the two great systems of law, the Civil Law and the Common Law, in a modern synthesis of social science, philosophy, legal history and comparative law."[40] He had written a book on the first American codifier Edward Livingston and later organized his criminal casebook to reflect the organization of a European criminal code.[41] Hall left LSU in 1939 for the University of Indiana before Louisiana—the only civil-law state in the U.S.—adopted the first modern criminal code in 1942. Given his direct experience with the challenges of codification, it was significant that he resigned from the MPC drafting committee in 1955 after having "argued earlier that further scientific study was needed to ready American criminal law for comprehensive codification."[42]

Some criminal-law scholars understandably, but mistakenly, believe that Louisiana's criminal code could not have served as a good model for the MPC:

> [T]he Model Code drafters had virtually no existing American criminal codes to which to turn, with the possible exception of the recently reformed criminal code of Louisiana. That code, however, could have only limited significance for a Model Code of American criminal law because of the unique history and nature of Louisiana law, which alone among the states was rooted not in uncodified English common law, but in codified European civil law.[43]

Since about 1975, Louisiana's 1942 Code has been so haphazardly amended that it has been severely damaged as a formal code. Nevertheless, Louisiana has had more experience than any other state in converting the common law of crimes to statutes. The quoted scholars failed to distinguish the *form* of codification from its *substance*. On the one hand, President Jefferson required Louisiana to adopt the common law of crimes (while permitting retention of the Roman-civil law in private law) following the territory's purchase in 1803 from France. On the other hand, Louisiana continued to adhere to the French requirement that all crimes must

be statutory. Thus, Louisiana accepted the *substance* of the common law of crimes, but not its *form*.

In the 1820s, Edward Livingston created a comprehensive criminal code for Louisiana. Although the Livingston Code failed to pass the legislature, it became a model for codification praised internationally by legal reformers. When Louisiana did finally adopt a formal criminal code in 1942, it borrowed from Livingston's Code. The MPC certainly drew in part from the Louisiana and Livingston codes in *substance* by departing from the common-law rule of strict construction[44] and in *form* by declaring that all crimes are statutory.[45]

Changing the *form* of the criminal law may or may not involve extensive changes in its *substance*. The 1942 Louisiana Criminal Code modified certain aspects of culpability by dropping the actual terms "mens rea" and "malice aforethought," while essentially preserving the mens rea principle. The MPC made much more radical changes, discussed above. While the codified form need not do so, legal reformers have often promoted it because it opens opportunities for extensive changes in the substance of the law.

Legal reform movements in the U.S. have long used codification to challenge the common law both in form and substance. The debates of the so-called American Codification Movement from 1820 to 1850 have been the subject of considerable academic writing.[46] The political, economic, and social dimensions of those debates are beyond the scope of this paper. It is noteworthy simply that codification has been and continues to be a favored form of substantive legal reform. It is a mistake, however, to think of proposals for codification as necessarily being democratically inspired.

> Codification is not, of course, inherently democratic. It has been a genuinely radical slogan, calling for the enactment of fixed written rules to restrain arbitrary authority, but it also has been the instrument of despotic authority striving to enforce its will through plain, succinct rules; and it has been the program of academic lawyers with the largely aesthetic aim of achieving *elegantia juris*.[47]

The fundamental fact that the MPC changed both the form and large parts of the substance of the law encouraged an attitude that traditional common-law principles were no longer sacrosanct. While the MPC clearly took the position that there should be no crime without culpability, its larger message was positivistic. Some legislatures more or less adhered to the mens rea principle, but it was as a matter of legislative grace. Others adhered only in part, creating inconsistencies to be resolved by the courts.[48] The MPC could not oblige states to adopt all of its provisions, but it did free them from a sense of obligation to common-law principles and cases.

3. Codification and the Courts.

Like the Louisiana Code and the Livingston Code, the MPC "was specifically designed to wrest the criminal law out of the hands of the judiciary."[49] As to culpability, that goal was impossible to achieve at least in states that did not adopt the default rule on culpability and the clear distinction between crimes and violations. When legislatures in those states enact statutes without a culpable state of mind, state courts have to interpret the legislature's intent. Some courts have been guided by the common-law principle of mens rea; others have not. In such a situation, judicial law-making continues, but not necessarily under the constraints of the common law. In many ways, the situation represents the worst of both the common law and civil law systems.

More generally, "wrest[ing] criminal law out of the hands of the judiciary" is extremely difficult in the U.S. due to at least three inter-related issues: 1. the more prominent role courts play in the Anglo-American system than in civil-law systems; 2. the principle of "fair import" interpretation, which traces from the Livingston Code to the Louisiana Code and into the MPC; and 3. the need to coordinate trial procedure in order to limit the possibilities for judicial interpretation.

The political purposes of codification, as epitomized in the French Civil Code, include making the laws understandable to ordinary people and subordinating the judiciary to the legislative branch. The French version of separation of powers is actually a system of parliamentary supremacy—at least to an American.

In such a system, judges are generally low-level civil servants who are expected simply to apply the law as (clearly) written by the legislative branch. At least before the emergence of strong courts under the European Union, continental judges have not been educated or expected to be creative.

In order to limit the power of judges to be creative with the criminal law, Livingston's Code adopted a principle of "genuine" or "fair import" construction to replace the common-law principle of strict construction.[50] That new rule of construction was later imported into Article 3[51] of the Louisiana Criminal Code. Nevertheless, the Louisiana Supreme Court has, from early on, sporadically declined to follow Article 3 and, instead, acted in a common-law fashion and adhered to the principle of strict construction.[52]

The principle of "fair import" construction is not well-understood and sometimes completely misinterpreted. Some scholars, who presumably do not know the origin of "fair import" construction in the Livingston attempt to limit judges, think the language amounts to "liberal construction" and an encouragement to judicial creativity.[53] Not only was the purpose exactly the opposite, but "fair import" construction is tied to the more general language used in the Livingston and Louisiana codes.

As a drafter of Louisiana's Criminal Code explained, with no success in persuading the Louisiana Supreme Court, "strict construction" is incompatible with the Code.[54] For instance, in Louisiana's theft statute, the subject of the crime can be "anything of value."[55] The term combines the three crimes—larceny, false pretenses, and embezzlement—and attempts to prevent judges from drawing distinctions in this area as common-law judges had done in the past. The very broad language is unlike the very specific language likely to emerge from the hand of a common-law-trained lawyer.[56] Like most of the language in the Louisiana Criminal Code, as originally enacted, it is not even susceptible to strict (in the sense of narrow) construction.

If the language of a criminal law is so broad as not to be susceptible to strict construction and intended to be removed from judicial interpretation, what protects the accused from vague and overbroad criminal laws? Of course, in an important but, in this context, secondary sense, the answer is the Fourteenth Amendment's doctrine on vagueness and overbreadth. Primarily, though, the principle of "fair import" construction is tied to the common-sense role of the jury.

The institution of the jury separates the trial of a criminal case in the U.S. from the judge-run, inquisitorial model in the Code countries of the Continent. In order effectively "to wrest the criminal law out of the hands of the judiciary," the substantive criminal law requires coordination with trial procedure. The jury-trial system can be so arranged, as it is in Louisiana, that the role of the judge is very limited. A Louisiana trial judge has virtually no discretion in the possible verdicts submitted to the jury. The judge must instruct the jury not only on the crime charged, but also on all the lesser-included crimes. Before the legislature started adding many crimes not included in the Code as originally enacted, it could be said that the lesser-included crimes, both as to the required act and mental elements, were always necessarily consistent with and supported by the greater crime.

The much-more complex MPC reflects the drafters' common-law training and their ambitions:

> Compared to many European criminal codes, the Model Code covers more topics in greater detail. As a result, the Code occasionally reads more like a criminal law textbook than a code. Its comprehensiveness and detail reflect the scope and nature of the Code's reform ambition. Topics can be left for judicial or scholarly interpretation only in the presence of a highly sophisticated judiciary and academic community.[57]

The MPC also faced other hurdles to "wrest[ing] the criminal law out of the hands of the judiciary." Although it adopted "fair import" construction, in part like the Livingston and Louisiana codes, it added a number of factors to guide interpretation. Although not so intended,[58] these factors seemed to invite judicial creativity.

Even if its principle of construction were more restrictive than it is, the MPC does not, and really could not, coordinate complementary changes to the trial judge's role vis-à-vis the jury. The MPC addresses

more than substantive criminal law, including some procedural matters,[59] but "[n]o part of the Model Code is explicitly devoted to the remaining aspect of penal law, the law of criminal procedure and evidence."[60] While rules of evidence have become more uniform in the states, drawing from the Federal Code of Evidence, states still differ in balancing the role of the judge vis-à-vis the jury. As indicated above, statutorily restricting a trial judge's discretion in charging and submitting possible verdicts for consideration by the jury can be very supportive of maintaining a legislated criminal law. States that traditionally have allowed the criminal-trial judge broad discretion in matters such as commenting on the evidence in a jury charge are less likely to restrict the trial judge to the extent necessary to limit judicial de-construction of a criminal code.

LEGISLATION TO REQUIRE THAT ALL CRIMES HAVE A MENS REA

The preceding discussion forms the basis for evaluating efforts and proposals to strengthen the protection of innocence through the requirement that all crimes have a mens rea. First, it is necessary to distinguish between a statement of principle and implementing rules.[61] Every state could make as a part of its criminal law a clear statement that the common-law *principle* of mens rea is fundamental. Thereafter, by rules compatible with its other criminal-law rules, each state would implement the principle.

The MPC avoids the principle, but more or less presumes it. It relies instead only on definitions and a default rule of construction. In states that declined to adopt those safeguards, courts are left to interpret legislative intent when a statute does not include a culpability element. As happened in Louisiana when the code appeared to make mens rea optional,[62] the courts either may or may not invoke the mens rea principle in construing statutes without such.

The advantages and disadvantages of a formal code flow from its nature as a closed system. If all the various parts of a criminal code coordinate, with the General Part providing the elements applicable to all crimes, the law should be very clear, requiring little judicial interpretation, and thus producing efficiency. The main criticism of codes is that, unlike the common law, they do not adapt well to change. Of course, statutory statements of law have to be updated occasionally. Common-law-trained lawyers generally assume that this is the job of the judiciary. If the legislature regularly updates the law and does so in a manner consistent with the form of the existing code, a criminal code can continue to work very efficiently. In our democratic society, however, legislatures rarely exhibit such discipline. Rather, they inevitably enact ad hoc additions, damaging the symmetry of the code and necessitating judicial interpretation.

Such has been the situation since about 1970 and the start of the "war on crime." Most additions to state criminal law have been what some might call "feel good" statutes: unnecessary laws, largely ignored by prosecutors because the conduct is already covered by existing crimes, and whose main purpose is to make the public "feel good" about their legislative sponsors. The new legislation generally breaks down the logic and efficiency of the code. This has happened not only to the Louisiana Criminal Code, but to the code in MPC states.[63] MPC states that omit the two provisions which protect mens rea, the default rule and the distinction between crimes and violations, further erode the common-law principle of mens rea as they add crimes without a culpability element.

Only a few MPC states have both the necessary provisions, however. Those MPC states that omitted them obviously made the legislative decision not to adopt them. With the lapse of time, legislatures in those states might be persuaded to adopt the two provisions. State prosecutors, however, will likely oppose any such change as unnecessary and even as "pro-criminal." In order to overcome such opposition it may be useful to reinforce the MPC culpability framework. That is to say, in addition to the MPC's default rule and definitions, some language could be introduced to re-establish that culpability is a matter of moral obligation binding the legislature to prevent the conviction of innocent persons.

Even if all the states influenced by the MPC were to adopt the above suggestions, still at least a dozen states would remain. The question naturally arises whether there might be a single model law for all the states. Certainly, there could be legislation in all states that

re-confirms the *principle* that every crime (as opposed to violations or other offenses without the possibility of jail time) must have a mens rea. The *rules* needed to implement the principle could not be uniform, however, unless the remaining states were to follow the MPC or all states—as one scholar has suggested[64]—adopt a new model criminal code.

The American Legislative Exchange Council ("ALEC") has created a piece of model legislation[65] whose

> purpose . . . is to enact default rules of application to ensure that criminal intent (*mens rea*) requirements are adequate to protect persons against unjust charges and convictions where the law has heretofore failed to clearly and expressly set forth the criminal intent (*mens rea*) requirements in the text defining the offense or penalty.[66]

The most significant aspect of this model legislation is its insistence on the need for every state to re-affirm and protect the principle of mens rea.

The actual implementation of the principle will necessarily vary somewhat among the states. The model act follows the MPC's analytical approach to the elements of culpability and makes the default rule applicable to all the elements. Unlike the MPC, however, it uses the term "intent." Most, but not all, states following the MPC culpability framework have dropped the term "intent."

As with the MPC itself, states are free to choose whether to adopt and how to integrate the ALEC model law. The ALEC model might encourage states following the MPC, but without its default rules, simply to adopt those default rules. States might also use the ALEC model law to reconsider, in part, the MPC approach and return to the term "intent." Utah, which has adopted the MPC's analytical framework on culpability, but without the default rules, nevertheless continues to use the term "intent." In MPC states without the default rules, therefore, the ALEC model law can serve as the basis for strengthening the protection of mens rea.

As to non-MPC states, it is more difficult to generalize. Although in speech, lawyers commonly equate mens rea with "intent," this is not accurate. Intent is a form of mens rea, one which can be divided into specific intent (similar to "purposely" in the MPC) and general intent (similar to "knowingly" in the MPC). As discussed above, a clear statement on the principle of mens rea is first of all needed. Next, the particular terms, in this case "intent," should be compatible with existing law in a state because the model law does not provide how to handle other inconsistencies that the model law would create.

The Louisiana Criminal Code, for example, does not employ the MPC's element analysis of culpability. Its General Part maintains the common-law terms "specific intent," "general intent," and "criminal negligence" (similar to "recklessly" in the MPC). The purpose of the ALEC model law could be achieved simply by a few short changes to the definitions of crime and criminal conduct.[67]

Conclusion

Fifty years after the final draft of the MPC in 1962 is an appropriate point for a serious debate about and assessment of the adequacy of the MPC's framework on culpability. The MPC's elements of culpability are analytically advanced, but are not necessarily easy to understand. As a recent empirical study demonstrated, "Jurors can't distinguish knowing from reckless."[68] More importantly, as discussed in this paper, the MPC's operating premises and radical changes to the common law may have been contributing causes—not the solution—to the erosion of mens rea. It is time to analyze the MPC's "radical change in the law of mens rea, one of the core principles of the common law [that] drew little criticism from commentators" other than Professor Jerome Hall.[69] The erosion of mens rea since the advent of the MPC suggests the need to embrace Professor Hall's insistence that the particular rules reflect the primacy of the principle of mens rea in criminal law.

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A survey of state mens rea requirements is available at this link: http://www.fed-soc.org/john_baker_mens_rea

Endnotes

1 WILLIAM BLACKSTONE, 4 COMMENTARIES, at 432 (9th ed., Callahan & Co. 1913).

2 Francis Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 83 (1933).

> In general, offenses not requiring a *mens rea* are the minor violations of laws regulating the sale of intoxicating liquor, impure or adulterated food, milk, drugs or narcotics, criminal nuisances, violations of traffic or motor-vehicle regulations, or of general police regulations passed for the safety, health, or well-being of the community and not in general involving moral delinquency.

Id.

3 *Id.* at 68.

4 *Id.* at 72.

5 *Id.* at 84.

6 Sayre's article claims that from the 1860s these new offenses "rapidly spread throughout the country" and that this development resulted from a new-found concern for "protection . . . of public and social interests . . . necessitated by the complexities of modern life." *Id.* at 83. A more recent article reviews the cases cited by the Sayre article and finds that they do not involve offenses concerning public welfare and do not support claims about an explosion in strict liability in state criminal law. *See* Richard G. Singer, *The Resurgence of Mens Rea: The Rise and Fall of Strict Liability*, 30 B.C.L.REV. 337 (1989).

> First, the vast majority of statutes and cases had nothing to do with public health or welfare; at least a half of the cases in the nineteenth century dealt not with housing, food, consumer protection generally, or other "regulatory" measures as such, but with control of liquor and protection of minors. Second, a number of courts continued to require full knowledge on the part of the defendant even in these kinds of offenses, and a sizeable number allowed reasonable mistake as a defense. Thus, the story of the "explosion" of strict criminal liability during the latter part of the nineteenth century is exaggerated, at best.

Id. at 363.

7 212 U.S. 481 (1909).

8 258 U.S. 250 (1922).

9 320 U.S. 277 (1943).

10 Morissette v. United States, 342 U.S. 246, 250-52 (1952) (footnote omitted); *see also* Staples v. United States, 511 U.S. 600, 613 n.6 (1994) (footnotes omitted).

11 402 U.S. 558, 564-65 (1971).

12 511 U.S. 600 (1994).

13 *Id.* at 619.

14 *See generally* AM. BAR ASS'N TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIME (1998).

15 BRIAN WALSH & TIFFANY JOSLYN, HERITAGE FOUND., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010), *available at* http://report.heritage.org/sr0077 and http://nacdl.org/withoutintent.

16 The survey is available at this link: http://www.fed-soc.org/john_baker_mens_rea

17 *See* PAUL H. ROBINSON & MARKUS DIRK DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 4 (1999) [hereinafter ROBINSON & DUBBER] (listing thirty-four states through 1983). West's *Encyclopedia of American Law* says:

> Following the introduction of the MPC, 36 states adopted new criminal codes, all of them influenced by the MPC and some of them using the exact language of the MPC for their statutes. Even if they did not adopt the language, some states used the MPC's model of organization as a starting point.

Model Penal Code, West's Encyclopedia of American Law, www.encyclopedia.com/doc/1G2-3437702966.html (last visited July 25, 2012); *see also* Model Penal Code (MPC), Mojo Law, http://www.mojolaw.com/info/cl014 (last visited July 25, 2012) ("As of 2007, thirty-seven states have adopted modified and partial versions of the Model Penal Code and several, including New York, New Jersey and Oregon, have enacted nearly all of its provisions."). In a telephone inquiry, the author of this article checked with personnel at the American Law Institute, who said that it does not maintain a current list of states whose criminal codes have adopted parts of its MPC.

18 *See* Jerome Hall, *The General Principles of Criminal Law* (2d ed., The Bobbs-Merrill Co. 1960) [hereinafter *General Principles of Criminal Law*].

19 *See supra* note 17.

20 *See* ROBINSON & DUBBER, *supra* note 17, at 12.

21 MODEL PENAL CODE AND COMMENTARIES 72 (Official Draft and Revised Comments 1985) (footnote omitted).

22 *Id.* § 2.02.

23 *Id.* § 2.02(3) (emphasis added).

24 Section 2.05 provides in pertinent part: "(1) The requirements of culpability prescribed by Sections 2.01 and 2.02 do not apply to: (a) offenses which constitute violations, unless the requirement involved is included in the definition of the offense or the Court determines that its application is consistent with effective enforcement of the law defining the offense." *Id.* § 2.05.

25 *Id.* § 2.05(1)(b), (2)(a) and (b).

26 Alaska, Arkansas, Delaware, Hawaii, Kansas, Missouri, Oregon, and Pennsylvania. *See infra* Survey of State Mens Rea Requirements, § A.

27 Illinois, North Dakota, Ohio, Tennessee, Texas, and Utah. *See infra* Survey of State Mens Rea Requirements, § B. Note that although the MPC default provision does not include "negligently," some states adopt an expanded default provision. "A number of jurisdictions, following New York's lead, provide that when the definition of an offense is silent as to the requisite culpability, any of the four culpable mental states will suffice, thereby including negligence." Model Penal Code and Commentaries 244-45 n.36 (Official Draft and Revised Comments 1985).

28 Robinson & Dubber, *supra* note 17, at 10.

29 *See* Model Penal Code § 210.6 (Tentative Draft No. 9, 1959).

30 Aristotle, Nicomachean Ethics, Book V (H. Rackham trans., Harv. Univ. Press 1926).

31 Robinson & Dubber, *supra* note 17, at 12 (emphasis added).

32 *Id.*

33 *See* Utah Code Ann. § 76-2-101 (1)(b).

34 Robinson & Dubber, *supra* note 17, at 17 n.6.

35 Jerome Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 Colum. L. Rev. 632 (1963).

36 Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 Buff. Crim. L. Rev. 53, 60 (2000) [hereinafter Dubber].

37 *Id.* at 64.

38 *Id.* at 60 n.9 (referring to Herbert Wechsler, *Book Review*, 49 Colum. L. Rev. 425 (1949)

39 *Id.* at 64.

40 Thomas A. Cowan, *Dedication—Jerome Hall*, 50 Ind. L.J., Art. 1 (1975).

41 Jerome Hall, Edward Livingston and His Louisiana Penal Code (1936). This author and others continued Hall's organization based on the format of a continental code into the last edition of the casebook, Hall's Criminal Law: Cases and Materials (5th ed., John S. Baker, Jr., Daniel H. Benson, Robert Force, and B.J. George, Jr. eds., Michie Co. 1993).

42 Robinson & Dubber, *supra* note 17, at 17 n.6 (citing Jerome Hall, *The Proposal to Prepare a Model Penal Code*, 4 J. Legal Stud. 91 (1951).

43 Robinson & Dubber, *supra* note 17, at 8.

44 *See* Model Penal Code § 1.02 comment (3d Tentative Draft 1954) (citing Louisiana's provision on construction as analogous to the principle of construction to be included in the MPC).

45 MPC § 1.05(1) provides: "No conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State." *See also* § 1.03(a).

46 *See* Robert W. Gordon, *Book Review:* The American Codification Movement, a Study of Antebellum Legal Reform, 36 Vand. L. Rev. 431 (1983).

47 *Id.* at 443.

48 *See, e.g.*, Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 Buff. Crim. L. Rev. 399 (2000) (Many states declined to adopt the MPC's rejection of the felony-murder rule, which was part of its position against strict liability. The article explores the tension of this inconsistency.).

49 Robinson & Dubber, *supra* note 17, at 10.

50 *See* John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?*, 16 Rutgers L.J. 495, 364-66 n.356 (1984-85) [hereinafter *Nationalizing Criminal Law*].

51 La. Rev. Stat. Ann. § 14:3.

> Interpretation
>
> The articles of this Code cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and to effect the objects of the law, all of its provisions shall be given *a genuine construction, according to the fair import of their words*, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision.

Id. (emphasis added).

52 Clarence J. Morrow, *Civilian Codification Under Judicial Review: The Generality of "Immorality" in Louisiana*, 21 Tul. L. Rev. 545, 549- 53, 557-58 (1946-47) [hereinafter Morrow].

53 *See Nationalizing Criminal Law*, *supra* note 50, at 564.

54 *See* Morrow, *supra* note 52, at 550-51.

55 La. Rev. Stat. Ann. § 14:67.

56 *See* Morrow, *supra* note 52, at 550.

> General language in legislation produces brevity, simplicity, clarity, and popularity of expression. It avoids detailed enumeration, particularization, circumlocution—those all too familiar lengthy passages in which the reader forgets the first portion before he reaches the middle. The choice of general phrasing is largely responsible for the success of civilian legislation; the lack of it is the single greatest defect in Anglo-American legislation, and the one that American draftsmen are trying hardest to overcome.

Id. (footnote omitted).

57 Robinson & Dubber, *supra* note 17, at 10.

58 *See id.*

> The Model Penal Code drafters' concern for advancing legality interests also showed in their creation of a system for the interpretation of the Code's provisions. Such guidance

in the exercise of judicial discretion increases the law's predictability and reduces both disparity in application and the potential for abuse of discretion.

The statutory principles of interpretation also are designed to advance the goals for which criminal liability and punishment are imposed. Model Penal Code Section 1.02 directs judges to interpret ambiguous provisions to further the Code's purposes. While such a provision has its shortcomings (it gives no guidance on what to do when different purposes conflict, as frequently occurs), it is an important first step toward rationality in code drafting, for it offers a formal statement of what the code is meant to achieve.

Id. (footnote omitted).

59 *Id.* at 4.

60 *Id.*

61 *General Principles of Criminal Law*, *supra* note 18.

62 Compare the discussion of *State v. Terrell*, 352 So. 220 (La. 1977), which upheld a conviction without a mens rea, in John S. Baker, Jr., *Criminal Intent—The Mental Element*, 39 La. L. Rev. 771 (1979), with *State v. Larson*, 653 So.2d 1158 (1995), which read in an intent requirement.

63 *See* Dubber, *supra* note 36, at 90.

64 *See id.*

65 In pertinent part, the model law provides as follows:

Section 1. {Title.} This Act may be cited as the "The Criminal Intent Protection Act."

Section 2. {Legislative Purpose and Findings.}

The purpose of this Act is to enact default rules of application to ensure that criminal intent (*mens rea*) requirements are adequate to protect persons against unjust charges and convictions where the law has heretofore failed to clearly and expressly set forth the criminal intent (*mens rea*) requirements in the text defining the offense or penalty.

Section 3. {Culpability Requirements.}

(A) Culpability Requirements.

(1) The provisions of this section shall apply to any criminal offense or penalty.

(2) Criminal Intent Required Unless Otherwise Provided—When the language defining a criminal offense or penalty does not specify the criminal intent required to establish an element of the offense or penalty, then such element shall be established only if a person acts:

(a) with the conscious object to engage in conduct of the nature constituting the element;

(b) with the conscious object to cause such a result required by the element;

(c) with an awareness of the existence of any attendant circumstances required by the element or with the belief or hope that such circumstances exist; and

(d) with either specific intent to violate the law or with knowledge that the person's conduct is unlawful.

(3) Prescribed Criminal Intent Requirement Applies To All Elements—When the language defining a criminal offense or penalty specifies the criminal intent required to establish commission of an offense or imposition of a penalty without specifying the particular elements to which the criminal intent requirement applies, such criminal intent requirement shall apply to all elements of the offense or penalty, including jurisdictional elements.

(4) For the purposes of this section, the following definitions apply:

(a) The term "criminal offense" shall include any portion of a statute, rule, or guidance that defines one or more elements of a violation of law that may be punished by a criminal penalty.

(b) The term "penalty" shall include any criminal fine, criminal restitution, criminal forfeiture, term of imprisonment or confinement, probation, debarment, or sentence of death imposed upon a defendant by the authority of the law and the judgment and sentence of a court.

(c) The terms "person," "he," and "actor" shall include any natural person, corporation, or unincorporated association.

Memorandum from the Am. Legislative Exch. Council to Pub. Safety & Elections Task Force Members 15-17 (Mar. 31, 2011), *available at* http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/pseupdated_35-daymailing%20Ohio.pdf (DRAFT Criminal Intent Protection Act).

66 *Id.* § 2.

67 Since the Louisiana Criminal Code was enacted as a well-formed code in 1942, a number of the newer statutes have used undefined mental elements that undermine the Code's consistency and structure. As to the mental elements defined in the General Part, the following changes would eliminate strict-liability "crimes." First, subsection (2) in La. Rev. Stat. Ann. § 14:8 (Criminal Conduct), below, would be dropped. For consistency, the following words would also be eliminated from La. Rev. Stat. Ann. § 14:11: "while in others no intent is required." The definition of crime, La. Rev. Stat. Ann. § 14:7 (Crime Defined) includes offenses outside the code, and these offenses are often regulatory. Such regulatory offenses would be re-defined as non-criminal violations.

8. Criminal conduct

Criminal conduct consists of:

(1) An act or a failure to act that produces criminal consequences, and which is combined with criminal intent; or

(2) A mere act or failure to act that produces criminal consequences, where there is no requirement of criminal intent; or

(3) Criminal negligence that produces criminal consequences.

La. Rev. Stat. Ann. § 14:8.

68 *See* Karen Sloan, *Study: Jurors Can't Distinguish Between Knowing and Reckless Conduct*, Nat'l L.J., Dec. 20, 2011.

69 Robinson & Dubber, *supra* note 17, at 12 & n.37.

Survey of State Mens Rea Requirements*

INTRODUCTION—THE MODEL PENAL CODE

The Model Penal Code ("MPC") identifies four distinct types of mens rea, namely purposely, knowingly, recklessly, and negligently. The MPC also contains the following express default mens rea provision for situations when the legislation is silent as to what culpable mental state is necessary if it is a material element of the offense: "2.02(3) Culpability Required Unless Otherwise Provided. 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."

According to the above provision, if culpability is a material element of an offense and is not expressly set out in the statute, then an accused can only be convicted if he/she acted purposely, knowingly, or recklessly. An accused cannot be convicted of an offense if the statute is silent as to culpability and he/she has acted negligently. This provision of the MPC does not take into consideration offenses that involve absolute/strict liability when a culpable mental state is not required.

In addition, the MPC also contains a provision that expressly dispenses with the culpability requirements in § 2.02(3) above, as follows:

> 2.05 When Culpability Requirements Are Inapplicable to Violations and to Offenses Defined by Other Statutes; Effect of Absolute Liability in Reducing Grade of Offense to Violation.
>
> (1) The requirements of culpability prescribed by Sections 2.01 and 2.02 do not apply to:
>
> (a) offenses which constitute violations, unless the requirement involved is included in the definition of the offense or the Court determines that its application is consistent with effective enforcement of the law defining the offense; or
>
> (b) offenses defined by statutes other than the Code, insofar as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears.

The review of the case law with respect to states that included one or both of the above sections from the MPC started with the cases listed in the annotated statutes for each state. The cases were noted to make sure they had not been overturned, and all of the cases that followed that particular decision were reviewed and added if relevant. In addition, some cases that were cited in the cases listed in the annotated statutes were added if they were particularly relevant or helpful.

The research quickly revealed that this is by no means an exhaustive list of relevant cases and may be only the tip of the iceberg in some jurisdictions. As a result, the summary is intended to provide a sense of some of the issues related to the default mens rea provision.

SUMMARY AND LIST OF ISSUES

There are fourteen states that have a default mens rea provision similar or identical to that found in § 2.02(3) of the MPC, namely Alaska, Arkansas, Delaware, Hawaii, Illinois, Kansas, Missouri, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, and Utah. There are eight states that have provisions similar or identical to both § 2.02(3) and § 2.05, namely Alaska, Arkansas, Delaware, Hawaii, Kansas, Missouri, Oregon, and Pennsylvania.

Very generally, the case law was found to be less than consistent, and the cases varied widely in their application of the principles of statutory interpretation and analysis of legislative intent. For example, some cases were a straightforward application of the default mens rea provision, while others were not. In addition, some courts undertook a thoughtful and detailed analysis of legislative intent, while others did little more than a cursory examination of the wording of the statute to decide whether the legislature intended to dispense with a culpable mental state. Lastly, it was noted that some courts grappled with difficult and seeming unintended consequences arising from the circumstances in that particular state.

* *This survey was compiled by Beverly Froese, Attorney at the Public Interest Law Centre of Legal Aid Manitoba, and Sessional Instructor, Faculty of Law, University of Manitoba.*

The following list of issues/concerns/observations was made after the review of the relevant case law from these fourteen states:

1. One of the most significant issues is how the courts interpret a "clear legislative intent" to dispense with a culpable mental state. The case law is inconsistent, and it seems that leaving it to the courts to decide whether the legislature intended to dispense with a culpable mental state often results in confusion and uncertainty. See for example the cases of *McNutt* and *Rutley* from Oregon, and *Rainoldi* and *Florence* from Texas. The *Florence* case from Texas is probably the best and most thoughtful case on this point. In that case the court set out clear guidelines to consider and undertook an in-depth analysis of each factor to come to its conclusion. In addition, the dissenting judgments in *Van Norsdall* and *Macquire* from Oregon are interesting and worthy of note.

2. There is a considerable disparity in the case law in terms of how much analysis the appellate courts do when determining legislative intent. For example, some courts say the wording of the statute is clear and unambiguous, while other courts undertake some degree of analysis of the legislative history, including looking to legislative debates or commentary in the statute. In addition, some courts cite cases from other jurisdictions or with similar statutes while others do not. See for example the cases of *Hoover* from Delaware, *Sevilla* from Illinois, *Horst* from Missouri, *Taylor* from Oregon, *Ludwig* from Pennsylvania, and *Turner* from Tennessee.

3. The court's interpretation of "legislative silence" is a significant issue when determining the appropriate culpable mental state, and the case law is inconsistent. Some courts interpret silence in the statute to be proof of legislative intent to dispense with a culpable mental state, while others say that legislative silence in and of itself does not mean an intent to dispense with a culpable mental state. See for example the cases of *Stivers* and *Adkins* from Arkansas, *Hill* from Tennessee, *Whitlow* and *Anderson* from Illinois, *Becker* from Ohio, and *Von Eil Eyerly* from Oregon.

4. Many of the defendants challenged the offenses on the grounds that the statute was unconstitutionally vague or a violation of due process. In some cases the courts imputed a culpable mental state to remedy the constitutional deficiency, while in other cases the courts felt bound by the wording of the statute. See for example the cases of *Mayfield*, *Ludwig*, and *Omar* from Pennsylvania.

5. Concerns about innocent conduct being captured if the offense does not require a culpable mental state seem to be an important factor in several of the cases. For example, see the cases of *Arron, Anderson*, and *Terrell* from Illinois; *Wolfe* and *Stroup* from Oregon; and *Howard* from Texas.

6. Several of the Oregon and Texas cases illustrate confusing and complex issues the courts are left to deal with after revisions have been made to the criminal code or offenses are moved in or out of the criminal code. See for example the dissenting judge's remarks in *Von Eil Eylerly* from Oregon.

7. In several of the cases, the defendant challenged the validity of the indictment or the instructions given to the jury because they either included an incorrect culpable mental state or excluded the correct culpable mental state. These cases illustrate the importance of having clarity and certainty in the wording of the statute in the first place so these matters do not have to proceed to the appellate courts. See for example the cases of *Carrea* from Delaware, *Holbron* from Hawaii, *Leach* from Illinois, *Williams* from Missouri, *Anderson* from Tennessee, and *Fitch* from Oregon.

8. Most of the cases relate to criminal/regulatory offenses; however, there are some examples of municipal code offenses in Ohio.

9. One of the relevant factors the courts will take into account when determining whether a culpable mental state is required is whether the consequences will lead to absurd or harsh results. See for instance the case of *Sevilla* from Illinois.

10. Another relevant factor when determining legislative intent to dispense with a culpable mental state is the harshness of the penalty. See for example the cases of *Whitlow* and *Sevilla* from Illinois and *Wolfe* from Oregon.

11. The case of *Weise* from Texas illustrates the issue of the appropriate remedy available to a defendant, i.e., habeas corpus prior to trial or appeal to a higher court after conviction, or the properly framed constitutional challenge. This is another example of the need for clarity and certainty in the statute in the first place because of the consequences if a defendant follows the wrong path.

12. Some of the states seemed to have a particular issue that frequently appears in the case law. For example, in Alaska several of the cases dealt with whether a culpable mental state is required for an aggravating circumstance and several of the Oregon cases dealt with either the meaning of "material element" or whether the statute creates a violation or a strict-liability offense.

13. One issue that came up in some of the cases was whether the default mens rea provision applies only to offenses in the criminal code or to other titles as well. See for instance the *Eldred* case from North Dakota and *Orr-Hickey* from Alaska.

A. STATES THAT HAVE PROVISIONS SIMILAR OR IDENTICAL TO § 2.02(3) AND § 2.05 OF THE MODEL PENAL CODE

1. ALASKA

Alaska's statute states that a person cannot be found guilty unless he/she acts with a culpable mental state. However, there are exceptions to the requirement of a culpable mental state, namely if the offense is a violation and no culpable mental state is specified in its definition, if it is designated as a strict-liability offense or if there is a legislative intent in the statute to dispense with the requirement of a culpable mental state.

If the offense does not fall within one of the above exceptions, then a culpable mental state is required. If the statute is silent, then the culpable mental state that must be proved regarding conduct is knowingly and the culpable mental state that must be proved regarding a circumstance or result is recklessly. Alaska's statute does have an express default mens rea provision; however, it is different from the MPC. First, it distinguishes between the mental state necessary for conduct and circumstance/result, and, second, it does not include purposely. Having said that, it is similar to the MPC because it excludes negligently.

In addition, Alaska's statute has a provision that is similar in part to § 2.05 because it excludes violations from the general requirements of culpability.

The relevant sections from Alaska's statute are as follows:

Title 11—Criminal Law
Chapter 81—General Provisions
Article 6—General Principles of Criminal Liability

Sec. 11.81.600. General requirements of culpability

(a) The minimal requirement for criminal liability is the performance by a person of conduct that includes a voluntary act or the omission to perform an act that the person is capable of performing.

(b) A person is not guilty of an offense unless the person acts with a culpable mental state, except that no culpable mental state must be proved

(1) if the description of the offense does not specify a culpable mental state and the offense is

(A) a violation; or

(B) designated as one of "strict liability"; or

(2) if a legislative intent to dispense with the culpable mental state requirement is present.

. . .

Sec. 11.81.610. Construction of statutes with respect to culpability

(a) *[Repealed, § 44 ch 102 SLA 1980.]*

(b) Except as provided in AS 11.81.600(b), if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to

(1) conduct is "knowingly"; and

(2) a circumstance or a result is "recklessly."

RELEVANT CASES:

(a) *Neitzel v. State*, 655 P.2d 325 (Alaska Ct. App. 1982)

The defendant was convicted of second-degree murder after shooting his girlfriend. According to AS 11.41.110(a), a person is guilty of second-degree murder if he/she "intentionally performs an act that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life . . . ." The trial judge held that second-degree murder does not require proof of specific intent and therefore did not allow the defendant to raise the defense of intoxication.

The Court of Appeals of Alaska began its analysis of the requisite culpable mental state by considering the MPC, which states that with the exception of violations and other strict-liability offenses, there must be a culpable mental state. This provision from the MPC is also in the Tentative Draft and in AS 11.81.600. The court noted the legislative committee's intent when amendments were made to AS 11.81.600 as being two-fold, namely: (1) "to clarify the general rule concerning culpability and to make clear that, with certain specified exceptions, a culpable mental state *must* be proven for every crime"; and (2) "culpability need not be established if a legislative intent to dispense with the culpability requirement appears."

The court then noted that the MPC, the Tentative Draft, and Alaska's Revised Code divide offenses into three separate elements: "(1) the nature of the conduct; (2) the circumstances surrounding the conduct; and (3) the results of the conduct." The culpable mental states in the Tentative Draft are essentially the same as those in the MPC, and "recklessly" and "negligently" have very similar definitions. Those provisions were incorporated into Alaska's Revised Code, except that the Revised Code limited the mental state of "intentionally" to apply only to results and "knowingly" to apply to conduct.

The State in this appeal argued that since the statute was silent regarding the mental state required for the circumstances, it should be interpreted as strict liability or the objective test of criminal negligence. The Court rejected this argument on the bases that AS 11.81.600(b) states that strict liability must be expressly designated and the commentary to AS 11.81.610 states that criminal negligence does not apply unless expressly included in the definition of the offense.

(b) *Johnson v. State*, 739 P.2d 781 (Alaska Ct. App. 1987)

In this case, the defendant was convicted of second-degree criminal trespass when he returned to a ski resort after being told he was banned. According to AS 11.46.330(a), a person is guilty of criminal trespass in the second degree if he/she "enters or remains unlawfully (1) in or upon premises; or (2) in a propelled vehicle." The phrase "enters or remains unlawfully" is defined in the statute as meaning "fail to leave premises or a propelled vehicle that is open to the public after being lawfully directed to do so personally by the person in charge."

The Court of Appeals of Alaska noted that the statute is silent as to mens rea, and therefore AS 11.81.610 applies, meaning the mens rea regarding conduct is "knowingly" and the mens rea regarding the circumstance is "recklessly." As a result, a conviction requires proof that the defendant knowingly remained on the premises after being ordered to leave and he recklessly disregarded the lawful order not to be on the premises. The court also noted that interpreting the statute in this manner ensured that it was not unconstitutionally vague.

(c) *Noblit v. State*, 808 P.2d 280 (Alaska Ct. App. 1991)

In this case, the defendant was convicted of hindering prosecution in the first degree. One of the grounds of his appeal to the Court of Appeals of Alaska was that the trial court failed to give proper instructions to the jury on the culpable mental state necessary for a conviction.

A person is guilty of hindering prosecution under AS 11.56.770(a) if he/she "render[s] assistance to a person who has committed a crime punishable as a felony with intent to (1) hinder the apprehension, prosecution, conviction, or punishment of that person; or (2) assist[s] that person in profiting or benefiting from the commission of the crime." At trial, the defendant argued that the jury should have been instructed that

in order to be convicted, there had to be proof that he either knowingly or recklessly knew the person he assisted had committed a felony.

The court of appeals began its analysis with a consideration of the hindering prosecution statutes and noted that the only difference between first and second degree is the seriousness of the offense the person being assisted had committed—i.e., first degree is when the person committed a felony and second degree is when the person committed a crime punishable by imprisonment of more than ninety days. In all other respects, the offense of hindering prosecution is the same in that the defendant must have rendered assistance to a person who had committed a crime.

The offense does require that the defendant acted with specific intent either to hinder or to profit/benefit. The statute is silent as to whether the defendant must actually know or recklessly disregard the fact that the person they are assisting has committed a crime.

The court of appeals disagreed with the defendant's argument and held that strict liability must be applied to that element of the offense. The court looked at the legislative history of the hindering prosecution statute—in particular, it looked to the Commentary on the Tentative Draft of Alaska's Revised Criminal Code for support. In addition, the court looked to the Commentary in the MPC regarding hindering prosecution and noted that it does not require proof that the defendant knew what type of crime the person had committed. Finally, the court noted that the courts in at least one other state, Colorado, rejected an argument similar to the defendant's and interpreted their hindering prosecution statutes as dispensing with a culpable mental element in the same way.

The defendant argued that his constitutional right to due process would be violated unless the statute required a culpable mental state regarding the underlying crime the person had committed. The court of appeals dismissed his argument on the basis that a culpable mental state is not required for each element of the offense. The court referred to AS 11.81.600(b) and noted that in general a culpable mental state is required except, for example, "when the legislature has clearly expressed its intent to apply strict liability to a specific element of a crime."

The court of appeals also looked to its past decisions rejecting the requirement of a culpable mental state regarding the seriousness of the offense "when a culpable mental state attaches to the core conduct of the offense itself." The court in particular cited the case of *Bell v. State*, 668 P.2d 829 (Alaska Ct. App. 1983), regarding the offense of promoting prostitution, which differentiates in seriousness on the basis of the age of the victim. In the *Bell* case, the court held that proof that the defendant knew the victim's age was not necessary to be convicted of first-degree promoting prostitution because the underlying conduct itself was a crime. Another case was *Ortberg v. State*, 751 P.2d 1368 (Alaska Ct. App. 1988), regarding the various degrees for the offense of malicious mischief. In that case, the court of appeals held that proof the defendant was aware of the value of the property was not necessary for a conviction because the conduct itself was a crime.

The court of appeals applied the reasoning in *Bell* and *Ortberg* in this case and held that "Noblit's conduct did not depend on the circumstances that changed his offense from a second-degree to a first-degree crime" because his conduct was unlawful regardless of whether the person's crime was a felony. It was sufficient that the defendant knew the person had committed a crime and had specific intent to either hinder prosecution or profit/benefit. The court of appeals concluded: "This culpable mental state affords adequate protection against the possibility of a conviction based on innocent conduct; no additional culpable mental state is necessary for due process purposes."

(d) <u>*Hoople v. State*, 985 P.2d 1004 (Alaska Ct. App. 1999)</u>

This case dealt with the interpretation of AS 28.35.030(n) relating to driving while intoxicated. According to the statute, it is a class C felony if within the past five years a person has been convicted two or more times of either driving while intoxicated or refusing a breath test. On appeal to the Court of Appeals of Alaska, the defendant argued that the statute violates her constitutional right to due process because it fails to require proof of a culpable mental state regarding the previous convictions.

The court concluded that the defendant's argument was contrary to the cases of *Bell*, *Ortberg*, and *Noblit*,

where the offenses at issue were divided into a basic crime and specific aggravating circumstances. In all of those cases, the court held that a defendant could be convicted without proof of a culpable mental state regarding the aggravating circumstances. The court noted that in both *Bell* and *Noblit* there was an express legislative intent through the commentary on the statute not to impose a culpable mental state on the aggravating circumstances. There was no commentary on the statute in the *Ortberg* case, and the court "relied on the doctrine that, when the defendant's basic underlying conduct is criminal, no culpable mental state need be proved with respect to an aggravating circumstance that raises the degree of the crime."

In this case, the defendant's argument was even weaker, the court found, because the offense of driving while intoxicated does not require a culpable mental state. The court noted that it would therefore "make little sense" to impose a culpable mental state on the aggravating factor, namely her prior convictions. In addition, the court noted that, practically speaking, a person would have to be either reckless or negligent about their prior convictions because the state constitution prevents their conviction for a crime unless they are personally present or waive that right.

(e) *Orr-Hickey v. State,* 973 P.2d 612 (Alaska Ct. App. 1999)

The defendant was convicted of hunting sheep in a closed area and possessing illegally taken game. On appeal to the Court of Appeals of Alaska, she argued that the instructions given to the jury were flawed. She also argued that the previous Alaska Supreme Court decision of *State* v. *Rice,* 616 P.2d 104 (Alaska 1981), which held that the requisite culpability for hunting offenses is civil negligence, is superseded by AS 11.81.610(b)(2). In support of her argument, she relied on the case of *Knutson v. State*, 736 P.2d 775 (Alaska Ct. App. 1985), where the court of appeals held that the accomplice liability provisions of Title 11 apply to Title 16 offenses.

The court rejected the defendant's argument on the basis that the case of *Reynolds v. State*, 655 P.2d 1313 (Alaska Ct. App. 1982), held that AS 11.81.610(b) only applies to offenses defined in Title 11 and she was convicted of violating a regulation under Title 16. The court declined to apply the reasoning in the *Knutson* case for two reasons: (1) "there is historical support for the doctrine the fish and game offenses should be considered 'general police regulations'—and that, therefore, less stringent culpable mental states should apply to these offenses"; and (2) interpreting AS 11.81.610(b) as applying to Title 16 offenses would be inconsistent with the holding in *Rice.* The court could not "overrule" *Rice* unless the legislature intended AS 11.81.610(b) to apply to this offense, and there was no legislative intent since the statute was enacted three years after the *Rice* decision.

(f) *MacDonald v. State*, 2000 Alaska Ct. App. LEXIS 14

In this case, the defendant was convicted under AS 11.56.310(a)(1)(B) of escape from arrest in the second degree. According to the statute, the difference in seriousness of the offense depends on the reason for the arrest—i.e., "A person who escapes from arrest for a felony commits the greater crime; a person who escapes from arrest for a misdemeanor commits the lesser."

On appeal, the defendant argued that the State should have to prove that he was aware he was being arrested for a felony. Citing the cases of *Noblit*, *Ortberg*, and *Hoople*, the court of appeals rejected his argument and concluded:

> We have repeatedly held that when the legislature separates an offense into degrees depending on the presence or absence of an aggravating circumstance, no culpable mental state need be proved with respect to the aggravating circumstance so long as the government proves that the defendant engaged in the criminal conduct that is basic to both degrees of the offense.

The court noted that the escape offense is similarly structured as the offenses in the above cases because, regardless of the degree, the same basic conduct is prohibited, namely "unlawfully removing oneself from official detention." The defendant's "subjective perception or surmise concerning the reason for his arrest was irrelevant."

(g) *State v. Strane*, 61 P.3d 1284 (Alaska 2003)

In this case, the defendant was convicted under AS 11.56.740(a) of violating a protective order. At trial, the defendant argued that he did not know he was violating the order because the victim had consented to the contact. The court of appeal reversed the conviction on the "principle of lenity," meaning statutes imposing criminal liability should be interpreted narrowly, which in this case would mean proof that the defendant "knowingly" violated the protective order. On that basis, the court of appeals held that the defendant ought to have had an opportunity to present a defense of "good faith mistake" at his trial.

On appeal to the Alaska Supreme Court, the State argued that the statute only requires proof that the defendant knowingly engaged in the prohibited conduct. The defendant argued that the court of appeals was correct in requiring proof that he not only knowingly engaged in the conduct, but that he knew those actions were prohibited. The Alaska Supreme Court stated that the correct interpretation of the offense "lies somewhere between these opposing positions."

The supreme court agreed with the court of Appeals' analysis that a culpable mental state is required for both the conduct and the circumstance elements of the crime. However, it disagreed with the court of Appeals' imposition of "knowingly" as the appropriate mental state regarding the circumstances, i.e., that the State would have to prove that the defendant knew the protective order prohibited his conduct.

The supreme court reversed the court of appeals on the basis that "compelling reasons weigh against the meaning it selected." The first and "perhaps . . . most prominent reason" was that the statute also contains an express section stating that consent to have contact with a defendant does not waive or nullify the provisions of a protective order. As a result, the applicable section is AS 11.81.620(a), which limits a defense of good-faith mistake or ignorance of the law unless the statute clearly allows them. In support of this interpretation, the court referred to the case of *Busby v. State*, 40 P.3d 807 (Alaska Ct. App. 2002), relating to the offense of driving with a license that has been revoked. In the *Busby* case, the defendant unsuccessfully argued that while he knew his Alaska license had been revoked, he was under the mistaken impression that his international driver's license allowed him to drive legally in the state. The court of appeals held that Busby's misunderstanding of the law was irrelevant because all the statute required was proof that he was aware his Alaska license had been revoked. The supreme court found that this case is very similar, and the defendant's mistaken belief that his conduct was lawful is not relevant.

The supreme court also reversed the court of Appeals' analysis of *Russell v. State*, 793 P.2d 1085 (Alaska Ct. App. 1990), which permitted a mistake-of-law defense in response to a charge of contempt of course for failing to appear after being subpoenaed. The court clarified the proper interpretation of *Russell* and distinguished it from this situation.

Of importance to the supreme court's decision was the fact that the defendant had received specific notice regarding his obligation to comply with the protective order and that the terms of the order were "facially clear and unqualified." Another significant factor was that there are no precedents where the courts have required a "subjective awareness of wrongdoing as a necessary or appropriate culpable mental state for a person accused of violating a domestic violence restraining order's no-contact provisions."

Based on the above, the supreme court concluded that the court of appeals was correct when it interpreted the statute as requiring proof that the defendant knew of the existence of the protective order and was aware of its contents. The court of appeals was wrong, however, when it interpreted the statute as requiring proof that the defendant also knew his conduct was unlawful. The statute precludes this interpretation because it expressly states that consent by the victim does not nullify or waive the terms of the order, and ignorance or mistake are prohibited as defenses unless the statute allows them. In this case, the defendant could be convicted by showing that he knew about the protective order and its contents and "he recklessly disregarded a substantial and unjustifiable risk that his conduct was prohibited by the order." The court went on to say that recklessness "could readily be inferred from his admitted knowledge of the order's existence and contents."

(h) *Dowl v. State*, 2003 Alaska Ct. App. LEXIS 69

In this case, the court of appeals explained the reasoning in *Strane* to mean that "in prosecutions for violation of a domestic violence restraining order, the State must prove that the defendant acted recklessly with respect to whether their conduct violated the terms of the restraining order."

(i) *Vickers v. State*, 175 P.3d 1280 (Alaska Ct. App. 2008)

In this case, the defendant was convicted of violating one of his bail conditions after having contact with his partner. At trial, the defendant raised the defense that he mistakenly believed he was allowed to contact her, but the district court relied on *Strane* to disallow his defense. On appeal, the defendant argued that *Strane* was not applicable because that case pertained to violations of protective orders, while his related to violations of bail conditions.

The court of appeals described the holding in *Strane* as imposing a culpable mental state of "recklessly," and a defendant may be convicted so long as he/she "understood that there was a substantial and unjustifiable possibility that his conduct would violate the order—that is, if the defendant's decision to run this risk was a gross deviation from what a reasonable person would do under the circumstances."

The court of appeals held that the reasoning in *Strane* applies in this situation and that the defendant was entitled to

> challenge the State's proof that he was reckless, either by showing that he was unaware of the risk that his conduct would violate the order, or by showing that his decision to run that risk was not a gross deviation from what a reasonable person would do in the situation.

The court referred to the *Busby* case, also cited by the supreme court in *Strane*, and its decision in *Clark v. State*, both of which prohibited a defendant from raising a mistake-of-law defense.

(j) *Deemer v. State*, 2009 Alaska Ct. App. LEXIS 55

The defendant in this case was convicted of giving false information to a police officer after she lied about her identity when stopped for a traffic violation. To convict under AS 11.56.800(a)(1)(B)(ii), the State must prove that the defendant knowingly gave false information to a peace officer concerning his/her identity while "being served with an arrest warrant or being issued a citation."

On appeal, the defendant argued that the culpable mental state of "knowingly" should not only apply to the conduct—i.e., the giving of false information about identity—but also to the circumstances that made the conduct a crime—i.e., when being served with an arrest warrant or being issued a citation. Relying on the *Noblit* and *Hoople* cases, the State argued that a culpable mental state of knowingly was only applicable to the conduct, not the circumstances.

The court of appeals rejected the State's argument and held that the reasoning in *Noblit* and *Hoople* did not apply in this case because, in both of those cases, the underlying conduct was a crime requiring proof of the aggravating circumstances. The court held that the offence of giving false information is materially different because lying to police about one's identity is not a crime in the absence of one of the above-noted circumstances, namely when being served with a warrant or being issued a citation. For that reason, proof of a culpable mental state regarding the circumstances is necessary for a conviction.

When determining the appropriate mental state, the court of appeals first looked to AS 11.81.610(b)(2), which states that recklessness is the appropriate standard regarding circumstances. The court then cited the case of *Strane v. State*, 16 P.3d 745 (Alaska Ct. App. 2001) (affirmed by the Alaska Supreme Court in *State v. Strane*, 61 P.3d 1284), where it interpreted a statute similar to the one at issue in this case as requiring a culpable mental state of knowingly to both conduct and circumstance.

The court found that it did not need to resolve this issue because in this case the jury was instructed that "knowingly" and not "recklessly" was the requisite mental state necessary for a conviction. Since proof at this higher standard was in the defendant's favor, the court did not reach the issue.

2. ARKANSAS

Arkansas's statute states that if the statute is silent as to culpable mental state, then unless the offense falls under one of the specific exceptions, a culpable mental state of purposely, knowingly, or recklessly is required. The exceptions are as follows:

- the offense is a violation, unless a culpable mental state is expressly included in the definition of the offense; or
- the offense defined by a statute that is not part of the Arkansas Criminal Code clearly indicates a legislative intent to dispense with any culpable mental state requirement for the offense or for any element of the offense.

Arkansas's statute is similar to § 2.05 of the MPC because it excludes both violations and offenses defined in statutes outside of the Arkansas Code, except (a) does not include "or the Court determines that its application is consistent with effective enforcement of the law defining the offense," and the wording of (b) is quite different.

Relevant excerpts from Arkansas's statute follow:

Arkansas Code
Title 5—Criminal Offenses
Subtitle 1—General Provisions
Chapter 2—Principles of Criminal Liability

5-2-203. Culpable mental states—Interpretation of statutes.

(a) If a statute defining an offense prescribes a culpable mental state and does not clearly indicate that the culpable mental state applies to less than all of the elements of the offense, the prescribed culpable mental state applies to each element of the offense.

(b) Except as provided in §§ 5-2-204(b) and (c), if the statute defining an offense does not prescribe a culpable mental state a culpable mental state is nonetheless required and is established only if a person acts purposely, knowingly, or recklessly.

(c)(1) When a statute defining an offense provides that acting negligently suffices to establish an element of that offense, the element also is established if a person acts purposely, knowingly, or recklessly.

(2)When acting recklessly suffices to establish an element, the element also is established if a person acts purposely or knowingly.

(3) When acting knowingly suffices to establish an element, the element also is established if a person acts purposely.

5-2-204. Elements of culpability—Exceptions to culpable mental state requirement.

(a) A person does not commit an offense unless his or her liability is based on conduct that includes a voluntary act or the omission to perform an act that he or she is physically capable of performing.

(b) A person does not commit an offense unless he or she acts with a culpable mental state with respect to each element of the offense that requires a culpable mental state.

(c) However, a culpable mental state is not required if:

(1) The offense is a violation unless a culpable mental state is expressly included in the definition of the offense; or

(2) An offense defined by a statute not a part of the Arkansas Criminal Code clearly indicates a legislative intent to dispense with any culpable mental state requirement for the offense or for any element of the offense.

RELEVANT CASES:

(a) *Martin v. State*, 261 Ark. 80 (1977)

The defendant was convicted of battery in the first degree, which offense is defined as "caus[ing] serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life." On appeal to the Arkansas Supreme Court, he argued that the statute is unconstitutionally vague and deficient because it does not have a culpable mental state.

The supreme court referred to Ark. Stat. Ann. § 41-204(2) (Criminal Code 1976) (which is similar to the current § 5-2-203(b)) and stated that "if the statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required, and is established only if a person acts purposely, knowingly, or recklessly." As a result of this provision, the defendant's argument was rejected because it clearly requires proof of culpability.

(b) *Coleman v. State*, 12 Ark. App. 214 (1984)

The defendant was convicted of battery in the first degree and argued on appeal that she did not have the requisite culpable mental state. The court of appeals dismissed her appeal on the basis that since § 41-1601(1)(c) is silent as to mens rea, then § 41-204(2) applies, meaning that "if the statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required, and is established only if a person acts purposely, knowingly, or recklessly." The court of appeals held that proof of any one of those mental states is sufficient to sustain a conviction.

(c) *Price v. State*, 285 Ark. 148 (1985)

The appellant was convicted of driving while intoxicated and speeding and argued on appeal to the Supreme Court of Arkansas that the offense provision ought to be declared invalid because it does not contain a culpable mental element. The court rejected his argument, only saying that § 41-204(2) "clearly does not require that any criminal statute make a culpable mental state an element of the crime in so many words."

(d) *State v. Setzer*, 302 Ark. 593 (1990)

The defendant was charged with use of a prohibited weapon under Ark. Code Ann. § 5-73-104(a) but was acquitted after the trial judge held that the offense required proof that he intended to use the weapon to inflict serious injury or death on another person. The State applied to the Supreme Court of Arkansas for an opinion certifying error, which application was dismissed.

The supreme court began its analysis by noting that although the definition of the offense at issue does not include a culpable mental state, it is not a strict-liability offense because under § 5-2-203(b), there must be proof that a person purposely, knowingly, or recklessly possessed the weapon. Further, the court noted that if the general assembly had wanted to criminalize mere possession of a weapon, it could have done so, but it expressly chose not to because it included an exception that allows a defendant to raise the defense that the weapon could likely not have been used unlawfully.

Because the supreme court found that the trial judge did not require the culpability that the State argued he required, it held that there had been no error.

(e) *Short v. State*, 349 Ark. 492 (2002)

Short was convicted of sexual abuse in the first degree under Ark. Code Ann. § 5-14-108(a)(4) because the victim was under the age of fourteen. One of his grounds of appeal before the Supreme Court of Arkansas was that the trial judge erred in holding that this is a strict-liability offense.

The supreme court began its analysis by noting the applicable principles of statutory interpretation, namely that any doubts about the interpretation of criminal statutes ought to be resolved in favor of the defendant; that statutes must be interpreted to give effect to legislative intent, for example by "giving the words their ordinary and usually accepted meaning in common language"; and that to aid in its interpretation, the court should look to other statutes relevant to the same subject matter.

The court noted that the statute in this case expressly states that if the victim of a sexual offense, not just sexual abuse, is under the age of fourteen, the defendant cannot raise the defense that he/she reasonably believed the child was older. In addition, the court had previously considered the mens rea requirement for the offense of statutory rape and noted that its definition is similar to sexual abuse. In *Clay v. State*, 318 Ark. 550 (1994), and other cases, the supreme court had held and re-affirmed that statutory rape is a strict-liability offense.

The court then considered whether § 5-2-204 applied and noted that only on three previous occasions had it required a culpable mental state when the statute was silent as to mens rea—namely, (1) *State v. Setzer*,

regarding use of a prohibited weapon; (2) *Yocum v. State*, which reaffirmed *Setzer* and confirmed that use of a prohibited weapon is not a strict-liability offense; and (3) *McDougal v. State*, where the court imputed a culpable mental state to the offense of operating a gambling house.

The court noted that the three cases above are distinguishable from the offense at issue in this case because none of those statutes prohibited a defendant from raising the defense that he/she did not have a culpable mental state. If the court imputed a culpable mental state to the sexual abuse offense, then it would effectively circumvent that provision. Further, requiring the State to prove that the defendant knew or ought to have known that the victim was fourteen or younger and then prohibiting the defendant from raising a defense that he/she did not know or reasonably believe the victim was fourteen or younger would lead to "absurd" and "inconsistent" results.

(f) *Stivers v. State*, 354 Ark. 140 (2003)

The Appellant was convicted of failing to stop after a motor-vehicle accident in violation of Ark. Code Ann. § 27-53-101. On appeal to the Supreme Court of Arkansas, he argued that the trial judge erred because the State should have been required to prove that he knew that the victim in the accident had been injured and that he purposely left the scene.

The court began its analysis with an interpretation of the statute to determine whether there is, or should be, a mental element. It referred to the same principles of statutory interpretation as in the *Short* case cited above.

The court then considered § 5-2-203 and § 5-2-204 and noted that because this offense is not part of the Arkansas Criminal Code, it is necessary to determine whether it "clearly indicates a legislative intent to dispense with any culpable mental state." The court noted that the mandatory language in the statute—i.e., a driver "shall" stop at the scene of an accident—"is a clear indication that the accident-causing driver's mental state is irrelevant." The court then looked at other offenses in this title and found that they had a mental element; for example, a person can be convicted for "wilfully" failing to report an accident. For that reason, the court concluded that when the legislature intends for an offense to have a culpable mental state, it places one in the statute. Therefore, if there is no mental state, then the legislature has "clearly intended to dispense with any intent requirement."

(g) *Owens v. State*, 92 Ark. App. 480 (2005)

The appellant Owens was convicted of possession of a weapon by an incarcerated person under Ark. Code Ann. §5-73-131. On appeal to the Court of Appeals of Arkansas, he argued that his conviction should have been overturned on the basis that he lacked the requisite culpable mental state because he did not intend to use the weapon to inflict serious physical injury.

The court began its analysis by setting out the relevant principles of statutory interpretation—namely, "to give effect to the intent of the legislature, construing the Statute as it reads, and giving the language its ordinary and commonly accepted meaning." The court also noted that if the language of the statute is clear, "there is no reason to resort to the rules of statutory interpretation." On that basis, the court found that the statute at issue did not intend to require a culpable mental state.

Having said that, the court agreed with both parties that the offense is not strict-liability because a defendant may raise the defense that he/she had approval to have the weapon or that the weapon "had an alternative common law purpose." The court noted that all that would be required is if the defendant "knowingly" or "purposely" possessed the weapon, and a conviction does not require proof that the defendant used or intended to use it. The court also referred to § 5-2-203(b) and stated that "if a criminal statute does not indicate a culpable mental state, culpability is established if the person acts purposely, knowingly, or recklessly."

(h) *Adkins v. State*, 371 Ark. 159 (2007)

Adkins was convicted of, among other things, failure to register as a sex offender under Ark. Code Ann. § 12-12-901. On appeal to the Supreme Court of Arkansas, he argued that the offense is not strict-liability and that the State failed to prove he possessed the requisite culpable mental state. In support of his argument, Adkins cited the *Setzer* case, where the

supreme court had imputed a culpable mental state when the statute was silent.

The supreme court began its analysis by noting the provisions of § 5-2-203(b) and that since the Sex Offender Registration Act is not part of the Arkansas Criminal Code, § 5-2-204(c)(2) is triggered. The appellant relied on the same cases raised by the appellant in the *Short* case, and as it did in that case, the court distinguished those cases on the basis that they dealt with offenses that were part of the Arkansas Criminal Code. Instead, the court cited cases such as *Stivers v. State*, 354 Ark. 140 (2003), where the supreme court had held that the legislature intended leaving the scene of an accident to be a strict-liability offense. In that case, the court noted that other offenses in Title 27 did include a culpable mental state, so the general assembly clearly could have inserted such language regarding the offense at issue if it had desired to do so.

The court then considered whether failure to register as a sex offender is, like in the *Stivers* case, a strict-liability offense and looked to the language of the statute itself. The court concluded that the wording of the statute clearly reveals a legislative intent to put the burden of registering on the sex offender, to make registration mandatory, to make the failure to comply a strict-liability offense.

In support of its interpretation, the court cited its previous decision in *Kellar v. Fayetteville Police Department*, 339 Ark. 274 (1999), where it determined whether the same provision was punitive or regulatory in nature. In that case, the court held that "no *scienter* is indicated in Arkansas's Act, and we conclude the offender's failure to register alone is sufficient to trigger the Act's provisions."

On the basis of its analysis of the entire statutory scheme and the holding in *Kellar*, the supreme court held that failure to register as a sex offender is a strict-liability offense.

3. DELAWARE

Delaware's statute states that a person cannot be found guilty without proof of the state of mind required by the statute. If the state of mind is not prescribed by law, then that element is established if the person acted intentionally, knowingly, or recklessly. However, it is unnecessary to prove a culpable state of mind in the following circumstances:

- if it is a violation and the definition does not include a culpable state of mind;
- if it is an offense in another statute and there is a legislative intent to impose strict liability, or if it is plainly apparent from the statute that a culpable state of mind is not a material element.

Delaware's statute is similar to § 2.02(3) of the MPC except it refers to "intentionally" rather than "purposely." In addition, it is similar to § 2.05 of the MPC because it excludes violations and offenses defined in statutes other than the criminal code. However, the wording in (1) does not include "or the Court determines that its application is consistent with effective enforcement of the law defining the offense." The wording in (2) is identical to the MPC except it adds the following sentence at the end: "In all cases covered by this subsection, it is nevertheless necessary to prove that the act or omission on which liability is based was voluntary as provided in §§ 242 and 243 of this title."

Relevant excerpts from Delaware's statute are the following:

Title 11—Crimes and Criminal Procedure
Part I—Delaware Criminal Code
Chapter 2—General Provisions Concerning Offenses

§ 251. Proof of state of mind required unless otherwise provided; strict liability

(a) No person may be found guilty of a criminal offense without proof that the person had the state of mind required by the law defining the offense or by subsection (b) of this section.

(b) When the state of mind sufficient to establish an element of an offense is not prescribed by law, that element is established if a person acts intentionally, knowingly or recklessly.

(c) It is unnecessary to prove the defendant's state of mind with regard to:

(1) Offenses which constitute violations, unless a particular state of mind is included within the definition of the offenses; or

(2) Offenses defined by statutes other than this Criminal Code, insofar as a legislative purpose to impose strict liability for such offenses or with respect to any material element thereof plainly appears. In all cases covered by this subsection, it is nevertheless necessary to prove that the act or omission on which liability is based was voluntary as provided in §§ 242 and 243 of this title.

RELEVANT CASES:

(a) *Upshur v. State*, 420 A.2d 165 (Del. 1980)

The defendant was convicted of carrying a concealed deadly weapon and possession of a deadly weapon by a prohibited person in violation of 11 Del. C. § 1442 and § 1448, respectively. One of his grounds of appeal to the Supreme Court of Delaware was that there was insufficient evidence at trial to prove he knowingly possessed the weapon.

The court noted that neither statute contains a mental element, and therefore §251 applies. The court accepted that the offenses require a culpable mental state of intentionally, knowingly, or recklessly and concluded that there was sufficient evidence before the jury to support a finding that he had the requisite state of mind.

(b) *State v. Carrea*, 2007 Del. Super. Ct. LEXIS 20

Though this is a superior court decision, I included it because it illustrates the practical problems that can arise. The three defendants in this case were indicted for failing to have an adult entertainment license under 24 Del. C. § 1606. At trial, just before closing its case, the State advised the trial judge that it wished to amend the indictments to include a mental element of "intentionally, recklessly or knowingly" in accordance with 11 Del. C. § 251. The next day the State reversed its request on the basis that a mental element was not required by the statute. The defendants then moved to have the indictment dismissed on the basis of a flawed grand-jury process and a defective indictment. They argued that they were prejudiced by the State's conduct because they had not known earlier that the State was proceeding on the basis that the offense was one of strict liability. The trial judge granted the defendants' motion and dismissed the charges on the basis that notice of the applicable mental element is "essential to the charge" and is a matter of substance, not merely form. The State applied to the Superior Court of Delaware, New Castle, for a re-argument.

On re-argument before the Delaware Superior Court, the State argued that the defendants were not prejudiced because requiring a mental element placed a heavier burden of proof on the State. The court agreed, but also noted that not providing notice of the requisite mental element affected the defendants' defense strategy and also their decisions regarding the questions to ask during cross-examination of the State's witnesses. The court reiterated that the purpose of an indictment is to give a defendant notice of each element of the charge and that allowing the State to add a mental element in the middle of the trial "dramatically changed the field of play." In addition, adding a mental element at this stage of the proceeding would undermine the grand-jury process because the grand jury would not have considered whether there was sufficient proof of the requisite mental element.

(c) *Hoover v. State*, 958 A.2d 816 (Del. 2008)

At issue in this appeal to the Supreme Court of Delaware was the constitutionality of the offense of operating a motor vehicle causing death under § 4176A of Title 21 of the Delaware Code. There were conflicting decisions in the lower courts that caused the Supreme Court to certify two questions: (1) do the provisions of § 251(b) apply to this offense? and (2) is the offense unconstitutionally vague? The court ultimately held that the answer to both of these questions is "no."

The court began its analysis by noting that § 251(c)(2) applies in this case because the offense is not in the criminal code, and therefore the only issue is whether the legislature intended it to be a strict-liability offense.

The court noted that the wording of the offense is unambiguous and requires proof of two things: (1) the defendant operated a motor vehicle in violation of Chapter 41 of Title 21, which includes proof of

any mental element for that violation; and (2) the operation of the vehicle caused the death of another person. The court held that the plain language of § 4176A "reflects the General Assembly's unambiguous intention not to otherwise provide a requisite mental state for committing this offense."

The court then went on to note that even if the statute contains unambiguous language, it is open to the court to look at the legislative record for more relevant information about the purpose of the statute. The court considered the senate debates and noted that the purpose of the operating-a-motor-vehicle-causing-death offense "was to address ordinary motor vehicle violations that result in the death of another person" and not to be the same as other vehicular offenses in the criminal code, i.e., vehicular homicide. The offense at issue is an unclassified misdemeanor and only requires proof of the underlying violation of the motor-vehicle code.

The court concluded that the general assembly's intent "was to create an offense that required a less culpable state of mind than criminal negligence in those cases where a motor vehicle offense results in the death of another." As a result, § 251(b) of Title 11 is not applicable because the general assembly intended the offense to be strict-liability.

With respect to the second question, the defendant argued that the statute was unconstitutionally vague "because liability is premised on the commission of an underlying traffic violation and the statute does not specify the state of mind an actor must possess to be found guilty of the resulting harm, the death of another person."

The supreme court held that this lack of specification alone does not render the statute unconstitutionally vague and cited U.S. Supreme Court and Delaware court decisions in support of its conclusion that it is up to the legislature to decide whether to "make the commission of an act a criminal offense even in the absence of criminal intent." The court then looked to cases from other jurisdictions regarding similar offenses, including North Carolina, California, and Connecticut. Lastly, because the offense at issue relates to public safety, the court relied on the U.S. Supreme Court case *Morissette v. United States*, 342 U.S. 246 (1952), which "held that statutes that relate to the public safety and welfare and that provide for the punishment of a person who lacked intent to commit a crime do not violate due process."

The court also held that the wording of the offense is "not so vague that persons of common intelligence must guess at its meaning, nor would they differ as to the statute's application." In support of its conclusion, the court relied on cases from the Oregon Supreme Court, the Pennsylvania Supreme Court, and the Michigan Court of Appeals.

(d) *State v. Adkins*, 970 A.2d 257 (Del. 2009)

In this case, the State appealed to the Supreme Court of Delaware from an order of the superior court granting the defendant's motion to declare 21 Del. C. § 4176A unconstitutionally vague. This is the same provision challenged in the *Hoover* case above. At trial, the defendant argued that the offense was unconstitutionally vague and also that the State must prove he acted intentionally, knowingly, or recklessly with respect to the underlying traffic offense, namely changing lanes when prohibited. The superior court granted his motion.

The Supreme Court of Delaware stayed the State's appeal pending the *Hoover* decision. At the hearing of this appeal, the State argued that this case is on point with *Hoover* and that the superior court's order ought to be reversed. The defendant conceded that *Hoover* forecloses his argument that the statute is unconstitutionally vague but argued that the wording of the statute violates due process because it "imposes a substantial penalty upon persons who lacked any intent to commit a crime." In support of his argument, the defendant relied on *United States v. Morrisette*, which held that a public safety statute without a culpable mental state does not violate due process if the penalty is minor and does not do "grave danger" to an accused's reputation. The State argued in response that the penalty is not substantial as compared to other similar offenses and that conviction of the underlying traffic offense does require a culpable mental state.

The supreme court declined on ripeness grounds to consider the issue because the defendant had not yet been convicted and sentenced.

4. HAWAII

Hawaii's statute states that if a culpable state of mind is not specified in the law, then the necessary mental state is established if the person acted intentionally, knowingly, or recklessly. However, a culpable state of mind is not required if the offense is a violation and the definition includes a state of mind or the legislative intent to impose a state of mind is plainly apparent; or a crime defined in any other statute has a legislative intent to impose absolute liability or it is plainly apparent from the statute regarding any element of the offense.

Hawaii's statute is similar to § 2.02(3) of the MPC except it refers to "intentionally" rather than "purposely." In addition, it is similar to § 2.05 because it excludes violations and offenses outside of the Code. However, the wording of (1) is different because it says "or a legislative purpose to impose such a requirement plainly appears" instead of "or the Court determines that its application is consistent with effective enforcement of the law defining the offense."

Relevant excerpts from Hawaii's statute are the following:

Division 5—Crimes and Criminal Proceedings
Title 37—Hawaii Penal Code
Chapter 702—General Principles of Penal Liability

§ 702-204. State of mind required.

Except as provided in section 702-212, a person is not guilty of an offense unless the person acted intentionally, knowingly, recklessly, or negligently, as the law specifies, with respect to each element of the offense. ***When the state of mind required to establish an element of an offense is not specified by the law, that element is established if, with respect thereto, a person acts intentionally, knowingly, or recklessly.***

§ 702-212. When state of mind requirements are inapplicable to violations and to crimes defined by statutes other than this Code.

The state of mind requirements prescribed by sections 702-204 and 702-207 through 702-211 do not apply to:

(1) An offense which constitutes a violation, unless the state of mind requirement involved is included in the definition of the violation or a legislative purpose to impose such a requirement plainly appears; or

(2) A crime defined by statute other than this Code, insofar as a legislative purpose to impose absolute liability for such offense or with respect to any element thereof plainly appears.

RELEVANT CASES:

(a) *State v. Holbron*, 78 Haw. 422 (1995)

The defendant was convicted of, among other offenses, possession of a firearm by a convicted person and possession of ammunition by a convicted person under Hawaii Revised Statutes § 134-7(b). On appeal to the Intermediate Court of Appeals of Hawaii, he argued that the trial judge erred by failing to instruct the jury on the requisite mental element required for a conviction.

The intermediate court of appeals noted that the offense did not include a culpable mental state and therefore applied § 702-204 to find that the requisite mental element is intentionally, knowingly, or recklessly. The court also noted the decision of the Hawaii Supreme Court in *State v. Pinero*, 70 Haw. 509 (1989), which held that the previous version of the offense that also did not expressly include a culpable mental state required proof that a defendant acted intentionally, knowingly, or recklessly.

The court also noted that the lack of a culpable mental state in the statute "might lead to the conclusion that the offenses were intended to be strict- or absolute-liability crimes." However, that is only the case if the legislative purpose to impose absolute liability "plainly appears." The court cited from the commentary to the statute that "such a purpose should not be discerned lightly by the courts." The court then referred to the *Pinero* case, where the Hawaii Supreme Court held that there was no legislative purpose to make the previous version of the offense an absolute-liability offense. The court also noted that no other section of that chapter of the Hawaii Revised Statutes had been held in previous cases to be absolute-liability offenses.

The State conceded on appeal that the trial judge did not instruct the jury on the requisite state of mind for conviction on these offenses. The court held that this failure was significant because "failure to attribute a state of mind to the act charged would logically lead the jury to the erroneous conclusion that the HRS §134-7(b) offenses were absolute liability crimes because no state of mind was specified in the instructions."

Of significance in this case is that even though the defendant did not object to the instructions at the trial, the court found it appropriate on appeal to "take notice of plain errors which affect the substantial rights of defendants." The court noted that it is a "grave error" to not accurately define the elements of an offense to a jury, and wrong instructions may lead to a mistaken impression on the part of the jury as to what is required for a conviction. The court concluded that the failure to provide proper instructions was "prejudicial and not a harmless error." As a result, the defendant's conviction on those counts were vacated and remanded for a new trial.

(b) *State v. Whitney*, 81 Haw. 99 (1996)

The defendant was convicted of "open lewdness" in violation of Hawaii Revised Statutes § 712-1217. On appeal to the Intermediate Court of Appeals of Hawaii, he argued that there was insufficient evidence to prove he acted recklessly.

The court noted that because there is no culpable mental state expressly included in the statute, then § 702-204 applies. As a result, the State must prove that a defendant acted intentionally, knowingly, or recklessly. The court concluded that there was sufficient evidence to prove that the defendant acted recklessly and upheld his conviction.

5. KANSAS

Kansas's statute was amended in 2011 and now states that if the definition of a crime does not include a culpable mental state, one is still required "unless the definition plainly dispenses with any mental element." If a culpable mental state is not defined in a crime and is required, then intent, knowledge, or recklessness is sufficient. In addition, a culpable mental state is not required with respect to the following:

- a misdemeanor, cigarette or tobacco infraction, or traffic infraction and the statute defining the crime clearly indicates a legislative purpose to impose absolute liability for the conduct described;
- a felony and the statute defining the crime clearly indicates a legislative purpose to impose absolute liability for the conduct described;
- a violation of K.S.A. 8-1567 or 8-1567a, and amendments thereto; a violation of K.S.A. 8-2,144, and amendments thereto; or a violation of K.S.A. 22-4901 *et seq.*, and amendments thereto.

The relevant sections of Kansas's statute are the following:

Chapter 21—Crimes and Punishment
Article 52—Principles of Criminal Liability

21-5202. Culpable mental state; definition of intentionally, knowingly, recklessly.

(a) Except as otherwise provided, a culpable mental state is an essential element of every crime defined by this code. A culpable mental state may be established by proof that the conduct of the accused person was committed "intentionally," "knowingly" or "recklessly."

. . .

(d) If the definition of a crime does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.

(e) If the definition of a crime does not prescribe a culpable mental state, but one is nevertheless required under subsection (d), "intent," "knowledge" or "recklessness" suffices to establish criminal responsibility.

. . .

21-5203. Guilt without culpable mental state, when.

A person may be guilty of a crime without having a culpable mental state if the crime is:

(a) A misdemeanor, cigarette or tobacco infraction or traffic infraction and the statute defining the crime clearly indicates a legislative purpose to impose absolute liability for the conduct described;

(b) a felony and the statute defining the crime clearly indicates a legislative purpose to impose absolute liability for the conduct described;

(c) a violation of* K.S.A. 8-1567 *or* 8-1567a*, and amendments thereto;

(d) a violation of* K.S.A. 8-2,144*, and amendments thereto; or

(e) a violation of* K.S.A. 22-4901 *et seq., and amendments thereto.

RELEVANT CASES:

There were no relevant cases listed in the annotated statute.

6. MISSOURI

Missouri's statute states that a person is not guilty of an offense unless he/she acts with a culpable mental state. If the definition of the offense does not prescribe a culpable mental state for any element, then the required culpable mental states are purposely or knowingly. Exceptions to this general rule are:

- if the offense is an infraction and no culpable mental state is prescribed by the statute defining the offense; or
- if the offense is a felony or misdemeanor and no culpable mental state is prescribed and imputing a culpable mental state is clearly inconsistent with the statute or may lead to an absurd or unjust result.

Missouri's statute is similar to § 2.02(3) of the MPC except it excludes recklessly as well as negligently if the statute is silent. In addition, it is similar to § 2.05 of the MPC because it excludes "infractions" (as opposed to "violations") and offenses outside of the statute, but the wording is different.

Relevant excerpts from Missouri's statute are the following:

Title 38—Crimes and Punishments
Chapter 562—General Principles of Liability

§ 562.016. Culpable mental state

1. Except as provided in section 562.026, ***a person is not guilty of an offense unless he acts with a culpable mental state, that is, unless he acts purposely or knowingly or recklessly or with criminal negligence, as the statute defining the offense may require with respect to the conduct, the result thereof or the attendant circumstances which constitute the material elements of the crime.***

2. A person "acts purposely," or with purpose, with respect to his conduct or to a result thereof when it is his conscious object to engage in that conduct or to cause that result.

3. A person "acts knowingly," or with knowledge,

(1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or

(2) With respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.

4. A person "acts recklessly" or is reckless when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

5. A person "acts with criminal negligence" or is criminally negligent when he fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

§ 562.021. Culpable mental state, application

1. If the definition of any offense prescribes a culpable mental state but does not specify the conduct, attendant circumstances or result to which it applies,

the prescribed culpable mental state applies to each such material element.

2. If the definition of an offense prescribes a culpable mental state with regard to a particular element or elements of that offense, the prescribed culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the offense.

3. Except as provided in subsection 2 of this section and section 562.026, if 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; but reckless or criminally negligent acts do not establish such culpable mental state.

4. If the definition of an offense prescribes criminal negligence as the culpable mental state, it is also established if a person acts purposely or knowingly or recklessly. When recklessness suffices to establish a culpable mental state, it is also established if a person acts purposely or knowingly. When acting knowingly suffices to establish a culpable mental state, it is also established if a person acts purposely.

5. Knowledge that conduct constitutes an offense, or knowledge of the existence, meaning or application of the statute defining an offense is not an element of an offense unless the statute clearly so provides.

§ 562.026. Culpable mental state, when not required

A culpable mental state is not required:

(1) If the offense is an infraction and no culpable mental state is prescribed by the statute defining the offense; or

(2) If the offense is a felony or misdemeanor and no culpable mental state is prescribed by the statute defining the offense, and imputation of a culpable mental state to the offense is clearly inconsistent with the purpose of the statute defining the offense or may lead to an absurd or unjust result.

RELEVANT CASES:

(a) *State v. Gullett*, 606 S.W.2d 796 (Mo. Ct. App. 1980)

The defendant was convicted of second-degree murder, and his appeal to the Court of Appeals of Missouri, Southern District, related to the defense of involuntary intoxication in that he could not have formed a specific intent to kill the victim.

According to § 562.076, a defense of intoxication may be raised to negate a purposely or knowingly mental state of mind, but not a reckless or criminally negligent state of mind. The court of appeals in this case simply noted that § 562.021 states that if a culpable mental state is not expressly stated in the statute, then it is established if a person acts purposely, knowingly, or recklessly. As a result, the defense of voluntary intoxication would not apply to statutes to which § 562.021 applies because they can be committed with a reckless state of mind.

(b) *State v. Miller*, 657 S.W.2d 259 (Mo. Ct. App. 1983)

The defendant was convicted of armed criminal action. On appeal to the Court of Appeals of Missouri, Eastern District, the court considered whether the offense requires a culpable mental state. The court noted that the statute does not contain an express culpable mental state and applied § 562.021.2. The court then considered § 562.026 and concluded that there was "no clear indication to dispense with a culpable mental state in the armed criminal action statute for any element of the offense and thus conclude that one is required." The court cited the Supreme Court of Missouri decision in *State v. Green*, 629 S.W.2d 326 (Mo. 1982), which also applied § 562.026 and noted that "a culpable mental state is not required if the statute defining the offense clearly indicates a purpose to dispense with the requirement of any culpable mental state as to a specific element of the offense."

(c) *State v. Scott*, 649 S.W.2d 559 (Mo. Ct. App. 1983)

In this case, the defendant was convicted of forcible rape in violation of § 566.030.1. On appeal to the Court of Appeals of Missouri, Western District, he argued that the trial judge erred in refusing to give the jury instructions relating to whether he believed the victim consented and to his mistake-of-fact defense.

The court of appeals noted that the forcible-rape statute does not include a specific-intent element and then cited § 562.026 to find that the culpable mental state could be purposely, knowingly, or recklessly. The court also cited the case of *State v. Foster*, 631 S.W.2d 672 (Mo. Ct. App. 1982), which specifically applied § 562.026 to the offense of forcible rape. The court concluded that it was a reversible error for the trial judge not to give instructions because there was evidence to support the defense of mistake of fact regarding consent.

(d) *State v. Horst*, 729 S.W.2d 30 (Mo. Ct. App. 1987)

The defendant was convicted of driving while intoxicated and driving with a license that had been revoked. One of his grounds of appeal to the Court of Appeals of Missouri, Eastern District, was that the trial court did not give proper jury instructions on the requisite mental state for a conviction of driving while license revoked.

The court of appeals held that the trial judge should have instructed the jury that there must be proof that the defendant was aware his license had been revoked; otherwise, he was not reckless. The court noted that the statute does not expressly include a culpable mental state and applied § 562.026.2. In addition, the court cited the case of *State v. Tippett*, 716 S.W.2d 909 (Mo. Ct. App. 1986), where the court held that the offense of driving while license revoked requires proof of actual or constructive knowledge. The court in the *Tippett* case did not refer to § 562.026.2, but instead relied on a case on point from the North Carolina Supreme Court.

The court noted that, at the time of the defendant's trial, it was not clear whether the offense was one of absolute liability or if a culpable mental state was required. The court acknowledged that, as a result, there was inadequate guidance and concluded: "But now we make clear that the offense requires a culpable mental state and competent evidence which negates that state of mind is admissible."

The court then concluded by stating that other courts, namely in Texas and Arizona, have found a culpable mental state required for the offense.

(e) *State v. White*, 28 S.W.3d 391 (Mo. Ct. App. 2000)

The defendant was convicted of delivery of a controlled substance within 2000 feet of a school and possession of a controlled substance with an intent to distribute. At trial he unsuccessfully moved for a judgment of acquittal on the basis that the State did not prove he knew he was within 2000 feet of a school.

The Missouri Court of Appeals, Western District, considered the statutory scheme and noted that § 195.211 prohibits distribution or possession of a controlled substance and § 195.214 states that a person commits that offense near a school if he/she is within 2000 feet. The court characterized § 195.211 as a "penalty enhancement" and not a separate or strict-liability offense. The court then noted that since neither offense contains an express culpable mental state, § 562.021.3 applies, meaning that the defendant must have acted purposely or knowingly.

The court concluded that there was insufficient evidence at trial to establish that the defendant knew he was delivering a controlled substance within 2000 feet of a school.

(f) *Hill v. State*, 88 S.W.3d 527 (Mo. Ct. App. 2002)

The defendant was convicted of robbery in the first degree, tampering in the first degree, armed criminal action, and possession of a short-barreled shotgun. On appeal to the Court of Appeals of Missouri, Western District, he argued that his Sixth Amendment right to effective counsel had been violated because his lawyer failed to object to a jury instruction that omitted the requisite culpable mental state of knowingly regarding the possession of the shotgun.

The court began its analysis by citing the case of *State v. Cruz,* 71 S.W.3d 612 (Mo. Ct. App. 2001),

which held that the culpable mental state for armed criminal conduct is either that in the underlying offense or that provided in § 569.021(3). As a result, since the underlying offense was robbery and armed criminal action does not expressly include a culpable mental state, it is purposely or knowingly.

The court concluded that because the jury would have had to find that he purposely or knowingly used the shotgun in the robbery, omitting the requisite mental state of knowingly for the possession charge was not a reversible error.

(g) *State v. Williams*, 126 S.W.3d 377 (Mo. 2004)

The defendant was convicted of second-degree assault and armed criminal action, and on appeal to the Supreme Court of Missouri, he argued that there was insufficient evidence to establish that he intended to cause death or serious physical harm to the victim. The supreme court concluded that the offense requires a culpable mental state of knowingly or purposely, but the omission of that mental state in the information did not prejudice the defendant.

The supreme court noted that the offense of armed criminal action does not contain an express mental state and applied § 562.021.3 to find that it should be purposely or knowingly. The court also expressly stated that the holding from the *Cruz* case referred to in *Hill* above "should no longer be followed."

The supreme court also rejected the defendant's argument that the offense requires an additional element of specific intent to cause death or serious harm to the victim. The court noted that the Southern District appeared to have introduced a specific-intent element and stated that cases that had adopted such an interpretation should not be followed.

7. OREGON

Oregon's statute states that if a statute defining an offense does not prescribe a culpable mental state, culpability is still required and is established only if a person acts intentionally, knowingly, recklessly, or with criminal negligence. However, a culpable mental state is not required in certain circumstances, including, in particular:

- the offense is a violation and a culpable mental state is not expressly included in the definition;
- it is an offense defined by statute outside of the Oregon Criminal Code that clearly indicates a legislative intent to dispense with a culpable mental state for the offense or any material element thereof.

Oregon's statute is similar to § 2.02(3) of the MPC because it establishes a default mens rea if the statute is silent. It is broader than the MPC because it also includes criminal negligence. In addition, it is similar to § 2.05 of the MPC because it excludes violations and offenses defined outside of the criminal code. However, unlike the MPC, (a) does not include "or the Court determines that its application is consistent with effective enforcement of the law defining the offense," and (b) also has different wording.

Relevant excerpts from Oregon's statute are the following:

Title 16—Crimes and Punishments
Chapter 161—General Provisions
Criminal Liability

161.095 Requirements of culpability.

(1) The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which the person is capable of performing.

(2) Except as provided in ORS 161.105, a person is not guilty of an offense unless the person acts with a culpable mental state with respect to each material element of the offense that necessarily requires a culpable mental state.

161.105 Culpability requirements inapplicable to certain violations and offenses.

(1) Notwithstanding ORS 161.095, ***a culpable mental state is not required if:***

(a) The offense constitutes a violation, unless a culpable mental state is expressly included in the definition of the offense; or

(b) An offense defined by a statute outside the Oregon Criminal Code clearly indicates a legislative intent to dispense with any culpable mental state requirement for the offense or for any material element thereof.

(2) Notwithstanding any other existing law, and unless a statute enacted after January 1, 1972, otherwise provides, an offense defined by a statute outside the Oregon Criminal Code that requires no culpable mental state constitutes a violation.

(3) Although an offense defined by a statute outside the Oregon Criminal Code requires no culpable mental state with respect to one or more of its material elements, the culpable commission of the offense may be alleged and proved, in which case criminal negligence constitutes sufficient culpability, and the classification of the offense and the authorized sentence shall be determined by ORS 161.505 to 161.605 and 161.615 to 161.655.

161.115 Construction of statutes with respect to culpability.

(1) If a statute defining an offense prescribes a culpable mental state but does not specify the element to which it applies, the prescribed culpable mental state applies to each material element of the offense that necessarily requires a culpable mental state.

(2) Except as provided in ORS 161.105, if a statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required and is established only if a person acts intentionally, knowingly, recklessly or with criminal negligence.

(3) If the definition of an offense prescribes criminal negligence as the culpable mental state, it is also established if a person acts intentionally, knowingly or recklessly. When recklessness suffices to establish a culpable mental state, it is also established if a person acts intentionally or knowingly. When acting knowingly suffices to establish a culpable mental state, it is also established if a person acts intentionally.

(4) Knowledge that conduct constitutes an offense, or knowledge of the existence, meaning or application of the statute defining an offense, is not an element of an offense unless the statute clearly so provides.

RELEVANT CASES:

(a) *State v. Fitch*, 23 Or. App. 487 (1975)

The defendant was convicted of first-degree burglary, and on appeal to the Court of Appeals of Oregon, he argued that the trial judge erred by refusing to give instructions to the jury on the lesser-included offense of criminal trespass in the second degree.

The court began its analysis by noting that the criminal-trespass statute does not require a culpable mental state and is therefore subject to § 161.115(2), which states that if an offense does not prescribe a culpable mental state, then it requires proof that the defendant unlawfully entered or remained in a dwelling house intentionally, knowingly, recklessly, or with criminal negligence. The court noted the commentary relating to § 116.115(2) that the purpose of this provision is to "do away with the problem that now often arises when a statute defining a crime fails to prescribe a required culpable state of mind," except for violations.

Since by virtue of § 116.115(2) the criminal-trespass statute requires one of the culpable mental states, the court found the jury instruction incomplete and inadequate because it only mentioned the culpable mental state of "knowingly." A proper instruction on criminal trespass would require an explanation of the lesser culpable mental states.

(b) *State v. Taylor*, 28 Or. App. 815 (1977)

This case was a consolidated appeal to the Court of Appeals of Oregon relating to four defendants convicted of driving while suspended. The issue was whether a culpable mental state was required.

The court reviewed the statutory framework in § 161 and noted that a culpable mental state is required. One of the exceptions is if the offense is outside of the criminal code and there is a clear legislative intent to dispense with a culpable mental state. Since the offense at issue is outside of the criminal code, the issue was legislative intent.

The court acknowledged the State's presentation of the legislative history but found that consideration

of that evidence was not necessary because the wording of the statute is "clear and unambiguous." The offense of driving while suspended does not expressly or by implication include a culpable mental state, and the performance of the act where a specific condition exists constitutes the crime. The statute provides for an affirmative defense of lack of notice of the suspension. Therefore, based solely on the wording and design of the statute, the court concluded that the legislature intended to dispense with a culpable mental state.

(c) *State v. Orth*, 35 Or. App. 235 (1978)

The defendant was convicted of negligently wounding another. On appeal to the Court of Appeals of Oregon, he argued that since the statute does not expressly contain a culpable mental state, it must be a "violation" as defined in § 161.105(2). That provision states that if an offense is outside of the criminal code and does not have a mental state, and no statute enacted after January 1, 1972 provides otherwise, then it is a violation.

The court concluded that the offense at issue does require a culpable mental state because the wording includes "failure to use ordinary care under the circumstances," which is a clear indication that the legislature intended to impose a culpable mental state.

(d) *State v. Blanton*, 284 Or. 591 (1978)

The defendant was convicted of the offense of criminal activity in drugs under § 167.207(1), which expressly requires that the defendant act "knowingly." Subsection (4) of the statute raises the offense to a Class A felony if the defendant provided drugs to a person under the age of eighteen.

On appeal to the Supreme Court of Oregon, the defendant argued that § 167.207(4) requires proof that he knew the person was under the age of eighteen. The court noted that his argument "places much reliance on the general policy of the 1971 criminal code to avoid 'strict liability' offenses, at least when the penalty includes possible imprisonment." The court stated that this argument "overshoots the mark" because the underlying offense of criminal activity in drugs does include a culpable mental state, and 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 noted that the legislature's policy is to require proof of a culpable mental state regarding each element of the offense, with the exception of those circumstances set out in § 161.105. That policy is found in § 161.115, which states that if a statute prescribes a culpable mental state but does not specify the element to which it applies, then it "applies to each material element of the offense that necessarily requires a culpable mental state."

The court acknowledged that the qualifying phrase at the end of § 161.115 "introduces a confusing appearance of circularity in the text." The court of appeal's interpretation was that this phrase was intended to distinguish between "those elements defining the substance or quality of the forbidden conduct" from elements such as limitations, jurisdiction, and venue.

The court concluded that the age of the drug recipient is a material element of the offense and, on that basis, imputed the mental state of knowingly.

(e) *State v. Hash*, 34 Or. App. 281 (1978)

The defendant was convicted of unlawful possession of a firearm by a person previously convicted of a felony. On appeal to the Court of Appeals of Oregon, he argued that the trial judge erred in finding that proof as to his belief about whether the firearm was operational was irrelevant.

The court noted that the offense does not contain an express culpable mental state and does not fall into one of the exceptions in § 161.105. It therefore applied § 116.115(2) to impute a culpable mental state into each material element of intentionally, knowingly, recklessly, or with criminal negligence.

(f) *State v. Von Eil Eyerly*, 37 Or. App. 399 (1978)

The defendant was convicted of failing to possess a certificate of title or notification of purchase regarding motor vehicles found on his business premises. One of the questions before the Court of Appeals of Oregon was whether the offense is one of strict liability punishable by incarceration or a "violation" punishable by a fine only.

The court began its analysis by noting that the prohibited conduct relating to the offense is clear but "the elements of the offense and possible punishment are less clear." Since the offense is outside of the criminal code, the court looked to § 161.085 to note that there are three types of offenses: (1) those that require proof of a culpable mental state; (2) those that are strict liability; and (3) those that are violations.

The State argued that the offense is strict-liability, while the defendant argued that it is a violation. The court agreed with the defendant that it is a violation. It noted in particular § 161.105, which states that a culpable mental state is not required if the offense is a violation, "unless a culpable mental state is expressly included in the definition of the offenses." The court summarized these provisions to form a general rule: "Generally, offenses that are *crimes* do require proof of a culpable mental state, and offenses that are *violations* do not require proof of a culpable mental state." In addition, the exceptions to that general rule are as follows:

> (1) [O]ffenses that are violations require proof of culpable mental state when it is "expressly included in the definition of the offense"; and (2) there can be a strict liability crime . . . when the offense is defined by statute outside the Criminal Code *and* there is clear legislative intent to dispense with any culpable mental state requirement.

The court then noted that the Oregon criminal statutes are based on the MPC and discussed the MPC's "clear-intent test" distinguishing crimes from violations as follows:

> In the case of crimes, as distinguished from violations[,] . . . [§ 161.105(1)(b)] accepts strict liability when the crimes are defined by a statute other than the Code "in so far as a legislative purpose to impose absolute liability for such crimes or with respect to any material element thereof plainly appears." That such a purpose should not be discerned very lightly by the courts seems very clear.
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> . . . [It is] tempting to provide that the "intention to create strict responsibility ought always to be evidenced by the words of the statute." *i.e.* by an explicit statement and not merely by the absence of a form of words denoting a requirement of culpability. This is, however, too severe a test for practical purposes since so much existing legislation that would not satisfy the test has been construed to impose absolute liability. Legislative acquiescence in such constructions, without amendment of the statute, may reasonably be regarded as evincing legislative purpose that the liability obtain. Accordingly, the weaker requirement that such a purpose "plainly appears" goes as far as we think it wise to go. In practice this might well mean either a settled interpretation or explicit statement in the statute. That is, however, left deliberately to judgment of the courts.

The court then cited its previous decision of *State v. Pierre*, 30 Or. App. 81 (1977), where it held that "legislative acquiescence" is not sufficient to "support a finding of clear intent to dispense with a culpability requirement given an absence of any history that the legislature was aware of the judicial constructions supposedly being approved by silence."

Based on the commentary from the MPC and the *Pierre* case, the court concluded that there is no clear legislative intent to create an absolute-liability offense for the offense at issue. The court noted that there could not be any legislative acquiescence because this statute had not yet been considered by an Oregon appellate court. There is no wording in the statute that evidences an intent to create an absolute-liability offense, and the fact that it is a Class A misdemeanor is not by itself proof that the legislature intended to impose strict liability. The court noted that there are dozens of regulatory offenses outside of the criminal code that provide for possible criminal penalties. Just because an offense carries a possible criminal penalty is not enough to satisfy the clear-intent test, and such a conclusion would be adverse to the "policy adverse to strict criminal liability."

On the basis that there is no clear intent that the offense be a strict-liability crime, the court concluded that it is a violation.

There was a strong dissent in this case concluding: "The legislation that has caused this court five months

of exquisite cogitation to arrive at a still disputed result fairly cries out for legislative clarification."

(g) *State v. Gartzke*, 39 Or. App. 463 (1979)

The defendant was convicted of criminal nonsupport of his child. On appeal to the Court of Appeals of Oregon, he argued that the jury instruction was in error because the statute "does not forbid negligent failure to support."

The court noted that the statute does not have an express culpable mental state and applied § 116.115(2) to find that it includes intentionally, knowingly, recklessly, or with criminal negligence. The court then concluded that "criminal negligence" is narrower than "negligence" and would not cover every situation of negligent failure to pay child support.

(h) *State v. Wolfe*, 288 Or. 521 (1980)

The defendant was convicted of possession of a knife by a person in a penal institution. The issue before the Supreme Court of Oregon was the culpable mental state required for a conviction.

The indictment charged the defendant with "knowingly" possessing the knife, and the court noted that if the offense requires a culpable mental state, then the conviction must be affirmed. The defendant's position, which the court noted was unusual for a defendant, was that the offense does not require a culpable mental state and therefore § 161.105(2) applies, meaning that it is a violation.

The trial judge interpreted the offense as requiring a culpable mental state of knowingly or intentionally. The judge relied on § 161.105(3), which states that if an offense outside of the criminal code does not require a culpable mental state, "the culpable commission of the offense may be alleged and proved, in which case criminal negligence constitutes sufficient culpability" and the sentenced is determined by other specific provisions. The court noted that the legislative history indicated that § 161.105(2) "was designed to cover the great variety of regulatory statutes that contain provisions for enforcement by criminal prosecution, and particularly to avoid strict liability for offenses potentially punishable by imprisonment."

The court began its analysis of whether the offense is a violation by noting that it only would be a violation if it falls outside of the criminal code and there is a clear indication of legislative intent to dispense with a culpable mental state. The court found that there is no such clear legislative intent because such dispensation of a culpable mental state "would be an improbable and artificial construction of a crime defined as a felony and carrying a potential 20-year sentence."

The court held that whether a culpable mental state is implicit in the definition "may be determined from the conduct and the circumstances with which it deals." The court found that possession of a weapon in a penal institution was "meant to include unknowing acts" and provided examples where a person could be innocently captured by the language of the statute. The court noted that "[s]uch a reading would not correspond to the gravity indicated by creating a felony punishable by a heavy sentence."

The court noted the seriousness of the offense and held that it would apply to a person who knowingly had a weapon in his/her possession and did not take appropriate steps to dispose of it. The court concluded that because of the seriousness of the offense, the legislature did not intend to require an additional mental element of intentionally "acting 'with a conscious objective to cause the result or to engage in the conduct so described.'"

Based on the above analysis, the court upheld the trial judge's decision on the basis that he did not interpret the law incorrectly.

(i) *State v. Stroup*, 290 Or. 185 (1980)

The defendant was convicted of driving a motor vehicle with a suspended license. On appeal to the Supreme Court of Oregon, he argued that, among other things, the State had not proved that the Motor Vehicles Division had previously mailed a notice to him that his license had been suspended, as it was required to do. The State's position was that all it had to prove was that the defendant was driving and his license was suspended. The Supreme Court of Oregon allowed the appeal "because of the importance of the questions raised by these conflicting contentions."

The offense of driving with a suspended license permits an affirmative defense of not receiving notice of the suspension. Prior to his trial, the defendant

gave the State notice that he intended to rely on such a defense.

In his concurring opinion, Justice Linde noted that "something more needs to be said about the elements of the crime." In his view, the issue was what the elements of the offense are and what mitigating circumstances are permitted. He began his analysis by considering § 161.095(2), which states that, except as provided in § 161.105, a person is not guilty of an offense unless he acts with the requisite mental state with respect to each material element that necessarily requires a culpable mental state.

Justice Linde relied on the court's previous decision in *State v. Wolfe*, 288 Or. 521 (1980), where it held that a culpable mental state is required for all offenses except those punishable only as violations, and violations require a culpable mental state only when expressly included in their definition. When an offense is outside of the criminal code and "clearly" is intended to dispense with a culpable mental state, that offense is punishable only as a violation. The *Wolfe* decision reflected the "general purpose" of limiting "condemnation of conduct as criminal when it is without fault."

Driving while license suspended is an offense outside of the criminal code, so the question, according to Justice Linde, was whether the statute clearly dispenses with a culpable mental state. Justice Linde noted that the statute is silent: it neither clearly specifies an intent to dispense with a culpable mental state or an intent to include one. In his view, the context of the statute reveals that a culpable mental state is an element of the offense for the following reasons: (1) The offense is defined as a "crime" that is either a Class A misdemeanor or a Class C felony and the court will "ordinarily assume . . . that it does not intend to make a criminal of one who has no reason to know the facts that make his conduct unlawful." On that basis, a person who drives without reason to suspect that his/her license is suspended should not be convicted of a crime. (2) If the statute were read to dispense with a culpable mental element, then § 161.105(2) would reduce the offense from a crime to a violation. The legislative intent was to make this offense a serious offense rather than eliminating a mental element and making it a violation.

(j) *McNutt v. State*, 295 Or. 580 (1983)

The defendant was convicted of removing material from the bed of a stream contrary to conditions of a permit. At issue before the Supreme Court of Oregon was whether a breach of an offense outside of the criminal code that does not specifically require a culpable mental state constitutes a misdemeanor or a violation.

The court began its analysis by noting that the wording of the statute does not include a culpable mental state, but it clearly and expressly states that the offense is a misdemeanor. The defendant argued that because the offense is outside of the criminal code and does not have a culpable mental state, it is a violation. His position was that, in order for his actions to constitute a crime, a culpable mental state must be required by the statute or there must be a clear legislative intent to dispense with a culpable mental state. He argued that because there was neither, there is no culpable mental state and the offense is a violation despite the express wording in the statute that it is a misdemeanor.

The court noted that the offense is not part of the criminal code, but the criminal code provisions apply. The court also noted that when re-writing the criminal code, "the 1971 legislature set forth certain general principles of criminal liability and established some required thresholds of *mens rea,* or blameworthy mental states." The general requirement is that a person must act with a culpable mental state regarding each material element that necessarily requires one. There are exceptions to that general rule, for example (1) when the offense is a violation or the offense is outside of the criminal code and there is a clear legislative intent to dispense with a culpable mental state; and (2) for any pre-1972 offenses outside of the criminal code that do not have a culpable mental state because they are considered to be violations. This second exception was the one the defendant relied on in this appeal.

Given that the offense is outside of the criminal code and does not expressly include a culpable mental state, the court first looked to whether one is required. The court noted that the offense pre-dates the Oregon Criminal Code, and nothing in the legislative history

reveals a legislative intent to dispense with a culpable mental state. As a result, the court concluded that the offense is punishable as a violation under § 161.105(2).

The court then noted that § 161.105(3) permits a prosecutor to upgrade the offense to a misdemeanor, for example to charge the defendant with acting with criminal negligence when he removed material from the stream. The court held that this was a matter of pleading a different offense, one that requires proof of a culpable mental state not required for a violation.

The court made it clear that this is not the same as "a statutory scheme providing different penalties for the same prohibited conduct." If the offense was designated as a violation, then the prosecutor could not upgrade it to a misdemeanor. However, when the offense has been designated as a misdemeanor, as was the case here, then "the prosecutor does have discretion to allege and prove a culpable mental state elevating the violation to a misdemeanor."

The court noted that § 161.115(2) did not apply in this case, as follows:

> When a statute such as ORS 541.615(1) clearly indicates neither an intent to dispense with a culpable mental state nor clearly indicates an intent to create a strict liability crime, an offense under such a statute is a "violation" which, in the prosecutor's discretion, can be upgraded to a misdemeanor (or in some cases a felony if the punishment section of the statute so provides) by alleging and proving a culpable mental state. This is provided for explicitly by ORS 161.105(3) and there is no need to look to ORS 161.115(2).

(k) *State v. Cho*, 297 Or. 195 (1984)

The defendant was convicted of breaching the wildlife laws by offering to purchase the gall bladder of a bear. On review, the Supreme Court of Oregon considered two questions: (1) is the offense a violation or a crime? and (2) is a culpable mental state required for a conviction?

The court noted that the construction and punishment of offenses under the statute are governed by § 161.095(2) of the criminal code, which states that, with the exceptions set out under § 161.105, a person is not guilty of an offense unless he/she acts with the necessary culpable mental state.

The court noted that the offense at issue is outside of the criminal code, it does not have an express culpable mental state, and the penalty for violating the statute was enacted in 1973. The legislature expressly designated the offense as a Class A misdemeanor. As a result, the court stated, § 161.105(2) must be applied to determine if the offense is a violation or a crime. The court noted that the wording of this provision is clear: "The offense is a violation unless the legislature has otherwise provided. That is exactly what the legislature has done. It has provided that this offense is a Class A misdemeanor."

The court went on to consider whether the offense requires a culpable mental state. The court began its analysis by noting that the "general rule is that to be guilty of a crime a person must act with a culpable mental state," and "a statute which defines a crime but does not prescribe a culpable mental state nonetheless requires culpability."

The court noted:

> There is only one way in Oregon to establish a crime outside the criminal code which does not require a culpable mental state. That is for the legislature to enact a statute, after January 1, 1972, which provides that an offense is not a violation, *and* for the offense to clearly indicate a legislative intent to dispense with the culpable mental state requirement.

The court then observed that the provisions contained in §§ 161.095-161.115 mandate that the principle that a person should only be punished for a crime if he/she has acted with mens rea is to apply to statutes outside of the criminal code except for the exception noted above. The court cited several decisions in support of this "legislative effort."

The court noted that the penalty provision was enacted after January 1, 1972 and that a Class A misdemeanor is a crime. As a result, the offense requires a culpable mental element "unless there is a clear indication of legislative intent to dispense with culpability." The court then stated:

The mere enactment of a crime without an expressly required culpable mental state is insufficient to establish such a clear indication. The designation of an offense as a misdemeanor (or felony) invokes the potential of incarceration of offenders. As opposed to a violation, the heightened impact on the liberty interest of the alleged misdemeanant or felon provides support for a culpability requirement in crimes.

The court dismissed the State's argument that simply because the government has a substantial interest in the preservation of wildlife, it is sufficient to conclude that these offenses are strict-liability crimes. A substantial government interest is not a "clear indication" of a legislative intent to dispense with a culpable mental state. The court also dismissed the State's contention that the "simplified system of citation and complaint for a wildlife infraction indicates a legislative intent to dispense with a culpable mental state requirement for a breach of the wildlife laws." The court acknowledged that this may reveal "some indication of legislative intent" but concluded that it falls short of "clearly" indicating the intent the statute requires. As a result, a culpable mental state is required for a conviction.

(l) *State v. Maguire*, 78 Or. App. 459 (1986)

The defendant was convicted of driving while intoxicated and petitioned the Court of Appeals of Oregon to reconsider its previous decision dismissing her appeal. The defendant argued that the trial judge erred in holding the offense of driving while intoxicated to be strict-liability, and she asserted that she should have been able to raise the defense of mental disease or defect.

The court upheld its previous decision that driving while intoxicated is a strict-liability offense. It noted that "although a culpable mental state is normally a requirement for criminal liability" if a statute is outside of the criminal code and adopted after January 1, 1972, it can be a strict-liability offense if there is a clear legislative intent to dispense with a culpable mental state.

Driving while intoxicated had been an offense for decades, but the specific provisions relating to the offense at issue were adopted after January 1, 1972. On its face, the statute only requires proof that the defendant was intoxicated, not that the defendant knew or ought to have known he/she was intoxicated. The court also noted that "the legislature made DUII a crime in order to keep dangerous drivers off the road" and assumed that the legislature was aware that "dangerously intoxicated drivers often insist, at times sincerely, that the liquor which they drank has not affected their driving ability." Based on the context, the court found a clear legislative intent to dispense with a culpable mental state.

There was a strong dissent in this case by Judge Warden, who disagreed with the majority's finding of a clear legislative intent based on the legislative history and surrounding circumstances relating to driving while intoxicated. The dissenting judge said that just because the legislature wants to keep drunk drivers off the road does not mean it intended to make the offense strict-liability. He used examples of other offenses, in particular arson, where the legislature does not want people to burn down buildings, but nonetheless requires a culpable mental state for a conviction. The dissent cited the *Cho* case and the court's view that requiring a clear legislative intent must be taken "seriously" and that there is nothing in the driving-while-intoxicated statute that reveals a clear legislative intent to dispense with a culpable mental state.

(m) *State v. Van Norsdall*, 127 Or. App. 300 (1994)

The defendant was convicted of assault in the first degree with a firearm and felon in possession of a firearm. On appeal to the Court of Appeals of Oregon, he argued that the trial judge erred by refusing to instruct the jury that the possession of a firearm charge required proof he knew he was a felon at the time.

The court noted that the offense does not expressly include a culpable mental state. It also observed that whether a defendant is a felon is not part of the "act"; it is "simply part of the attending circumstances." As such, there is no mental element attached.

The court relied on *Blanton* to find that the elements of an offense are divided into two categories: (1) those that relate to the substance of the act and

require a culpable mental state; and (2) "those that relate to conditions that exist outside the actor's state of mind," such as venue or jurisdiction, "for which no culpable mental state is required."

The court concluded that the status of being a felon falls into the second category and is "not an element that is logically provable by a *mens rea,* and that, therefore, it is not an element to which a culpable mental state applies."

In addition, the court noted that there are no concerns about the defendant being convicted on the basis of strict liability because "the state has acknowledged the appropriate culpable mental state by charging defendant with 'knowingly' possessing a firearm." The court agreed that the only requisite mental state relates to possession of the firearm, not to whether the defendant knew or ought to have known he was a felon. The court considered this situation to be the same as a conviction for theft because it does not require a defendant to know the value of the stolen property. The court concluded by stating that "a felon will not be acquitted of the crime of being a felon in possession of a firearm simply because he claims to have forgotten his prior felony conviction or professes not to understand what a 'felon' is."

There was a strong dissent in this case. Judge Leeson disagreed with the majority's opinion that a culpable mental state is not necessary regarding the status of being a felon. In his view, status as a felon is a material element of the crime and not comparable to the second category noted above. He also noted that often statutes require a mental state for "attending circumstances" and commented that this was the case in *Blanton* itself, relating to providing drugs to a person under the age of eighteen. In addition, he disagreed with the majority that the status as a felon is not "logically provable." In his view, "culpability as to one's status as a felon refers to knowing that one has been convicted of a felony, or recklessly or with criminal negligence failing to realize it." Finally, he cited cases where "the potential for injustices in the majority's rule is illustrated," in particular the case from California *People v. Bray*, 52 Cal. App. 3d 494 (1975), where the defendant legitimately did not know if he had been convicted of a felony or not. Judge Leeson would have found that whether a defendant knew or did not know his/her status as a felon was a question of fact for the trier of fact to decide.

(n) *State v. Rutley*, 343 Or. 368 (2007)

The defendant was convicted of delivering controlled substances within 1000 feet of a school. The trial judge held that the State did not need to prove the defendant knew the distance from the school, and the court of appeals disagreed. The Supreme Court of Oregon reviewed and reversed in part the decision of the court of appeal.

The supreme court began its analysis by "summarizing Oregon law generally with regard to the mental state requirements for crimes." It noted that "criminal liability generally requires an act that is combined with a particular mental state." The court cited § 161.095(2), which states that except in certain express circumstances, a person is not guilty unless he/she acts with a culpable mental state "with respect to each material element of the offense that necessarily requires a culpable mental state." The court also acknowledged the difficulty in interpreting that provision, quoting from *Blanton* that "the qualifying phrase . . . introduces a confusing appearance of circularity in the text."

The court noted that the offense does not include a culpable mental state. In addition, it stated that even though the offense is outside of the criminal code, the provisions of the criminal code governing its construction do apply, in particular those relating to whether a culpable mental state is required.

As the offense is not part of the criminal code, the court first looked to whether the legislature clearly intended to dispense with a culpable mental state with regard to the material element of delivery within 1000 feet of a school. The court reiterated its previous decisions and confirmed that "statutory silence alone is not a sufficiently clear indication of legislative intent to dispense with a culpable mental state, and this 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."

The court started with the text and concluded that it "evidences a clear legislative intent to give drug dealers a reason to locate the 1,000-foot school boundary and stay outside it—by punishing the failure to do so as the most serious of crimes." The court noted that the wording of the statute "leaves no doubt that the legislature intended to protect children from drug use and the violence and other negative influences that accompany drug delivery." The court concluded that imputing a culpable mental state regarding the distance from the school "would work against the obvious legislative purpose, in that it would create an incentive for drug dealers *not* to identify schools, and *not* to take into consideration their distance from them in engaging in their illegal activity."

The court then looked to the difficulties for the State to prove that the defendant had a culpable mental state, for example in proving whether the defendant knew about the existence of the school. The court had "no hesitation in concluding that the likelihood that the legislature intended to require the state to prove a defendant's culpable mental state as to that collectivity of school-related requirements is virtually nonexistent." The court ultimately concluded:

> Based on the legislature's obvious intent to protect children from predatory drug dealers by enhancing the penalty for delivery in the vicinity of a school, the grammatical structure of the statute's text, and the nature of the element (no mental state is logically required for a distance element), we conclude that the legislature's omission of a mental state was purposeful with regard to the 1,000 foot distance element. In accordance with ORS 161.105(1)(b), we hold that, in defining the offense, the legislature has "clearly indicate[d] an intent to dispense with [a] culpable mental state" as to the 1,000-foot distance element.

(o) *State v. Jones*, 223 Or. App. 611 (2008)

The defendant was convicted of first-degree theft and unauthorized use of a vehicle. He argued on appeal to the Court of Appeals of Oregon that the State was required to prove that he had a culpable mental state regarding material elements of each offense. More specifically, the defendant argued that the State was required to prove that he knew the value of the property he stole and he knew trailer was a "vehicle." The court of appeals noted that the question for each is whether the legislature intended to require proof of a culpable mental state.

With respect to first-degree theft, the statute expressly states that there must be intent to take the property. The question is whether that intent also applies to the value of the property. This requires consideration of § 161.105 and 161.115(1). The court noted that the issue whether or not a culpable mental state attaches to an element of the crime is a "chronically vexing problem." It noted that "one dividing line" is whether the offense is part of the criminal code or not. For offenses within the criminal code, then § 161.095(2) and 161.115(1) applies. For offenses outside of the criminal code, § 161.105(1)(b) divides them into two categories, "those statutes that clearly indicate a legislative intent to dispense with any culpable mental state requirement for the offense or for any material element thereof, and those statutes that do not." If there is no legislative intent to dispense with a culpable mental state—for example, if there is one in the text—then determining to which elements it applies is governed by § 161.095(2) and 161.115(1), in the same way as they apply to criminal-code offenses. If the statute is outside of the criminal code and clearly indicates a legislative intent to dispense with a culpable mental state, then none is required.

In this case, first-degree theft is an offense in the criminal code and expressly includes a culpable mental state of "intent to deprive." Therefore, the question is whether this mental state applies to the value of the property. The court held that it does not because the culpable mental state precedes the prohibited act and "neither the grammatical structure nor the obvious legislative purpose of the statute suggests the culpable mental state extends to elements beyond the prohibited act." In support of this interpretation, the court noted that if a culpable mental state were extended in that manner, a defendant could simply "defeat a charge of first-degree theft by either wilful ignorance of the value of the property stolen or by credibly testifying that he believed the value to be less than $750." The court found it "unlikely that the legislature would provide for

such defenses to first-degree theft merely by specifying that theft requires a culpable mental state of 'with intent to deprive.'"

With respect to whether the State was required to prove that the defendant knew or ought to have known the trailer was a "vehicle," the court observed that the statute does not expressly specify a culpable mental state for that element. In addition, the court noted that the indictment charged the defendant with "unlawfully and knowingly" taking a vehicle. As a result, the court found that the State was required to prove that he knowingly took the trailer. The court then cited the supreme court's decision in *State v. Lane,* 341 Or. 443 (2006), which held that proof the defendant understood a statutory definition was not required for a conviction. In this case, the State had presented evidence that the defendant knew he was "engaged in the unauthorized use of a vehicle."

(p) *State v. Rainoldi*, 236 Or. App. 129 (2010)

The defendant was convicted of felon attempting possession of a firearm. On appeal to the Court of Appeals of Oregon, he argued that he could not be convicted without proof that he knew he had been convicted of a felony. The State argued that the issue had already been decided in *Van Norsdall*; however, the court concluded that since "the relevant law on this issue has developed since our decision in *Van Norsdall*, we agree with defendant and overrule that case."

The court began its analysis by noting that the offense is not part of the criminal code and therefore is treated differently from offenses in the criminal code "for the purposes of determining whether they imply culpable mental states and, if so, with respect to which elements."

Statutes that are not part of the criminal code are governed by § 161.105(1)(b), meaning a culpable mental state is not required if there is a clear legislative intent to dispense with one. The court noted that the legislative history revealed that this provision was intended to deal with "the gaggle of miscellaneous offenses located throughout the Oregon Revised Statutes."

If a statute is outside of the criminal code and there is a clear legislative intent to dispense with a culpable mental state, then no mental state is required. If there is no such clear legislative intent, then the offense is treated as though it were part of the criminal code, which means that § 161.095 applies. That provision states that unless it falls under the circumstances described in § 161.105, then a person cannot be convicted without proof of a culpable mental state regarding "each material element of the offense that necessarily requires a culpable mental state."

The offense at issue falls outside of the criminal code, so the first issue is whether there is a clear legislative intent to dispense with a culpable mental state. The court noted that this step was not completed in the *Van Norsdall* case. The court conducted this inquiry by using "the usual techniques of statutory interpretation: examination of text and context, as well as recourse to legislative history and, if necessary, maxims of construction." Further, given that the offense is governed by § 161.105(1)(b), "we are not only looking for indications of what the legislature intended when it enacted ORS 166.270(1), but for *clear* indications." The court also noted the "overarching legislative bias against strict liability crimes," as evidenced by the Commentary to the Criminal Law Revision Commission's Proposed Oregon Criminal Code.

The text of the offense does not provide any indication of a legislative intent to dispense with a culpable mental state, and cases such as *Cho* held: "The mere enactment of a crime without an expressly required culpable mental state is insufficient to establish such a clear indication." Further, there is no affirmative defense permitted for lack of notice, which has been considered in previous cases to be "a feature that the court has identified as one indication that the legislature intended that the state, in its case-in-chief, need not prove any culpable mental state." In addition, there is no mental state regarding any other elements of the offense, which the supreme court in cases such as *State v. Irving*, 268 Or. 204 (1974), found significant in that "the legislature is more likely to dispense with a culpable mental state with respect to one element if other elements carry express culpable mental states."

In addition, the court looked at other statutes relating to possession of a firearm, such as possession of a firearm by a person prohibited by state or federal law

from owning or possessing one. That statute requires proof that a defendant knew he/she was prohibited from owning or possessing a firearm. The court stated that an inference can be drawn from the statute that "the legislature knew how to impose a culpable mental state requirement when it so intended," and "in light of the overarching legislative preference against strict liability crimes, that inference is a far cry from a clear indication."

In addition, there is no indication from the legislative history of a clear legislative intent to dispense with a culpable mental state. The offense dates back to 1925, and each time it was amended, no mention was made of the requisite culpable mental state. The court noted that "such silence has been interpreted as an indication that the legislature did *not* intend to dispense with a *scienter* requirement." On the other hand, the supreme court in *State v. Miller,* 309 Or. 362 (1990), found that "legislative silence, at least in some situations, [is] evidence that the legislature *did* intend to create a strict liability crime." In order to reconcile these conflicting conclusions about legislative silence in the legislative history, the court noted that the supreme court would likely not have come to the conclusion that it did in the *Miller* case

> had it not been for another, overriding, factor—a factor that appears to be a unifying theme in the Supreme Court's attempts to discern whether a particular statute shows a clear indication to dispense with a culpable mental state. That theme is this: The legislature is presumed to dispense with a culpable mental state requirement where *imposing* such a requirement would result in a statute that is extremely difficult to enforce. Put another way: The Supreme Court seems to rephrase the question from, "Does this statute clearly indicate the intent to dispense with a culpable mental state?" to, "Could the legislature possibly have intended this statute to *include* a culpable mental state?"

The Court noted specific examples in support of its interpretation of supreme court cases. For example, in the *Miller* case, the supreme court stated that it was "preposterous" for the legislature to have intended a drunk driver to avoid criminal liability by saying he/she did not know how drunk they were. In the *Irving* case, the supreme court observed that it would be "absurd to require the state to prove that the defendant knew that the purchaser was, in fact, a police officer." In *Rutley*, the most important factor to the supreme court was "the serious impediment to almost *any* enforcement imposed by a 'knowing' requirement."

The court noted that requiring the State to prove that the defendant knew or should have known he was a felon

> would not eviscerate the statute or impede prosecution to the same extent as requiring that a defendant knew he was selling drugs within 1000 feet of a building that he knew was a school by what he knew were minors . . . or requiring that a DUII defendant knew that his blood alcohol content is .08 or greater.

Proving those culpable mental states would not be logical, whereas in this case "a defendant *can* logically be expected to know—or to be remiss in not knowing—that he or she has been convicted of a felony." The court took into account that for the most part it would be very difficult for a defendant to successfully prove he/she did not know.

Based on all of the above, the court concluded that there was no clear legislative intent to dispense with a culpable mental state regarding the defendant's status as a felon. As a result, § 161.095(2) applies, and the next question is whether the status as a felon is a "material" element that necessarily requires proof of a culpable mental state. This is a question that "has long vexed Oregon courts," and this "rule, which appears in no other state or federal jurisdiction, is gibberish."

The Court noted that its previous approach to this issue needed to be "modified." The court also observed that in 1970, there was a large-scale revision of Oregon's criminal statutes, including those relating to whether a culpable mental state is required. The statutes were based on the Model Penal Code, and the definition of a material element "clearly requires a culpable mental state for each element that relates to the harm or evil sought to be prevented and does not require a culpable mental state with elements pertaining to venue, jurisdiction, statute of limitations, and the like." The court noted that

because of the original wording of the legislation and because the term "material element" was not defined, there was a considerable amount of confusion about which elements would require a culpable mental state and which would not. After doing an extensive review of the legislative history, the court concluded:

> [W]hen a statute falls inside the criminal code and does not explicitly prescribe a culpable mental state, or when, as here, the statute falls outside the criminal code and does not reveal a clear indication that the legislature intended to dispense with a culpable mental state requirement, a culpable mental state is required for elements that are relevant to the harm or evil incident to the conduct sought to be prevented by the law defining the offense, and is *not* required for venue, jurisdiction, statute of limitations, "and the like."

The court then applied this standard to possession of a firearm by a felon to determine whether the status as a felon relates to the harm sought to be prevented or whether it is similar to venue or jurisdiction. In *Van Norsdall*, the court held that it was similar to venue or jurisdiction, but the court now stated "that [this] holding was wrong." The court concluded that status as a felon is a material element for which a culpable mental state is required because "[t]hat status goes to the evil at which the statute is directed: firearms in the hands of individuals who have at one time shown an inability to conform to the criminal law and might therefore be considered more dangerous than others. By the same token, the element of being a felon transforms otherwise innocent conduct into a crime; a similarly situated nonfelon may possess or attempt to possess a firearm without violating the law." The court expressly overruled *Van Norsdall* and held that a conviction requires proof that the defendant knew or should have known he had been convicted of a felony when he attempted to purchase the firearm.

8. PENNSYLVANIA

Pennsylvania's statute states that a person is not guilty of an offense unless he/she acted intentionally, knowingly, recklessly or negligently, as the law may require. If culpability is not prescribed by law, then this element of the offense is established if the person acted intentionally, knowingly, or recklessly. This general rule does not apply in the following circumstances:

- it is a summary offense, unless the culpable mental state is included in the definition or a court determines that its application is consistent with effective enforcement of the law defining the offense; or
- it is an offense defined by statutes other than this title and there is a legislative purpose of imposing absolute liability, or a culpable mental state for any material element is not plainly apparent.

Pennsylvania's legislation has a default mens rea provision similar to § 2.02(3) of the MPC, except it refers to "intentionally" rather than "purposely." In addition, the wording is almost identical to § 2.05 of the MPC, except it refers to "summary offenses" rather than "violations."

Relevant excerpts from Pennsylvania's statute are the following:

> Title 18—Crimes and Offenses
> Part I—Preliminary Provisions
> Chapter 3—Culpability
>
> § 302. General requirements of culpability.
>
> (a) *Minimum requirements of culpability.* —***Except as provided in section 305 of this title (relating to limitations on scope of culpability requirements), a person is not guilty of an offense unless he acted intentionally, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.***
>
> . . .
>
> (4) A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard

of care that a reasonable person would observe in the actor's situation.

(c) Culpability required unless otherwise provided. —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 intentionally, knowingly or recklessly with respect thereto.

§ 305. Limitations on scope of culpability requirements.

(a) *When culpability requirements are inapplicable to summary offenses and to offenses defined by other statutes.* ***—The requirements of culpability prescribed by section 301 of this title (relating to requirement of voluntary act) and section 302 of this title (relating to general requirements of culpability) do not apply to:***

(1) summary offenses, unless the requirement involved is included in the definition of the offense or the court determines that its application is consistent with effective enforcement of the law defining the offense; or

(2) offenses defined by statutes other than this title, in so far as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears.

(b) *Effect of absolute liability in reducing grade of offense to summary offense.* —Notwithstanding any other provision of existing law and unless a subsequent statute otherwise provides:

(1) when absolute liability is imposed with respect to any material element of an offense defined by a statute other than this title and a conviction is based upon such liability, the offense constitutes a summary offense; and

(2) although absolute liability is imposed by law with respect to one or more of the material elements of an offense defined by a statute other than this title, the culpable commission of the offense may be charged and proved, in which event negligence with respect to such elements constitutes sufficient culpability and the classification of the offense and the sentence that may be imposed therefor upon conviction are determined by section 106 of this title (relating to classes of offenses) and Chapter 11 of this title (relating to authorized disposition of offenders).

RELEVANT CASES:

(a) *Commonwealth v. Mayfield*, 574 Pa. 460 (2003)

The defendant corrections officer was convicted of institutional sexual assault in violation of the Institutional Sexual Assault Statute. On appeal to the Supreme Court of Pennsylvania, she argued that the statute violates due process because there is no express culpable mental state.

The court reversed the trial judge's decision agreeing with the defendant that the statute was unconstitutional. The trial judge relied on the U.S. Supreme Court case of *Staples v. United States*, 511 U.S. 600 (1994), to find that since the statute carries a "harsh penalty" and "implicated legal activity," it violated due process.

The court concluded that it was not necessary to consider the punishment or the type of prohibited conduct at issue because that is only in circumstances "where the legislature's intent as to *mens rea* is unclear." In this case, the general assembly's intent is clear because even though the offense does not include a culpable mental state, § 302 applies. The court agreed with the trial judge that the general assembly did not intend for the offense to be one of strict liability, and therefore the trial judge "need have done nothing more than advert to §302(c) and require the Commonwealth to prove at least recklessness." The court found that imputing a mental state from § 302(c) "renders the statute perfectly constitutional."

(b) *Commonwealth v. Ludwig*, 583 Pa. 6 (2005)

The defendant was convicted of drug delivery resulting in death in violation of § 2506. On appeal to the Supreme Court of Pennsylvania, he challenged the constitutionality of the statute on the grounds of vagueness because it does not include a culpable mental state.

The court began its analysis by noting that § 2506 defines the crime of third-degree murder when death results from conveying certain controlled substances. The statute does not expressly include a culpable mental state, and therefore the court looked to the intent of the general assembly.

The court stated that determining whether a culpable mental state is required begins with § 302(c), the statutory default provision. The court noted that this provision states that when culpability "is not prescribed by law," then it is established if the person acts with one of the listed mental states.

The court concluded that the appropriate culpable mental state is "prescribed by law" because the "law is clear and well-settled regarding the *mens rea* for third degree murder . . . . [W]e have consistently prescribed the culpability required for third degree murder to be malice." The court noted that "malice" is the distinction in law between murder and manslaughter, and other third-degree murder offenses in the crimes code require a culpable mental state of malice. The court concluded that because the general assembly included this offense as one of murder in the third degree, "the Legislature made it plain that malice is the requisite *mens rea*" rather than the culpable mental states listed in § 302(c). Given that there is a culpable mental state for this offense, the court held that it is not unconstitutionally vague.

The dissenting justice agreed with the majority that the statute is not unconstitutionally vague; however, he disagreed with its conclusion that the culpable mental state is malice. In the dissenting justice's view, the culpable mental states listed in § 302(c) should have been applied to the offense. In his opinion, third-degree murder "is a class of crimes that can include any number of different offenses," and even though the court has found in the past that other offenses considered to be third-degree murder require a culpable mental state of malice, that does not mean the general assembly cannot classify a type of offense as third-degree murder and require a different culpable mental state. He disagreed with the majority's presumption that this was the general assembly's intent, and he would have imputed the culpable mental state of recklessness from § 302(c).

(c) *Commonwealth v. Omar*, 602 Pa. 595 (2008)

This case was a consolidated appeal to the Supreme Court of Pennsylvania regarding violations of the Trademark Counterfeiting Statute relating to using or possessing items with a counterfeit mark. The trial judge struck down the statute on the basis that it was unconstitutionally vague and overbroad. On appeal, the Commonwealth argued that the statute "is limited to those persons with the intent to sell or distribute items with counterfeit trademarks" and therefore "does not reach a substantial amount of constitutionally protected speech." In support of its argument, the Commonwealth relied in part on § 302(c).

The court agreed with the Commonwealth that the "likely legislative intent . . . was to prohibit the deceptive, unauthorized use of a trademark for profit" and not "to prohibit the use of trademarked words in constitutionally protected speech." However, the court found that the "plain language of the statute as written prohibits a much broader range of uses of trademarks, many of which involve constitutionally protected speech." The court did not accept the Commonwealth's suggestion to incorporate "the intent to sell or distribute into the definition of the offense."

With respect to § 302(c), the Court acknowledged the default mens rea provision but also noted that it "does not speak to what conduct a person must commit intentionally, knowingly or recklessly, and in no way mentions the intent to sell or distribute." As a result, the court concluded: "Although we have no doubt that the General Assembly did not intend to criminalize the use of terms or words absent intent to profit from the sale of counterfeit goods, we are bound by the language as enacted, which criminalizes a substantial amount of protected speech."

B. STATES THAT HAVE A DEFAULT MENS REA PROVISION SIMILAR OR IDENTICAL TO § 2.02(3) OF THE MODEL PENAL CODE BUT DO NOT HAVE A PROVISION SIMILAR OR IDENTICAL TO § 2.05

9. ILLINOIS

Illinois's statute states that with the exception of absolute liability offenses, a person is not guilty of an offense unless he/she acts with one of the culpable mental states. If it is not an absolute-liability offense and the statute does not prescribe a culpable mental state, then intentionally, knowingly, or recklessly is sufficient. Illinois's statute is similar to § 2.02(3) of the MPC, except it refers to "intentionally" instead of "purposely."

Relevant excerpts from Illinois's statute are the following:

Chapter 720—Criminal Offenses
Criminal Code
Criminal Code of 1961
Title II—Principles of Criminal Liability
Article 4—Criminal Act and Mental State

§ 720 ILCS 5/4-3. Mental state

Sec. 4-3. Mental state. ***(a) A person is not guilty of an offense, other than an offense which involves absolute liability, unless, with respect to each element described by the statute defining the offense, he acts while having one of the mental states described in Sections 4-4 through 4-7*** [720 ILCS 5/4-4 through 720 ILCS 5/4-7].

(b) If the statute defining an offense prescribed a particular mental state with respect to the offense as a whole, without distinguishing among the elements thereof, the prescribed mental state applies to each such element. ***If the statute does not prescribe a particular mental state applicable to an element of an offense (other than an offense which involves absolute liability), any mental state defined in Sections 4-4, 4-5 or 4-6 [720 ILCS 5/4-4, 720 ILCS 5/4-5 or 720 ILCS 5/4-6] is applicable.***

(c) Knowledge that certain conduct constitutes an offense, or knowledge of the existence, meaning, or application of the statute defining an offense, is not an element of the offense unless the statute clearly defines it as such.

§ 720 ILCS 5/4-4. Intent

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

§ 720 ILCS 5/4-5. Knowledge

Sec. 4-5. Knowledge. A person knows, or acts knowingly or with knowledge of:

(a) The nature or attendant circumstances of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that his or her conduct is of that nature or that those circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that the fact exists.

(b) The result of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that that result is practically certain to be caused by his conduct.

Conduct performed knowingly or with knowledge is performed wilfully, within the meaning of a statute using the term "willfully", unless the statute clearly requires another meaning.

When the law provides that acting knowingly suffices to establish an element of an offense, that element also is established if a person acts intentionally.

§ 720 ILCS 5/4-6. Recklessness

Sec. 4-6. Recklessness. A person is reckless or acts recklessly when that person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense, and that disregard constitutes a gross deviation from the standard of

care that a reasonable person would exercise in the situation. An act performed recklessly is performed wantonly, within the meaning of a statute using the term "wantonly", unless the statute clearly requires another meaning.

RELEVANT CASES:

(a) *People v. Leach*, 3 Ill. App. 3d 389 (1972)

The defendant was convicted of mob action and resisting or obstructing a peace officer. On appeal to the Appellate Court of Illinois, First Division, she argued that the complaint relating to the mob-action charge did not state an offense because there was no allegation that she acted with a culpable mental state.

The mob-action statute does not include an express mental state. The court noted that the Illinois Revised Statutes at the time stated that a person is not guilty of an offense without the requisite mental state unless it is an absolute-liability offense. The court also commented that a culpable mental state is not required for certain misdemeanor offenses or "if the statute defining the offense clearly indicates a legislative purpose to impose absolute liability."

The court noted that the offense of mob action is punishable by incarceration and that the statute "contains no indication, clear or otherwise, of a legislative purpose to make it an absolute liability crime." As a result, a defendant cannot be convicted of mob action unless he/she acted intentionally, knowingly, or recklessly. In support of its conclusion, the court cited the previous decision of *Landry v. Daley*, 280 F. Supp. 938 (N.D. Ill. 1968), where the U.S. district court also held that the Mob Act "does not involve absolute liability." In the *Landry* case, the court stated that requiring a mental element will "substantially narrow the scope of the offense" and "clarify and limit it and supply objective standards for the adjudication of guilt."

The court then went on to hold that "a complaint, information or indictment which does not set forth the nature and elements of the crime sought to be charged fails to state an offense and is subject to dismissal." The court concluded that a complaint like the one in this case that does not include all of the essential elements of the offense is "fatally defective and cannot support a conviction."

(b) *People v. Arron*, 15 Ill. App. 3d 645 (1973)

The defendant was convicted of "jumping bail" in violation of § 32 of the Illinois Criminal Code of 1961. On appeal to the Appellate Court of Illinois, First District, he argued that the statute is unconstitutional because it does not require a culpable mental state at the time the bond is forfeited. The court noted that the defendant did not raise this issue at trial but nonetheless agreed to consider the issue.

The defendant challenged the statute on the basis that the incurrence of a forfeiture does not require a mental state. The court agreed that "a criminal intent is an essential element of crimes, other than certain nontrue crimes"; however, incurring a forfeiture is not an element of the crime. Rather, it is a condition precedent upon which the offense of jumping bail is based. The court noted that a defendant only becomes subject to criminal liability when he/she "wilfully" fails to surrender.

The court then looked to the committee comments when the statute was amended in 1961 and noted that the statute was intended "to expressly prohibit an intentional violation of a bail bond." On that basis, the court concluded that the wording of the statute is clear and will not capture "an innocent or excusable failure to surrender."

(c) *People v. Turner*, 57 Ill. App. 3d 62 (1978)

The defendant was convicted of violating his bail bond after he failed to appear in court. On appeal to the Appellate Court of Illinois, First District, he argued, among other things, that the bail-bond statute is unconstitutional "since it requires no criminal intent at the time of the bond forfeiture."

Similar to the *Arron* case, the defendant had not raised this issue at trial, but the court noted that even if it were to consider this issue on the merits, it would reject his argument because "the incurring of a forfeiture is not an element of the crime in a strict sense, but rather a condition precedent." The court cited the *Arron* case and held that there was no reason to change the holding in that case.

(d) *People v. Whitlow*, 89 Ill. 2d 322 (1982)

The defendants were convicted of a number of offenses in violation of the Illinois Securities Law of 1953. A number of grounds were raised on appeal to the Supreme Court of Illinois, including that the State "fail[ed] to allege specific intent to defraud as an element" of the Securities Law violations. The State argued that the offenses do not require any mental state because none is included in the statute and they are intended to be absolute-liability offenses.

The supreme court noted that because they are felony offenses, they cannot be absolute-liability "unless the legislature clearly indicates the intent to impose it." The court observed that the statute is silent as to a culpable mental state but that "mere absence of express language describing a mental state does not *per se* lead to the conclusion that none is required."

The court found that there is nothing to indicate that the legislature intended these offenses to be absolute-liability. It also noted in particular that "the harshness of potential penalties for these violations militates against such a conclusion."

The court applied the provisions of § 4 of ch. 38 of the Illinois Revised Statutes to find that if the offenses are not absolute-liability, then the mental states of intentionally, knowingly, or recklessly apply. The next issue the court considered was which one of these mental states is applicable to the securities-law violations. It noted that this issue had not yet been decided by the U.S. Supreme Court but that similar provisions of the Securities Act of 1933 had been considered by the federal courts, although the federal statute requires that the person have acted "willfully." The court cited a number of federal cases holding that specific intent is necessary, although those conclusions could have been based in part on the fact that the wording of the federal statute includes the mental element "willfully." The Illinois statute has no such wording; also, in a then-recent federal case, *United States v. Farris*, 614 F.2d 634 (9th Cir. 1979), the 9th Circuit ruled that "either recklessness or knowledge will sustain a conviction for securities fraud." The court also cited the case of *Aaron v. Securities & Exchange Commission*, 446 U.S. 680 (1980), where the U.S. Supreme Court had held that there must be an "intent to deceive, manipulate, or defraud." The court noted that in the *Aaron* case "the court did not rule out the possibility that even reckless conduct may suffice for a conviction under the Act."

The court adopted the reasoning from the U.S. Supreme Court cases and concluded that a mental state is an essential element of these offenses, and that mental state "embraces intentional or knowing misconduct." This was relevant to § 12(I), which reads "to employ any device, scheme or artifice to defraud . . . ."

With respect to § 12(F)—which prohibits "engag[ing] in any transaction, practice or course of business . . . which works or tends to work a fraud or deceit upon the purchaser or seller"—or § 12(G)—which prohibitsto obtaining money or property through the sale of securities by means of any untrue statement or omission ...", the Court also adopted the reasoning in the *Aaron* case that a culpable mental state is not an element.

(e) *People v. Avant*, 178 Ill. App. 3d 139 (1989)

The defendant was convicted of robbery, and on appeal to the Appellate Court of Illinois, Fourth District, he argued among other things that the jury instructions were "constitutionally deficient" because they did not include one of the mental states set out in § 4-3(a) of the Criminal Code. The State argued that because the defendant did not raise this issue at trial, he was precluded from raising it on appeal.

The court agreed that in general if a defendant does not object or offer alternative jury instructions at trial, he/she cannot raise the issue on appeal. Having said that, if the matter is "in the interests of justice," the reviewing court may consider it to prevent "grave errors or to correct errors in cases so closely balanced that fundamental fairness requires that the jury be properly instructed." In the court's view, the principle of "fundamental fairness" includes jury instructions that contain the essential elements of the offense and therefore agreed to consider the defendant's argument.

The court noted that the offense of robbery does not include a particular mental state and that previous case law has established that the "State need only prove

general intent to satisfy the *mens rea* of robbery." The defendant argued that § 4-3(b) of the code must apply because robbery is not an absolute-liability offense. The defendant relied on the case of *People v. Grant*, 101 Ill. App. 3d 43 (1981), where the court considered jury instructions regarding assault and criminal trespass to land and found that they lacked the requisite mental state.

The court distinguished the *Grant* case and found that the analysis in *People v. Anderson*, 93 Ill. App. 3d 646 (1981), which dealt with armed robbery, rape, and deviate sexual assault, is persuasive. The court then reviewed a number of its previous decisions regarding the sufficiency of jury instructions and noted that the case law has repeatedly held that "only where the statutory definition of an offense includes a mental state with which the act is committed as an element of the offense, that mental state must be alleged in the charging instruction to meet the requirements of section 111-3 of the Code of Criminal Procedure." In this case, the jury received the approved robbery instructions, and the defendant did not object at trial. The court concluded that "these instructions were properly given and correctly state the Illinois law as to the essential elements of the offense of robbery."

The court then considered the defendant's argument that due process under federal law requires proof as to every essential element of the crime and that a mental state may not be "implied or presumed." The court dismissed this ground of appeal on the basis that the defendant's mental state was not contested and his case did "not involve an instruction on evidentiary presumptions."

(f) *People v. Sevilla*, 132 Ill. 2d 113 (1989)

The defendant was convicted of knowingly failing to file a retailers' occupation tax return under the Retailer's Occupation Tax Act even though the offense does not include a mental state. The circuit-court judge did not allow the defendant to raise a mistake-of-law defense. The appellate court reversed her conviction and ordered a new trial on the basis that the offense requires the mental state of "knowingly" and the defendant should have been given the opportunity to present evidence regarding her state of mind.

The State's petition for leave to appeal to the Illinois Supreme Court was granted. The issues on appeal included whether the offense of failing to file a retailers' occupation tax return includes a mental element and, if it does, whether "knowledge" is the requisite mental element.

The court began its analysis by referring to its previous decision of *People v. Player*, 377 Ill. 417 (1941), wherein the court held that the offense at issue does not have a mental element. The State argued that the *Player* case was still controlling, while the defendant argued that the holding in *Player* had been affected by subsequent amendments to the statute. The Illinois Supreme Court agreed with the defendant.

The court noted that the purpose of the statute in general is to levy a tax on retailers and imposes a duty on retailers to file tax returns and submit payments. The Act "contains a detailed registration and enforcement scheme" and makes failure to file a tax return a criminal offense, albeit one without an express mental element.

The court then referred to § 4-9 of the criminal code, which states that a mental state is not required if the offense is a misdemeanor not punishable by incarceration or a fine of more than $500 or the state clearly indicates a legislative purpose to impose absolute liability. This provision applies to all criminal penalty provisions, including those outside of the Illinois Criminal Code of 1961. As the offense of failing to file a retailers' tax return is not a misdemeanor, "the underlying question is one of statutory interpretation" in finding out if there is a legislative purpose to impose absolute liability.

The court noted that because the statute does not expressly state whether a mental state is required, "we must look to sources beyond the statutory language to ascertain the intent of the legislature," and it was required to consider "the reason and necessity for the law, the evils sought to be remedied, and the purpose to be achieved."

The court began its analysis by quoting from the committee comments regarding § 4-9 and concluded that they "reveal the legislature intended to limit the scope of absolute liability" and showed a "restrictive

construction of statutory provisions which are silent as to mental state."

The court concluded that "[a]bsent either a clear indication that the legislature intended to impose absolute liability or an important public policy favoring it, this court has been unwilling to interpret a statute as creating an absolute liability offense."

The court then noted the two amendments to the statute since the *Player* case. The first was to add a provision a civil penalty for failing to file a tax return. The court also mentioned that during the legislative debates, comments were made that revealed the legislature's intent not to impose civil liability for "unintentional, technical violations of the Act." The court observed that there is no parallel provision regarding criminal liability; however, if that were not the case, the "disparity could lead to harsh and absurd results if we were to hold that the offense of failing to file a return is one of absolute liability." The court noted that a defendant could be relieved of civil penalties but end up being convicted criminally. The court also dismissed the State's argument that prosecutorial discretion would prevent those situations.

The second amendment to the statute elevated the offense to a felony. In the court's view, "the degree of punishment is a significant factor to consider in determining whether a statute creates an absolute liability offense." The court also noted that with "the exception of those offenses in which public policy favors absolute liability, it would be unjust to subject a person to a severe penalty for an offense that might be committed without fault." The court found: "It stands to reason that when the legislature increased the penalty provisions from a misdemeanor to a felony, the legislature intended to include mental state as an element of the offense." The court concluded:

> As a result of these amendments, when read in conjunction with section 4-9 of the Criminal Code, the principle set forth in *Player* that the offense of failing to file a retailers' occupation tax return was one of absolute liability is no longer viable. Accordingly, we hold that the offense includes a mental state element. The section does not indicate a clear legislative purpose for imposing absolute liability and there is not an important public policy which favors absolute liability, especially in light of the civil penalty provisions available to the Department of Revenue as a means of collecting unpaid and overdue taxes.

The court then considered what the applicable mental state is for the offense. Both the State and the defendant asserted that "knowledge" is the applicable mental state, and the court agreed. The court looked at the language of the statute itself and other parallel statutes. The court noted that § 13 of the statute regarding criminal sanctions requires for most offenses a mental element of willfulness or knowledge and not recklessness. The court also noted that similar provisions in the Illinois Income Tax Act also have a mental state of willfulness. For those reasons, the court concluded that "knowledge" is the applicable mental state.

(g) *People v. Terrell*, 132 Ill. 2d 178 (1989)

The defendant was convicted of murder and aggravated criminal sexual assault. One of the grounds of appeal to the Supreme Court of Illinois was whether the criminal-sexual-assault and aggravated-criminal-sexual-assault statutes violate due process. The defendant argued that the aggravated-criminal-sexual-assault statute was unconstitutional because it "requires a less culpable mental state than is required for the lesser offense of aggravated criminal sexual abuse."

The court noted that the aggravated-criminal-sexual-assault-statute "punishes innocent as well as culpable conduct." The court cited a previous decision in *People v. Burmeister*, 147 Ill. App. 3d 218 (1986), where the appellate court rejected a similar argument and held that "the legislature clearly did not intend the aggravated criminal sexual assault statute to define a strict liability or public welfare offense." The court also noted §§ 4-3 to 4-9 of ch. 39 of the Illinois Revised Statutes and stated:

> So construed, the aggravated criminal sexual assault statute does not punish innocent conduct or set up an unconstitutional anomaly between the greater offense of aggravated criminal sexual assault and the lesser offense of aggravated criminal sexual abuse. . . . Rather, both aggravated criminal sexual assault

and the lesser offense of aggravated criminal sexual abuse require an intentional or knowing act by the accused.

(h) *People v. Langford*, 195 Ill. App. 3d 366 (1990)

The defendant pleaded guilty to a Class A misdemeanor under the Timber Buyers Licensing Act and tried to withdraw his guilty plea at trial. The trial judge denied his motion, and he appealed to the Appellate Court of Illinois, Fourth District, which reversed his conviction and remanded the matter for further proceedings.

The defendant argued, among other things, that "the information was void because it failed to allege a mental state." The trial judge interpreted the offense as absolute-liability, but the court disagreed with that interpretation.

The court stated that §§ 4-4 to 4-6 of the criminal code apply unless the offense is strict-liability. The court then noted: "Absolute liability cannot be imposed for an offense for which the offender may be jailed unless the legislature clearly indicated its intend to require that result." The court held that neither the statute nor its legislative history reveals such an intent.

The court acknowledged that there was no federal counterpart to the statute but looked to Illinois statutes relating to crimes against property and noted that several of them require the mental state of "knowing." The court concluded:

> We hold that the information was deficient because it did not allege a mental state. Because the trial court misapprehended the law regarding the issue of the mental state required to be alleged in a charge under the Act, we hold it abused its discretion by refusing to vacate defendant's guilty plea.

(i) *People v. Anderson*, 148 Ill. 2d 15 (1992)

The defendants were acquitted of hazing when the trial judge held that the hazing statute was unconstitutionally overbroad and vague. The State appealed directly to the Supreme Court of Illinois, which reversed the lower court's decision.

The court began by noting that the defendants had misinterpreted the hazing statute by considering it to be an absolute-liability offense in terms of causing injury to another person. The court noted that the hazing statute does not contain a culpable mental state, "but this court will not automatically assume that the General Assembly intended an absolute liability offense when no mental state is specified." The court referred to the criminal code's "default provision" and then considered whether the general assembly considered hazing to be an absolute-liability offense.

The default provision in effect at the time stated that a mental state was required unless the offense is a misdemeanor not punishable by incarceration "or the statute clearly indicates a legislative purpose to impose absolute liability." Since hazing is a misdemeanor punishable by incarceration, the court had to consider whether there was a clear legislative purpose to impose absolute liability.

The court examined the history of the hazing statute since its enactment in 1901. It noted that there was no legislative history from that time, but even so,

> we believe it unlikely that the General Assembly intended that conduct with consequences that were no fault of the defendant's be punished with six months' imprisonment. Rather, we believe its intention was to deter conduct that is likely to result in injury by punishing conduct which causes injuries that could have been avoided. Thus, we conclude that hazing was not intended to be an absolute liability offense. Further, since we believe the statute was intended to deter reckless (or worse) conduct resulting in injury, we hold that the State must prove recklessness, knowledge or intent . . . .

Based on this interpretation of the hazing statute, the court dismissed the defendants' argument that it was unconstitutionally overbroad. The court noted that the statute would not capture "innocent conduct."

10. NORTH DAKOTA

North Dakota's statute states that if the statute does not specify a culpable mental state and does not explicitly state that a person may be guilty without one, then the culpability required is "willfully." The term "willfully" is defined as "intentionally, knowingly or recklessly." North

Dakota's legislation is similar to § 2.02(3) of the MPC, except it uses the global term "willfully" and uses the term "intentionally" rather than "purposely."

Relevant excerpts from North Dakota's statute are as follows:

North Dakota Century Code
Title 12.1—Criminal Code
Chapter 12.1-02—Liability and Culpability

12.1-02-02. Requirements of culpability.

1. For the purposes of this title, a person engages in conduct:

. . .

2. If a statute or regulation thereunder 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.

3.a. Except as otherwise expressly provided, where culpability is required, that kind of culpability is required with respect to every element of the conduct and to those attendant circumstances specified in the definition of the offense, except that where the required culpability is "intentionally", the culpability required as to an attendant circumstance is "knowingly".

b. Except as otherwise expressly provided, if conduct is an offense if it causes a particular result, the required degree of culpability is required with respect to the result.

c. Except as otherwise expressly provided, culpability is not required with respect to any fact which is solely a basis for grading.

d. Except as otherwise expressly provided, culpability is not required with respect to facts which establish that a defense does not exist, if the defense is defined in chapters 12.1-01 through 12.1-06; otherwise the least kind of culpability required for the offense is required with respect to such facts.

e. A factor as to which it is expressly stated that it must "in fact" exist is a factor for which culpability is not required.

4. Any lesser degree of required culpability is satisfied if the proven degree of culpability is higher.

5. Culpability is not required as to the fact that conduct is an offense, except as otherwise expressly provided in a provision outside this title.

RELEVANT CASES:

(a) *State v. Eldred*, 564 N.W.2d 283 (N.D. 1997)

In this case the defendant was convicted of carrying a loaded firearm in a vehicle, possession of a firearm by a convicted felon, and possession of drug paraphernalia. One of his grounds of appeal to the Supreme Court of North Dakota was that the trial judge erred in not allowing him to present evidence to support a "mistake of law" defense.

The Court began its analysis by noting that the "mistake of law" defense generally does not apply unless the statute contains a culpable mental state. It then noted that the possession-of-a-firearm offense is strict-liability. The court dismissed the defendant's argument that § 12.1-02-02(2) ought to apply because that provision is only applicable to Title 12.1 offenses. The court cited case law that has also considered § 12.1-02-02.5 to note that "the willful culpability level will not be read into other chapters unless the legislature specifically states as such."

11. OHIO

Ohio's statute states that a person is not guilty of an offense without the requisite degree of culpability. If the section does not specify the degree of culpability and the intent to impose strict criminal liability is not plainly apparent, then a culpable mental state is not required. However, if the section does not specify culpability or the intent to impose strict criminal liability is not plainly apparent, then recklessness is sufficient. Ohio's statute is similar to § 2.02(3) of the MPC, except it only imposes a default mens rea of recklessness.

Relevant excerpts from Ohio's statute are the following:

Title 29—Crimes—Procedures
Chapter 2901—General Provisions
Criminal Liability

§ 2901.21. Requirements for criminal liability

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) The person's liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing;

(2) The person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

(B) 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 for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

RELEVANT CASES/COMMENTARY:

(a) From the commentary to the annotated statute:

The second part of the section provides a uniform rule for determining whether culpability is required when the statute is silent as to the offender's mental state at the time of the offense. Although the case law is not entirely clear, the apparent rule is that even if the statute fails to specify any degree of culpable mental state, strict criminal liability will not be applied unless the statute plainly indicates that the legislature intended to impose strict liability. In essence, the section codifies this rule, and also provides that when an intention to impose strict liability is not apparent, recklessness is sufficient culpability to commit the offense. Under existing case law, either intent or scienter is required in such instances, although it is not clear which is required in a given case.

(b) *State v. Cheraso*, 43 Ohio App. 3d 221 (1988)

One of the grounds of appeal raised by the appellant at the Court of Appeals of Ohio, Eleventh Appellate District, was that a conviction for selling alcohol to a minor requires proof that he knowingly sold the alcohol to a minor, or at least that he acted recklessly.

The court noted that when a statute reads, "No person shall . . . ." and there is no express mental element, that is a clear indication that the legislature intended the offense to be strict-liability, and ignorance of a fact cannot be raised as a defense. Therefore, since the offense at issue falls into that category, there is no requirement for the State to prove a culpable mental state. The court cited the previous decision of the Ninth District in *State* v. *Kominis*, 73 Ohio App. 204 (1943), in support of its conclusion.

(c) *State v. Jones*, 2004 Ohio 1495

The defendant was convicted of selling alcohol to a minor and argued before the Court of Appeals of Ohio, Fourth Appellate District, that this was not a strict-liability offense and, because of § 2901.21(B), a conviction requires proof that she acted recklessly.

The court began by noting the cases that have previously found the offense of selling alcohol to a minor to be a strict-liability offense, in particular the case of *State v. Won*, Summit App. No. 12658 (Dec. 31, 1986), where the "court plainly debunked the very argument Jones sets forth in her brief." In the *Won* case, the Ninth Appellate District held that there is nothing in the wording of the statute to indicate that proof of a culpable mental state is required. The court in *Won* also noted that because the statute expressly allows for an affirmative defense—for example, "good faith acceptance of spurious identification"—it shows the legislature's intent to create a strict-liability offense. The court adopted the reasoning in *Won* and held that the offense is strict-liability.

(d) *City of Middleburg Heights v. Bowman*, 2006 Ohio 5582

The defendant was convicted of operating an overweight commercial vehicle in a residential area in violation of the Middleburg Heights Municipal Code. One of the grounds of his appeal to the Court of Appeals of Ohio, Eighth Appellate District, was that the statute does not "plainly indicate a purpose to impose strict liability and therefore recklessness is the culpable mental state."

The court agreed that the municipal code does not expressly include a culpable mental state; however, it found that there was a clear legislative intent to impose strict liability. The court relied on the case of *State v. Coldwell*, 1980 Ohio App. LEXIS 10619, where the court found that the offense at issue does not expressly contain a culpable mental state and "we deem it clear that the legislature intended to impose strict liability for driving an overweight truck."

(e) *City of Carlisle v. Martz Concrete Co.*, 2007 Ohio 4362

The defendant was convicted of four violations of the City of Carlisle's property-maintenance code. On appeal to the Court of Appeals of Ohio, Twelfth Appellate District, he argued, among other things, that the complaints were defective because they did not contain a culpable mental state. He also argued that § 2901.21(C) ought to apply and the requisite mental state should be recklessness.

The court began its analysis by noting that the legislature is entitled to impose strict liability for particular conduct "in furtherance of the public health, safety and welfare." It then noted that the wording of the property-maintenance code "plainly indicates that the intended mental state for each violation is strict liability." The court stated that the purpose of the code falls within that category because "it advances the appearance of property in the community, protects real estate from impairment and destruction of value, and encourages economic and community development." As a result, the offenses are strict-liability, and no proof of a culpable mental state is required.

In support of its conclusion, the court relied on *City of Mayfield Heights v. Barry*, 2003 Ohio 4065, where the Eighth District held that the city's landscaping ordinance was a strict-liability offense even though the wording of the statute did not say "no person shall." The court in *Barry* considered the language of the statute—i.e., "the owner of the property shall . . . ."—to be analogous because it conveys to the resident what he/she must do to comply with the ordinance. Thus the language is sufficient to plainly indicate an intent on the part of the legislature to impose strict liability.

(f) *City of Dayton v. Becker*, 2008 Ohio 2074

The defendant was convicted of failing to obey a legal order of a housing inspector in violation of the Revised Code of General Ordinances of the City of Dayton. On appeal to the Court of Appeals of Ohio, Second Appellate District, he argued that the trial judge erred in finding the offense to be strict-liability and barring him from presenting a defense.

The court began its analysis by noting that the trial judge relied on its previous decision of *City of Dayton v. Platt*, 1989 Ohio App. LEXIS 1225, which held that the offense at issue is strict-liability and does not require proof of a culpable mental state. The court then explained that the *Platt* decision was no longer binding and had been superseded by the decision of the Supreme Court of Ohio in *State v. Collins*, 89 Ohio St. 3d 524 (2000). In the *Collins* case, the Supreme Court of Ohio stated that the language of § 2901.21(B) sets out a test to determine whether an offense is strict-liability:

> We acknowledge the convincing public policy arguments presented by the state and *amicus* Ohio Prosecuting Attorneys' Association in support of the proposition that failure to follow a court-ordered child support order should be a strict liability offense. However, the General Assembly itself has established the test for determining strict criminal liability in R.C. 2901.21(B). That statute provides that where a statute defining a criminal offense fails to expressly specify a mental culpability element, *e.g.*, negligence, recklessness, or intentional conduct, proof of a violation of the criminal provision requires a showing of recklessness, absent a plain indication in the statute of a legislative purpose to impose strict criminal liability. R.C. 2901.21(B). It is not enough that the General Assembly in

fact intended imposition of liability without proof of mental culpability. Rather the General Assembly must plainly indicate that intention in the language of the statute. There are no words in R.C. 2919.21(B) that do so.

Were we to accept the state's argument that public policy considerations weigh in favor of strict liability, thereby justifying us in construing R.C. 2919.21(B) as imposing criminal liability without a demonstration of any *mens rea*, we would be writing language into the provision which simply is not there—language which the General Assembly could easily have included, but did not. Cf. *State v. Young* (1988), 37 Ohio St. 3d 249, 525 N.E.2d 1363 (violation of R.C. 2907.323 [A][3], providing that "no person shall," *e.g.*, possess or view, any material or performance involving a minor who is in a state of nudity, requires showing of recklessness); *State v. McGee* (1997), 79 Ohio St. 3d 193, 680 N.E.2d 975 (violation of R.C. 2919.22[A], which provides that "no person, who is the parent * * * of a child under eighteen years of age * * *, shall" endanger that child, requires showing of recklessness). Clearly, society has just as compelling a need to protect children from sexual exploitation and child endangerment as it does to ensure payment of court-ordered child-support obligations.

Based on the *Collins* case, the court noted that while the statute does not expressly contain a culpable mental state, neither does it contain language that plainly indicates a legislative intent to impose strict liability.

12. <u>TENNESSEE</u>

Tennessee's statute states that a culpable mental state within the relevant title is required unless the definition of the offense plainly dispenses with a mental element. If the definition within the relevant title does not plainly dispense with a mental element, then intent, knowledge, or reckless suffices.

The wording in Tennessee's statute is different from the MPC, but its meaning is similar: if the legislation does not plainly dispense with a mental element, then intent, knowledge, or recklessness is required. In addition, Tennessee's statute refers to the term "intent" rather than "purposely."

Relevant excerpts from Tennessee's statute are as follows:

Title 39—Criminal Offenses
Chapter 11—General Provisions
Part 3—Culpability

39-11-301. Requirement of culpable mental state.

(a)(1) A person commits an offense who acts intentionally, knowingly, recklessly or with criminal negligence, as the definition of the offense requires, with respect to each element of the offense.

(2) When the law provides that criminal negligence suffices to establish an element of an offense, that element is also established if a person acts intentionally, knowingly or recklessly. When recklessness suffices to establish an element, that element is also established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, that element is also established if a person acts intentionally.

(b) A culpable mental state is required within this title unless the definition of an offense plainly dispenses with a mental element.

(c) If the definition of an offense within this title does not plainly dispense with a mental element, intent, knowledge or recklessness suffices to establish the culpable mental state.

RELEVANT CASES:

(a) <u>*State v. Anderson*, 894 S.W.2d 320 (Tenn. Crim. App. 1994)</u>

The defendant was convicted of escaping from a penal institution. On appeal to the Court of Criminal Appeals of Tennessee, he argued that the indictment should have been dismissed because he "did not have adequate notice under due process that his conduct constituted an escape." Both the defendant and the State cited case law in support of their arguments regarding what the necessary culpable mental state should be. The

court did not rely on those cases, instead noting that "both parties ignore T.C.A. §39-11-301(c)," which is the default mens rea provision. The court found that this provision applies because the offense does not expressly include a culpable mental state.

(b) *State v. Turner*, 953 S.W.2d 213 (Tenn. Crim. App. 1996)

The defendant was convicted of driving while intoxicated and on appeal to the Court of Criminal Appeals of Tennessee argued that there was insufficient evidence for a conviction because there was no proof that he intended to operate the vehicle.

The court cited previous cases holding that the offense does not require a culpable mental state, including the supreme court decision in *State v. Lawrence*, 849 S.W.2d 761 (Tenn. 1993). The court also noted that the legislative intent was not only to prohibit driving while intoxicated, but also "to encompass the mere physical control of a vehicle." The court concluded that the legislature's intent was to create a strict-liability offense, and it "is for the legislature to determine whether the public injury threatened by those driving under the influence is so great as to justify imposition of strict liability."

(c) *State v. Hill*, 954 S.W.2d 725 (Tenn. 1997)

The defendant was convicted of aggravated sexual battery. The trial judge dismissed his motion for a new trial because the indictment did not specify a culpable mental state. On appeal, the appellate court reversed the trial court's decision and held that the indictment was defective because it failed to allege a mens rea.

The Supreme Court of Tennessee began its analysis by noting that the offense was originally enacted in 1858, over 130 years before the state enacted the Sentencing Reform Act of 1989 that "expressly abolished common law offenses and statutorily specified the conduct necessary to support a criminal prosecution in Tennessee." One of the provisions of the Sentencing Reform Act of 1989 is § 39-11-301, the default mens rea section, which states that a culpable mental state is required "unless the definition of the offense 'plainly dispenses with a mental element.'"

The offense of aggravated rape does not expressly include a culpable mental state, and the court found that "neither does it plainly state that no such mental state is required." As a result, the court applied § 39-11-301 to impute the mens rea of intent, knowledge, or recklessness. It also concluded that the indictment provided adequate notice and was constitutionally and statutorily valid. The court held:

> for offenses which neither expressly require nor plainly dispense with the requirement for a culpable mental state, an indictment which fails to allege such mental state will be sufficient to support prosecution and conviction for that offense so long as
>
> (1) the language of the indictment is sufficient to meet the constitutional requirements of notice to the accused of the charge against which the accused must defend, adequate basis for entry of a proper judgment, and protection from double jeopardy;
>
> (2) the form of the indictment meets the requirements of Tenn. Code Ann. §40-13-202; and
>
> (3) the mental state can be logically inferred from the conduct alleged.

(d) *Davis v. Warden*, 2008 Tenn. Crim. App. LEXIS 64

The defendant was convicted of aggravated rape and aggravated robbery. On appeal to the Court of Criminal Appeals of Tennessee, he argued, among other things, that "the trial court lacked subject matter jurisdiction or legal authority to render judgment on the aggravated rape conviction because . . . the indictment failed to allege the *mens rea* of the crime."

The court noted that the offense does not include a culpable mental state and applied § 39-11-301(c) to find that the mental state is intentionally, knowingly, or recklessly. The court also cited the *Hill* case and concluded that the trial judge did not err in instructing the jury that a conviction could be based on recklessness.

13. TEXAS

Texas's statute states that a person does not commit an offense without a culpable mental state. If the definition of the offense does not provide one,

then a culpable mental state is still required unless it is plainly dispensed with. The statute also states that certain offenses defined by a municipal ordinance or county commissioners court cannot dispense with a culpable mental state.

The wording in Texas's statute is different from the MPC, but its meaning is similar: if the legislation does not plainly dispense with a culpable mental state, then intent, knowledge, or recklessness is required. However, Texas's statute refers to the term "intent" rather than "purposely."

Relevant excerpts from Texas's statute are as follows:

Penal Code
Title 2—General Principles of Criminal Responsibility
Chapter 6—Culpability Generally

§ 6.02. Requirement of Culpability

(a) Except as provided in Subsection (b), a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires.

(b) If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.

(c) If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b), intent, knowledge, or recklessness suffices to establish criminal responsibility.

(d) Culpable mental states are classified according to relative degrees, from highest to lowest, as follows:

(1) intentional;

(2) knowing;

(3) reckless;

(4) criminal negligence.

(e) Proof of a higher degree of culpability than that charged constitutes proof of the culpability charged.

(f) An offense defined by municipal ordinance or by order of a county commissioners court may not dispense with the requirement of a culpable mental state if the offense is punishable by a fine exceeding the amount authorized by Section 12.23.

RELEVANT CASES:

(a) *Pope v. State*, 1996 Tex. App. LEXIS 4697 (1996)

The defendant was convicted of driving while intoxicated and, on appeal to the Court of Appeals of Texas, First District, argued that the verdict should have been set aside because it did not allege a culpable mental state.

The court began its analysis with a history of the statute, noting that in 1993 the legislature moved it from the revised civil statutes to the penal code, effective September 1, 1994. At that time, case law such as *Beasley v. State*, 810 S.W.2d 838 (Tex. App. 1991), held that the offense of driving while intoxicated did not require a culpable mental state.

The defendant argued that after the DWI statute was moved to the penal code, it became subject to § 6.02(b), the default mens rea provision, because § 49.11 had not yet been enacted and did not come into effect until September 1, 1995. That provision expressly stated that "notwithstanding Section 6.02(b), proof of a culpable mental state is not required for a conviction of an offense under this chapter."

The court had previously rejected this same argument in *Chunn v. State*, 923 S.W.2d 728 (Tex. App. 1996), and held that the legislature did not intend to require a culpable mental state for driving while intoxicated when it moved it from the civil statutes to the penal code. The court in *Chunn* had also held that there was no legislative intent to dispense with a culpable mental state during the period of time between when the offense was codified in the penal code and the enactment of § 49.11. For that reason, the court dismissed the defendant's appeal in this case.

(b) *Sanders v. State*, 936 S.W.2d 436 (Tex. App. 1996)

The defendant was convicted of his second offense of driving while intoxicated. On appeal to the Court of Appeals of Texas, Third District, he argued that the complaint was defective because it did not include a culpable mental state.

Similar to the *Pope* case, the court began by explaining the legislative history of the offense, in particular that it had been moved from the penal code to the civil statutes in 1973. The offense "neither required nor dispensed with the requirement of a culpable mental state." At the same time, the legislature enacted § 6.02, the default mens rea provision.

In the case of *Ex Parte Ross*, 522 S.W.2d 214 (Tex. Crim. App. 1975), the issue before the Texas Court of Criminal Appeals was whether the offense required a culpable mental state because § 6.02(b) expressly stated that the default mens rea provision applies to offenses outside of the penal code "unless the statute defining the offense provides otherwise." The court held that a culpable mental state was not required "because it believed that the legislature did not intend to require a culpable mental state for DWI when it enacted section 6.02." The court arrived at this conclusion for two reasons: (1) the legislature could have amended the DWI statute to include a culpable mental state when it was moved to the civil statutes but did not; and (2) other penal-code provisions relating to intoxication "made it 'apparent that the Legislature never intended to require proof of the culpable mental state' in a DWI case."

The court noted, like in *Pope*, that in 1993 the legislature moved the DWI statute back to the penal code but did not amend it to include a culpable mental state. In 1995, the legislature enacted § 49.11 to expressly state that a culpable mental state is not required.

The court then observed that three other courts of appeal in Texas had already considered this issue. Although deciding these cases on different reasoning, each held that the DWI statute did not require a culpable mental state during the period of time between when the offense was transferred from the civil statutes to the penal code and the enactment of § 49.11.

The court ultimately found the reasoning of the Fourteenth District Court of Appeals in *Aguirre v. State*, 928 S.W.2d 759 (Tex. App. 1996), to be the most persuasive. In the *Aquirre* case, "the court reasoned that, by its nature, the DWI offense cannot require a culpable mental state" because individuals who are intoxicated by alcohol are often incapable of judging the extent of their impairment and "would escape conviction by virtue of their diminished capacity to formulate a criminal intent." The court questioned the reasoning in *Ross* because of its "apparent contradiction of the seemingly clear language of section 6.02"; however, it agreed with other courts of appeal that its holding was binding.

(c) *Palacios v. State*, 1997 Tex. App. LEXIS 5857 (1997)

The defendant was convicted of driving while intoxicated, and on appeal to the Court of Appeals of Texas, First District, she argued that the charging instruction was defective because it failed to include a culpable mental state. The court dismissed her appeal on the basis of the *Chunn* case, where it "already held that the Legislature did not intend to require a culpable mental state for DWI offenses when it moved the DWI statute from the revised civil statutes to the Penal Code."

(d) *Ex Parte Bennett Weise*, 55 S.W.3d 617 (Tex. Crim. App. 2001)

The defendant was convicted of illegal dumping in violation of the Texas Health and Safety Code. On application to the Court of Criminal Appeals of Texas for a writ of habeas corpus, he argued that the statute is unconstitutionally vague because it does not include a culpable mental state.

The court did not entertain the defendant's application for habeas corpus on the grounds that it "is generally not available before trial to test the sufficiency of the complaint, information, or indictment." In addition, because the defendant did not challenge the offense on the basis that it is facially unconstitutional but rather only as applied to his circumstances, the court found that it did not fall into one of the exceptions to that general rule.

(e) *State v. Howard*, 172 S.W.3d 190 (2005)

The defendant, "a dancer at an adult cabaret," was charged with "violating the 'no touch' provision of the Dallas City Code regulating sexually oriented businesses and the conduct of their employees." The trial judge granted her motion to dismiss the charges on the basis that the statute infringes upon constitutionally protected expressive conduct. On appeal, the Court of Appeals of Texas, Fifth District, upheld the trial judge's decision.

The offense under the Dallas City Code is a violation and strict-liability, meaning that it criminalizes "conduct based on touching alone, regardless of any culpability." The court began its analysis by noting that exotic dancing is constitutionally protected conduct but not in all circumstances. While the government may enact "content-neutral" regulations, "its authority to regulate is not unfettered and the ordinance must fall within the bounds of the Constitution." After applying the four-part legal test to determine whether an ordinance violates First-Amendment rights, the court found that "it fails to satisfy the fourth factor of restricting the protected conduct narrowly to do only what is necessary to prevent the 'secondary effects' of adult cabarets." The court held that criminalizing touching without a culpable mental state "criminalizes accidental or inadvertent touching and thus is a greater restriction on free expression than is essential to further the City's interests."

(f) *Ex Parte Guerrero*, 2006 Tex. App. LEXIS 10780

The defendant was charged with the offense of improper relationship between educator and student and applied to the Court of Appeals of Texas, Fifth District, for a writ of habeas corpus. The defendant argued that the offense violates his liberty interests and "is overbroad and vague and not narrowly tailored to meet legitimate government interests." More particularly, one of his arguments was that the offense fails to require a culpable mental state and did not require proof that he knew the complaining witness was a student.

While the court, similar to the court in *Weise*, noted that this matter would have been more appropriately raised as a motion to quash the indictment prior to the trial, it nonetheless stated that even though the offense at issue does not include a culpable mental state, "§6.02(c) of the penal code supplies the applicable mental state."

(g) *Florance v. State*, 2009 Tex. App. LEXIS 3188

The defendant was convicted of consuming alcohol as a minor, and on appeal to the Court of Appeals of Texas, Fifth District, she argued, among other things, that "her right to due process was violated by the trial court's instructions to the jury because those instructions failed to include the culpable mental state." In particular, she argued that since the offense does not expressly include a culpable mental state, § 6.02 applies, and "alcohol-related offenses require a mens rea of at least criminal negligence." The State argued that the offense is strict-liability and therefore does not require a culpable mental state.

The court noted that "if a statute plainly dispenses with a culpable mental state as an element of the offense, it is a strict liability statute," and if "no mental state is specified in a statute, section 6.02 of the Texas Penal Code provides a default rule that, unless the definition of the offense 'plainly dispenses with any mental element,' if a mental state is not specified in a statute, 'intent, knowledge, or recklessness suffices to establish criminal responsibility.'"

The court cited the guidelines established by the Texas Court of Criminal Appeals in the case of *Aguirre v. State*, 22 S.W.3d 463 (Tex. Crim. App. 1999), "to determine whether a statute dispenses with a culpable mental state," as follows (citations removed):

> First, the statute is examined to determine whether it contains an affirmative statement that the conduct is a crime though done without fault. Silence about whether a culpable mental state is an element of an offense leaves a presumption that one is required;
>
> Second, in the absence of an express intent to dispose with the requirement of a culpable mental state, the statute is examined to determine whether such an intent is manifested by other features of the statute. These features include: (1) the language of the statute; (2) the nature of the offense as either *malum prohibitum* or *malum in se*; (3) the subject of

the statute; (4) the legislative history of the statute; (5) the seriousness of harm to the public; (6) the defendant's opportunity to ascertain the true facts; (7) the difficulty in proving a culpable mental state; (8) the number of prosecutions expected; and (9) the severity of the punishment.

The court noted that since the offense did not contain an "affirmative statement that the conduct is a crime though done without fault," it applied the above guidelines to determine if a culpable mental state is required, as follows:

- The language of the statute "clearly omits a culpable mental state," which the Court considered to be "a clear implication of the legislature's intent to dispense with a mental element in that section." Further, since other offenses in the section prescribe a mental state, this is an additional factor weighing against a culpable mental state.

- The offense is strict-liability. Such offenses are generally characterized as *malum prohibitum,* another factor that weighs against a culpable mental state.

- The subject matter of strict-liability offenses is "traditionally associated with laws protecting the public health, safety or welfare, as to the element of a child's age in statutes that protect children, and laws designed to protect children." The offense at issue "regulates the consumption of alcohol by minors and is designed to protect children," another factor weighing against a culpable mental state.

- The legislative history reveals the addition of an affirmative defense and the moving of the offense under the chapter of the Consumption of Alcohol by a Minor statute entitled "Provisions Relating to Age," which either weighs against a culpable mental state or is neutral.

- The seriousness-of-the-harm-to-the-public factor is relevant because "[g]enerally, the more serious the consequences to the public, the more likely the legislature intended to impose liability without regard to fault." In this case the offense is intended to protect children from the risks associated with consuming alcohol and to protect the public, a factor weighing against a culpable mental state.

- The defendant and other minors "would have little difficulty" in determining the facts of the offense, another factor weighing against a culpable mental state.

- With respect to prosecutions: "The greater the difficulty in proving a mental state, the more likely legislators intended to create a strict liability offense to ensure more effective law enforcement." Since intent can be "inferred from a defendant's words, actions, and conduct, proving a mental state in this statute is no more difficult than proving a mental state in another offense." As a result, this factor weighs in favor of a culpable mental state.

- With respect to the number of prosecutions, "the fewer the expected prosecutions, the more likely the legislature meant to require the prosecutors to go into the issue of fault." In addition, the "greater the number of prosecutions, the more likely the legislature meant to impose liability without regard to fault." As there was no evidence on this point, the court found this to be a neutral factor.

- With respect to the severity of punishment, the "greater the punishment, the more likely some fault is required. The presumption against strict liability becomes stronger for offenses punishable by confinement. Conversely, the lighter the punishment, the more likely the legislature meant to impose liability without fault." In this case punishment for the offense "does not impose any legal disability or disadvantage," and unless it is a subsequent conviction, the punishment will likely be only a fine, a factor that weighs against a culpable mental state.

The court concluded: "A majority of the factors we have considered weigh against requiring a culpable mental state and demonstrate a violation of section 106.04 is a strict liability offense. Accordingly, we conclude that the absence of a required culpable mental state does not render section 106.04 unconstitutional."

14. <u>UTAH</u>

Utah's statute states that a person is not guilty of an offense without a culpable mental state unless it is an absolute-liability offense. Every offense except an

absolute-liability offense requires a culpable mental state, and if the definition of the offense does not specify the culpable mental state and it is not a strict-liability offense, then intent, knowledge, or recklessness is required. Utah's statute is similar to the MPC, except it uses the term "intent" rather than "purposely."

Relevant excerpts from Utah's statute are as follows:

> Title 76—Utah Criminal Code
> Chapter 2—Principles of Criminal Responsibility
> Part 1—Culpability Generally
>
> § 76-2-101. Requirements of criminal conduct and criminal responsibility
>
> ***(1) (a) A person is not guilty of an offense unless the person's conduct is prohibited by law; and***
>
> ***(b) (i) the person acts intentionally, knowingly, recklessly, with criminal negligence, or with a mental state otherwise specified in the statute defining the offense, as the definition of the offense requires; or***
>
> ***(ii) the person's acts constitute an offense involving strict liability.***
>
> (2) These standards of criminal responsibility do not apply to the violations set forth in Title 41, Chapter 6a, Traffic Code, unless specifically provided by law.
>
> § 76-2-102. Culpable mental state required—Strict liability
>
> ***Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility.*** An offense shall involve strict liability if the statute defining the offense clearly indicates a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state.

RELEVANT CASES:

(a) *State v. Blue*, 17 Utah 175 (1898)

The defendant was convicted of embezzlement and, on appeal to the Supreme Court of Utah, argued that the trial judge erred in giving instructions to the jury that did not require proof of criminal intent.

The court held that "it seems clear that the legislation did not design the punishment of a public officer for an act committed innocently, without any criminal intent."

> Evil intent is the very essence of crime, and, whenever a person is convicted of an offense, such conviction carries with it the implication of moral turpitude, dishonesty, and fraud. The principles which make it essential that an evil intent accompany the act lie at the very root of public justice. The intent has always been the test of guilt. . . . In general, for an act to render a person a criminal, it must be the result of executive volition. The mind of the doer must have been criminal. This has been so from time immemorial, and neither in moral nor religious sentiment have any people entertained the idea that an act itself would make a person guilty unless the mind were so.

The court did note an exception to the general rule, stating that in some circumstances a criminal intent is not required:

> It is undoubtedly within the power of the legislature to enact laws which would render liable to punishment, and brand as felons, persons for the doing of acts which, at the time of their commission, they honestly believed were right and lawful. . . . It is evident, however, that such enactments would not be aided by interpretation to produce such results, and that no statute will be given such effect unless it be indisputable that such is the meaning of the enactment.

This case was cited in the annotated statute; however, it is from 1898 and not relevant to the default mens rea provision except to the extent that it speaks to the importance of requiring a guilty mind.

C. STATES WHOSE STATUTES ON THEIR FACE REQUIRE A CULPABLE STATE OF MIND BUT DO NOT HAVE A DEFAULT MENS REA PROVISION

The following state statutes do not have a default mens rea provision like that in the MPC. On their face, these statutes state that to be guilty of an offense, a person must have a culpable mental state, and there are no express exceptions to that general rule—for example, for offenses that involve absolute liability.

15. CALIFORNIA

The relevant provisions of California's statute are as follows:

Penal Code

§ 20. To constitute crime there must be unity of act and intent

In every crime or public offense ***there must exist a union, or joint operation of act and intent, or criminal negligence***.

RELEVANT CASES:

People v. Colver (1980, Cal App 1st Dist) 107 Cal App 3d 277, 165 Cal Rptr 614, 1980 Cal App LEXIS 1965.

People v. Howell (1924, Cal App) 69 Cal App 239, 230 P 991, 1924 Cal App LEXIS 126.

People v. Casey (1995, Cal App Dep't Super Ct) 41 Cal App 4th Supp 1, 49 Cal Rptr 2d 372, 1995 Cal App LEXIS 1289.

People v. Peak (1944, Cal App) 66 Cal App 2d 894, 153 P2d 464, 1944 Cal App LEXIS 792.

People v. Gory (1946) 28 Cal 2d 450, 170 P2d 433, 1946 Cal LEXIS 227. People v. Sargent (1999) 19 Cal 4th 1206, 81 Cal Rptr 2d 835, 970 P2d 409, 1999 Cal LEXIS 9.

16. GEORGIA

The relevant provisions of Georgia's statute are as follows:

Title 16—Crimes and Offenses
Chapter 2—Criminal Liability
Article 1—Culpability

§ 16-2-1. "Crime" defined

(a) A "crime" is a violation of a statute of this state in which there is a joint operation of an act or omission to act and intention or criminal negligence.

(b) Criminal negligence is an act or failure to act which demonstrates a willful, wanton, or reckless disregard for the safety of others who might reasonably be expected to be injured thereby.

RELEVANT CASES:

Cargile v. State, 194 Ga. 20, 20 S.E.2d 416, answer conformed to, 67 Ga. App. 610, 21 S.E.2d 326 (1942).

Owens v. State, 120 Ga. 296, 48 S.E. 21 (1904).

Mitchell v. State, 20 Ga. App. 778, 93 S.E. 709 (1917).

James v. State, 153 Ga. 556, 112 S.E. 899 (1922).

Bacon v. State, 209 Ga. 261, 71 S.E.2d 615 (1952).

General Oil Co. v. Crowe, 54 Ga. App. 139, 187 S.E. 221 (1936).

Loeb v. State, 75 Ga. 258 (1885).

17. IDAHO

The relevant provisions of Idaho's statute are as follows:

Penal Code
Title 18—Crimes and Punishments
Chapter 1—Preliminary Provisions

§ 18-114. Union of act and intent

> In every crime or public offense ***there must exist a union, or joint operation, of act and intent, or criminal negligence.***

RELEVANT CASES:

State v. Sterrett, 35 Idaho 580, 207 P. 1071 (1922).

State v. Sterrett, 35 Idaho 580, 207 P. 1071 (1922).

Note the *Sterrett* case pre-dates the above provisions of Idaho's Penal Code.

18. NEVADA

The relevant provisions of Nevada's statute, with my emphasis added in bold and italics, are as follows:

> Title 15—Crimes and Punishments
> Chapter 193—General Provisions
>
> 193.190. To constitute crime there must be unity of act and intent.
>
> In every crime or public offense ***there must exist a union, or joint operation of act and intention, or criminal negligence.***

RELEVANT CASES:

There were no relevant cases listed in the annotated statute.

D. STATES WHOSE STATUTES RECOGNIZE—IN VARYING DEGREES—A PRESUMPTION IN FAVOR OF A MENTAL ELEMENT BUT DO NOT HAVE A DEFAULT MENS REA PROVISION LIKE THAT IN THE MPC

Several state statutes do not have a default mens rea provision like that in the MPC. Many of these statutes expressly recognize that a culpable mental state is not required if it is an offense involving absolute liability. In addition, they recognize that in some circumstances a culpable mental state is required; however, they do not expressly state which culpable mental state is necessary and only state that one is required if the prohibited conduct requires one.

19. ALABAMA

Alabama's statute states that if prohibited conduct is all that is required or a material element of the offense does not require a culpable mental state, then it is a strict-liability offense. If a culpable mental state is required, then it is an offense of mental culpability. If no culpable mental state is expressly designated, then one may be required if the prohibited conduct necessarily involves one. Unless the statute defining a crime clearly indicates an intent to impose strict liability, then it is a crime of mental culpability.

Alabama's statute expressly recognizes that some offenses require a culpable mental state and others do not. However, it does not provide an express default mens rea if it is not an absolute-liability offense, and the law is silent regarding the necessary culpable mental state for an offense of mental culpability.

Relevant excerpts from Alabama's statute are as follows:

> Alabama Code
> Title 13A—Criminal Code
> Chapter 2—Principles of Criminal Liability
>
> § 13A-2-3. Minimum requirement for criminal liability—Strict liability—Mental culpability.
>
> The minimum requirement for criminal liability is the performance by a person of conduct which includes

a voluntary act or the omission to perform an act which he is physically capable of performing. If that conduct is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, the offense is one of "strict liability." If a culpable mental state on the part of the actor is required with respect to any material element of an offense, the offense is one of "mental culpability."

§ 13A-2-4. Mental state.

(a) When a statute defining an offense prescribes as an element thereof a specified culpable mental state, such mental state is presumed to apply to every element of the offense unless the context thereof indicates to the contrary.

(b) Although no culpable mental state is expressly designated in a statute defining an offense, an appropriate 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 culpable mental state. A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, states a crime of mental culpability.

(c) If a statute provides that criminal negligence suffices to establish an element of an offense, that element also is established if a person acts recklessly, knowingly or intentionally. If recklessness suffices to establish an element, that element also is established if a person acts knowingly and intentionally. If acting knowingly suffices to establish an element, that element also is established if a person acts intentionally.

RELEVANT CASES

Smith v. State, 223 Ala. 346, 136 So. 270, 1931 Ala. LEXIS 426 (1931).

20. ARIZONA

Arizona's statute states that if the statute does not expressly prescribe a culpable mental state, then none is required and it is a strict-liability offense unless the conduct necessarily involves a culpable mental state. However, Arizona's statute does not provide a specific default mens rea if a culpable mental state is required.

Relevant excerpts from Arizona's statute are the following:

Title 13—Criminal Code
Chapter 2—General Principles of Criminal Liability

§ 13-201. Requirements for criminal liability

The minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform a duty imposed by law which the person is physically capable of performing.

§ 13-202. Construction of statutes with respect to culpability

A. If a statute defining an offense prescribes a culpable mental state that is sufficient for commission of the offense without distinguishing among the elements of such offense, the prescribed mental state shall apply to each such element unless a contrary legislative purpose plainly appears.

B. 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.

C. If a statute provides that criminal negligence suffices to establish an element of an offense, that element also is established if a person acts intentionally, knowingly or recklessly. If acting recklessly suffices to establish an element, that element also is established if a person

acts intentionally or knowingly. If acting knowingly suffices to establish an element, that element is also established if a person acts intentionally.

RELEVANT CASES

There were no relevant cases listed in the annotated statute.

21. COLORADO

Colorado's statute states that if conduct is all that is required or a material element of an offense does not require a culpable mental state, then it is a strict-liability offense. If a culpable mental state is required, then it is an offense of mental culpability. If no culpable mental state is expressly designated, then one may be required if the conduct prohibited by the offense or an element of the offense necessarily prescribes it.

Colorado's statute recognizes that sometimes a culpable mental state may be required but does not provide an express default mens rea if the statute is silent and it is not an absolute-liability offense.

Relevant excerpts from Colorado's statute are as follows:

Title 18—Criminal Code
Article 1—Provisions Applicable to Offenses Generally
Part 5—Principles of Criminal Culpability

18-1-502. Requirements for criminal liability in general and for offenses of strict liability and of mental culpability

The minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing. ***If that conduct is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, the offense is one of "strict liability". If a culpable mental state on the part of the actor is required with respect to any material element of an offense, the offense is one of "mental culpability".***

18-1-503. Construction of statutes with respect to culpability requirements

(1) When the commission of an offense, or some element of an offense, requires a particular culpable mental state, that mental state is ordinarily designated by use of the terms "intentionally", "with intent", "knowingly", "willfully", "recklessly", or "criminal negligence" or by use of the terms "with intent to defraud" and "knowing it to be false" describing a specific kind of intent or knowledge.

(2) 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.

(3) If a statute provides that criminal negligence suffices to establish an element of an offense, that element also is established if a person acts recklessly, knowingly, or intentionally. If recklessness suffices to establish an element, that element also is established if a person acts knowingly or intentionally. If acting knowingly suffices to establish an element, that element also is established if a person acts intentionally.

(4) When a statute defining an offense prescribes as an element thereof a specified culpable mental state, that mental state is deemed to apply to every element of the offense unless an intent to limit its application clearly appears.

RELEVANT CASES:

People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

People v. Moore, 674 P.2d 354 (Colo. 1984).

People v. Trevino, 826 P.2d 399 (Colo. App. 1991).

Gorman v. People, 19 P.3d 662 (Colo. 2000).

People v. Coleby, 34 P.3d 422 (Colo. 2001).

Gorman v. People, 19 P.3d 662 (Colo. 2000).

22. KENTUCKY

Kentucky's statute states that a person is not guilty of an offense unless he/she has engaged in conduct that is intentional, knowingly, wanton or reckless, except if the offense is one that imposes absolute liability (as that term is defined in the statute). If no culpable mental state is designated, then one may be required if the prescribed conduct necessarily involves one.

Kentucky's statute recognizes that a culpable mental state may be required for certain offenses but does not provide an express default mens rea if the legislation is silent.

Relevant excerpts from Kentucky's statute are the following:

Title L—Kentucky Penal Code
Chapter 501—General Principles of Liability

501.030. Criminal liability.

A person is not guilty of a criminal offense unless:

(1) He has engaged in conduct which includes a voluntary act or the omission to perform a duty which the law imposes upon him and which he is physically capable of performing; and

(2) He has engaged in such conduct intentionally, knowingly, wantonly or recklessly as the law may require, with respect to each element of the offense, except that this requirement does not apply to any offense which imposes absolute liability, as defined in KRS 501.050.

501.040. Culpability—Construction of statutes.

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.

501.050. Absolute liability.

A person may be guilty of an offense without having one (1) of the culpable mental states defined in KRS 501.020 ***only when:***

(1) The offense is a violation or a misdemeanor as defined in KRS 500.080 ***and no particular culpable mental state is included within the definition of the offense; or***

(2) The offense is defined by a statute other than this Penal Code and the statute clearly indicates a legislative purpose to impose absolute liability for the conduct described.

RELEVANT CASES:

Saxton v. Commonwealth, 315 S.W.3d 293, 2010 Ky. LEXIS 158 (Ky. 2010).

Saxton v. Commonwealth, 315 S.W.3d 293, 2010 Ky. LEXIS 158 (Ky. 2010).

23. LOUISIANA

Louisiana's statute expressly states that "some crimes require a specific criminal intent, while in others no intent is required." However, the statute does not specify in this section what crimes do not require a culpable mental state or include a default mens rea provision.

Relevant excerpts from Louisiana's statute are as follows:

Louisiana Revised Statutes
Title 14—Criminal Law
Chapter 1—Criminal Code
Part 1—General Provisions
Subpart B—Elements of Crime

§ 14:11. Criminal intent; how expressed

The definitions of some crimes require a specific criminal intent, while in others no intent is required. Some crimes consist merely of criminal negligence that produces criminal consequences. However, in the absence of qualifying provisions, the terms "intent" and "intentional" have reference to "general criminal intent."

RELEVANT CASES:

State v. Larson, La. 94-1237, 653 So. 2d 1158, 1995 La. LEXIS 967 (La. Apr. 10 1995).

24. MAINE

Maine's statute states that a person cannot be convicted of a crime unless there is proof of the culpable mental state of intent, knowledge, recklessness, or negligence, as may be required. Unless expressly stated otherwise, a culpable mental state need not be proved in the following circumstances:

- if the statute expressly states that a culpable mental state is not required to be guilty;
- if any criminal statute expressly states that the crime is a strict-liability crime or the statute expressly reflects a legislative intent to impose criminal liability without proof of intent.

Maine's statute expressly recognizes that a culpable mental state is required for some crimes and not others. However, it does not contain an express default mens rea provision like in the MPC.

Relevant excerpts from Maine's statute are as follows:

Title 17A—Maine Criminal Code
Part 1—General Provisions
Chapter 2—Criminal Liability; Elements of Crimes

§ 32. Elements of crimes defined

A person may not be convicted of a crime unless each element of the crime is proved by the State beyond a reasonable doubt. "Element of the crime" means the forbidden conduct; the attendant circumstances specified in the definition of the crime; the intention, knowledge, recklessness or negligence as may be required; and any required result.

§ 34. Culpable state of mind as an element

1. A person is not guilty of a crime unless that person acted intentionally, knowingly, recklessly or negligently, as the law defining the crime specifies, with respect to each other element of the crime, except as provided in subsection 4. When the state of mind required to establish an element of a crime is specified as "willfully," "corruptly," "maliciously" or by some other term importing a state of mind, that element is satisfied if, with respect thereto, the person acted intentionally or knowingly.

2. When the definition of a crime specifies the state of mind sufficient for the commission of that crime, but without distinguishing among the elements thereof, the specified state of mind applies to all the other elements of the crime, except as provided in subsection 4.

3. When the law provides that negligence is sufficient to establish an element of a crime, that element is also established if, with respect thereto, a person acted intentionally, knowingly or recklessly. When the law provides that recklessness is sufficient to establish an element of a crime, that element is also established if, with respect thereto, a person acted intentionally or knowingly. When the law provides that acting knowingly is sufficient to establish an element of the crime, that element is also established if, with respect thereto, a person acted intentionally.

4. Unless otherwise expressly provided, a culpable mental state need not be proved with respect to:

A. Any fact that is solely a basis for sentencing classification;

B. Any element of the crime as to which it is expressly stated that it must "in fact" exist;

C. Any element of the crime as to which the statute expressly provides that a person may be guilty without a culpable state of mind as to that element;

D. Any element of the crime as to which a legislative intent to impose liability without a culpable state of mind as to that element otherwise appears;

E. Any criminal statute as to which it is expressly stated to be a "strict liability crime" or otherwise expressly reflects a legislative intent to impose criminal liability without proof by the State of a

culpable mental state with respect to any of the elements of the crime; or

F. Any criminal statute as to which a legislative intent to impose liability without a culpable state of mind as to any of the elements of the crime otherwise appears.

4-A. As used in this section, "strict liability crime" means a crime that, as legally defined, does not include a culpable mental state element with respect to any of the elements of the crime and thus proof by the State of a culpable state of mind as to that crime is not required.

5. Deleted. Laws 1999, c. 23, § 2, which includes A and B.

RELEVANT CASES:

State v. Dana, 517 A.2d 719, 1986 Me. LEXIS 920 (Me. 1986).

State v. Keaten, 390 A.2d 1043, 1978 Me. LEXIS 814 (Me. 1978).

State v. Fowler, 676 A.2d 43, 1996 Me. LEXIS 119 (Me. 1996).

State v. Black, 2000 ME 211, 763 A.2d 109, 2000 Me. LEXIS 217 (2000).

25. MONTANA

Montana's statute states that except for deliberate homicide or offenses involving absolute liability, a person is not guilty of an offense without having one of the culpable mental states of knowingly, negligently, or purposely. However, the statute does not expressly state which of these culpable mental states applies if the statute is silent as to mens rea.

Relevant excerpts from Montana's statute are as follows:

Title 45—Crimes
Chapter 2—General Principles of Liability
Part 1—Definitions and State of Mind

45-2-103 General requirements of criminal act and mental state.

(1) Except for deliberate homicide as defined in 45-5-102(1)(b) ***or an offense that involves absolute liability, a person is not guilty of an offense unless, with respect to each element described by the statute defining the offense, a person acts while having one of the mental states of knowingly, negligently, or purposely.***

45-2-104 Absolute liability.

A person may be guilty of an offense without having, as to each element of the offense, one of the mental states of knowingly, negligently, or purposely only if the offense is punishable by a fine not exceeding $500 or the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described.

RELEVANT CASES:

State v. Huebner, 252 Mont. 184, 827 P.2d 1260, 1992 Mont. LEXIS 68, 49 Mont. St. Rep. 210 (Mont. 1992).

26. NEW HAMPSHIRE

New Hampshire's statute states that a person is only guilty of murder, a felony, or a misdemeanor if he/she acts purposely, knowingly, recklessly, or negligently, as the law may require. It also states that a person may be guilty of a violation without regard to such culpability.

New Hampshire's statute expressly recognizes offenses for which a culpable mental state is required and those for which one is not required. However, it does not include an express default mens rea provision like the MPC.

Relevant excerpts from New Hampshire's statute are as follows:

Title LXII—Criminal Code
Chapter 626—General Principles

626:2 General Requirements of Culpability.

I. A person is guilty of murder, a felony, or a misdemeanor only if he acts purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense. He may be guilty of a violation without regard to such culpability. ***When the law defining an offense prescribes the kind of culpability that is sufficient for its commission,*** without distinguishing among the material elements thereof, such culpability shall apply to all the material elements, unless a contrary purpose plainly appears.

RELEVANT CASES:

State v. Aldrich, 124 N.H. 43, 466 A.2d 938, 1983 N.H. LEXIS 356 (1983).

State v. Bergen, 141 N.H. 61, 677 A.2d 145, 1996 N.H. LEXIS 47 (1996).

State v. Curran, 140 N.H. 530, 669 A.2d 798, 1995 N.H. LEXIS 188 (1995).

State v. Curran, 140 N.H. 530, 669 A.2d 798, 1995 N.H. LEXIS 188 (1995).

27. NEW JERSEY

New Jersey's statute states that a person is not guilty of an offense unless he/she acted purposely, knowingly, recklessly, or negligently, as the law may require. The statute also states that although a culpable mental state is not expressly designated in a statute defining an offense, one may be required if the proscribed conduct necessarily involves such a culpable mental state. In addition, unless the statute clearly indicates a legislative intent to impose strict liability, then the statute should be construed as defining a crime requiring a culpable mental state of purposely, knowingly, recklessly, or negligently.

New Jersey's statute expressly recognizes that there are offenses for which a culpable mental state is required; however, it does not contain an express default mens rea provision like in the MPC for circumstances where the statute is silent as to culpability.

Relevant excerpts from New Jersey's statute are the following:

Title 2C—The New Jersey Code of Criminal Justice
Subtitle 1—General Provisions
Chapter 2—Liability

§ 2C:2-2. General requirements of culpability

a. Minimum requirements of culpability. ***Except as provided in subsection c.(3) of this section, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.***

b. Kinds of culpability defined.

(1) Purposely. A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.

(2) Knowingly. A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.

(3) Recklessly. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person

would observe in the actor's situation. "Recklessness," "with recklessness" or equivalent terms have the same meaning.

(4) Negligently. A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. "Negligently" or "negligence" when used in this code, shall refer to the standard set forth in this section and not to the standards applied in civil cases.

c. Construction of statutes with respect to culpability requirements.

(1) Prescribed culpability requirement applies to all material elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

(2) Substitutes for kinds of culpability. When the law provides that a particular kind of culpability suffices to establish an element of an offense such element is also established if a person acts with higher kind of culpability.

(3) Construction of statutes not stating culpability requirement. 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. A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime with the culpability defined in paragraph b.(2) of this section. This provision applies to offenses defined both within and outside of this code.

RELEVANT CASES:

State v. Demarest, 252 N.J. Super. 323, 599 A.2d 937, 1991 N.J. Super. LEXIS 415 (App.Div. 1991).

State v. Emmons, 397 N.J. Super. 112, 936 A.2d 459, 2007 N.J. Super. LEXIS 358 (App.Div. 2007).

State v. Dixon, 346 N.J. Super. 126, 787 A.2d 211, 2001 N.J. Super. LEXIS 459 (App.Div. 2001).

State v. Overton, 357 N.J. Super. 387, 815 A.2d 517, 2003 N.J. Super. LEXIS 52 (App.Div. 2003).

28. NEW YORK

New York's statute states that if conduct is all that is required for the commission of an offense, or if the offense or a material element of an offense does not require a culpable mental state, then it is an offense of strict liability. If a culpable mental state is required, then it is an offense of mental culpability. The statute also states that if a culpable mental state is required, then it will ordinarily be designated by terms such as "intentionally," "knowingly," "recklessly," or "criminal negligence." In addition, although a culpable mental state may not be expressly designated in a statute defining an offense, one may still be required if the proscribed conduct necessarily involves such culpable mental state. Unless there is a clear legislative intent to impose strict liability, then statutes defining a crime should be construed as defining a crime of mental culpability.

New York's statute expressly recognizes that there are offenses for which a culpable mental state is required and offenses for which one is not required. However, it does not contain an express default mens rea provision like the one in the MPC.

Relevant excerpts from New York's statute are as follows:

Penal Law
Part One—General Provisions
Title B—Principles of Criminal Liability

§ 15.10. Requirements for criminal liability in general and for offenses of strict liability and mental culpability

The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing. ***If such conduct is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, such offense is one of "strict liability."*** If a culpable mental state on the part of the actor is required with respect to every material element of an offense, such offense is one of "mental culpability."

§ 15.15. Construction of statutes with respect to culpability requirements

1. When the commission of an offense defined in this chapter, or some element of an offense, requires a particular culpable mental state, such mental state is ordinarily designated in the statute defining the offense by use of the terms "intentionally," "knowingly," "recklessly" or "criminal negligence," or by use of terms, such as "with intent to defraud" and "knowing it to be false," describing a specific kind of intent or knowledge. When one and only one of such 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.

2. 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. A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability. This subdivision applies to offenses defined both in and outside this chapter.

RELEVANT CASES:

People v Nogueros (1977) 42 NY2d 956, 398 NYS2d 139, 367 NE2d 645.

People v Lee (1983) 58 NY2d 491, 462 NYS2d 417, 448 NE2d 1328, 39 ALR4th 661.

People v Williams (1993) 81 NY2d 303, 598 NYS2d 167, 614 NE2d 730.

People v Stone (1975) 80 Misc 2d 536, 364 NYS2d 739.

People v Ackroyd (1989, Sup) 144 Misc 2d 149, 543 NYS2d 848.

E. STATES WHOSE STATUTES IMPLICITLY RECOGNIZE THAT THERE ARE OFFENSES FOR WHICH A CULPABLE MENTAL STATE IS NOT NECESSARY AND DO NOT HAVE AN EXPRESS DEFAULT MENS REA PROVISION LIKE THE MPC

Some state statutes implicitly recognize that a culpable mental state is not required in certain circumstances, in particular by using the phrases such as "when" or "if" the commission of an offense requires a culpable mental state. These statutes do not have an express default mens rea provision like the MPC or provide any detail as to when a culpable mental state is required and when it is not.

29. CONNECTICUT

Connecticut's statute states that "when" the commission of an offense requires a particular mental state, then it is ordinarily designated by specific terms that may apply to every element of the offense or only certain element(s). It is implicit from this that there may be offenses for which a culpable mental state is not required but the statute does not provide any further details or include an express default mens rea provision.

Relevant excerpts from Connecticut's statute are the following:

Title 53a—Penal Code
Chapter 951—Statutory Construction; Principles of Criminal Liability

Sec. 53a-5. Criminal liability; mental state required.

When the commission of an offense defined in this title, or some element of an offense, requires a particular mental state, such mental state is ordinarily designated in the statute defining the offense by use of the terms "intentionally", "knowingly", "recklessly" or "criminal negligence", or by use of terms, such as "with intent to defraud" and "knowing it to be false", describing a specific kind of intent or knowledge. When one and only one of such 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.

RELEVANT CASES:

There were no relevant cases listed in the annotated statute.

30. INDIANA

Indiana's statute states that "if" a kind of culpability is required for the commission of an offense, it is a requirement for every element of prohibited conduct unless the statute defining the offense provides otherwise. It is implicit from this language that there may be offenses for which a culpable mental state is not required; however, the statute does not provide any further details or include an express default mens rea provision like the MPC.

Relevant excerpts from Indiana's statute are the following:

Title 35—Criminal Law and Procedure
Article 41—Crimes—General Substantive Provisions
Chapter 2—Basis of Liability

35-41-2-2. Culpability.

(a) A person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective to do so.

(b) A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so.

(c) A person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.

(d) Unless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with

respect to every material element of the prohibited conduct.

RELEVANT CASES:

There were no relevant cases listed in the annotated statute.

31. MINNESOTA

Minnesota's statute states that "when" criminal intent is an element of a crime, that intent is indicated by specific terms, such as "intentionally," "or some form of the verbs 'know' or believe.'" It is implicit from this wording that there may be offenses for which a culpable mental state is not required; however, the statute does not provide any further details or include an express default mens rea provision like the MPC.

Relevant excerpts from Minnesota's statute are as follows:

Crimes, Criminals
Chapter 609—Criminal Code

Subd. 9. Mental State

(1) When criminal intent is an element of a crime in this chapter, such intent is indicated by the term "intentionally," the phrase "with intent to," the phrase "with intent that," or some form of the verbs "know" or "believe."

(2) "Know" requires only that the actor believes that the specified fact exists.

(3) "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result. In addition, except as provided in clause (6), the actor must have knowledge of those facts which are necessary to make the actor's conduct criminal and which are set forth after the word "intentionally."

(4) "With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result.

(5) Criminal intent does not require proof of knowledge of the existence or constitutionality of the statute under which the actor is prosecuted or the scope or meaning of the terms used in that statute.

(6) Criminal 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.

RELEVANT CASES:

There were no relevant cases listed in the annotated statute.

32. WISCONSIN

Wisconsin's statute states that "when" criminal intent is an element of a crime, it is indicated by specific terms, for example "intentionally," "or some form of the verbs 'know' or 'believe.'" It is implicit from this wording that there may be offenses for which a culpable mental state is not required; however, the statute does not provide any further details or include an express default mens rea provision like the MPC.

Relevant excerpts from Wisconsin's statute are as follows:

Criminal Code
Chapter 939—Crimes—General Provisions
Subchapter I—Preliminary Provisions

939.23. Criminal intent.

(1) ***When criminal intent is an element of a crime*** in chs. 939 to 951, such intent is indicated by the term "intentionally", the phrase "with intent to", the phrase "with intent that", or some form of the verbs "know" or "believe".

(2) "Know" requires only that the actor believes that the specified fact exists.

(3) "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his or her

conduct criminal and which are set forth after the word "intentionally".

(4) "With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.

(5) Criminal intent does not require proof of knowledge of the existence or constitutionality of the section under which the actor is prosecuted or the scope or meaning of the terms used in that section.

(6) Criminal 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.

RELEVANT CASES:

State v. Mueller, 201 Wis. 2d 121, 549 N.W.2d 455, 1996 Wisc. App. LEXIS 402, Blue Sky L. Rep. (CCH) P74113, RICO Bus. Disp. Guide P9013 (Wis. Ct. App. 1996), review denied by 204 Wis. 2d 318, 555 N.W.2d 123 (Wis. 1996), review denied sub nomine State v. Stopple, 204 Wis. 2d 318 (Wis. 1996).

State v. Smith, 150 Wis. 2d 317, 442 N.W.2d 605, 1989 Wisc. App. LEXIS 333 (Wis. Ct. App. 1989).

State v. Danforth, 125 Wis. 2d 293, 371 N.W.2d 411, 1985 Wisc. App. LEXIS 3436 (Wis. Ct. App. 1985), affirmed by 129 Wis. 2d 187, 385 N.W.2d 125, 1986 Wisc. LEXIS 1805 (Wis. 1986).

STATE v. ROOT, 101 Wis. 2d 731, 306 N.W.2d 306, 1981 Wisc. App. LEXIS 3882 (Wis. Ct. App. 1981).

State v. Verhasselt, 83 Wis. 2d 647, 266 N.W.2d 342, 1978 Wisc. LEXIS 1013 (Wis. 1978).

F. STATES THAT DO NOT HAVE ANY RELEVANT PROVISIONS RELATING TO CULPABILITY OR A DEFAULT MENS REA LIKE THE MPC

There were several state statutes that do not have any relevant provisions—for example, relating to an express default mens rea provision like the MPC, or addressing culpability in a way similar to the statutes noted above. The District of Columbia and the United States Code have been included in this section.

33. FLORIDA

Title 46—Crimes

34. IOWA

Title XVI—Criminal Law and Procedure
Subtitle 1—Crime Control and Criminal Acts
Chapter 701—General Criminal Law Provisions

35. MARYLAND

Criminal Law
Title 1—General Provisions

36. MASSACHUSSETTS

Several criminal statutes
Chapters 263 to 280

37. MICHIGAN

Chapter 750—Michigan Penal Code

38. MISSISSIPPI

Title 97—Crimes

39. NEBRASKA

Chapter 28—Crimes and Punishments

40. NEW MEXICO

Chapter 30—Criminal Offenses

41. NORTH CAROLINA

Chapter 14—Criminal Law

42. OKLAHOMA

Title 21—Crimes and Punishments

43. RHODE ISLAND

Title 11—Criminal Offenses

44. SOUTH CAROLINA

Title 16—Crimes and Offenses

45. SOUTH DAKOTA

Title 22—Crimes

46. VERMONT

Title 13—Crimes and Criminal Procedure

47. VIRGINIA

Title 18.2—Crimes and Offenses Generally

48. WASHINGTON

Title 9—Crimes and Punishments

49. WEST VIRGINIA

Chapter 61—Crimes and Their Punishment

50. WYOMING

Title 6—Crimes and Offenses

51. DISTRICT OF COLUMBIA

Division IV—Criminal Law and Procedures and Prisoners
Title 22—Criminal Offenses and Penalties

52. UNITED STATES CODE

Title 18—Crimes and Criminal Procedure
Part I—Crimes

Appendix 1

Excerpts from the American Law Institute's Model Penal Code and Commentaries, Comment to § 2.02 (1985). Citations are omitted.

1. *Objective*. This section expresses the Code's basic requirement that unless some element of mental culpability is proved with respect to each material element of the offense, no valid criminal conviction may be obtained. This requirement is subordinated only to the provision of Section 2.05 for a narrow class of strict liability offenses that are limited to those for which no severer sentence than a fine may be imposed.

The section further attempts the extremely difficult task of articulating the kinds of culpability that may be required for the establishment of liability. It delineates four levels of culpability: purpose, knowledge, recklessness and negligence. It requires that one of these levels of culpability must be proved with respect to each "material element" of the offense, which may involve (1) the nature of the forbidden conduct, (2) the attendant circumstances, or (3) the result of conduct. The question of which level of culpability suffices to establish liability must be addressed separately with respect to each material element, and will be resolved either by the particular definition of the offense or the general provisions of this section.

The purpose of articulating these distinctions in detail is to advance the clarity of draftsmanship in the delineation of the definitions of specific crimes, to provide a distinct framework against which those definitions may be tested, and to dispel the obscurity with which the culpability requirement is often treated when such concepts as "general criminal intent," "mens rea," "presumed intent," "malice," "willfulness," "scienter" and the like have been employed. . . .

2. *Purpose and Knowledge*. In defining the kinds of culpability, the Code draws a narrow distinction between acting purposely and knowingly, one of the elements of ambiguity in legal usage of the term "intent." Knowledge that the requisite external circumstances exist is a common element in both conceptions. But action is not purposive with respect to the nature or result of the actor's conduct unless it was his conscious object to perform an action of that nature or to cause such a result. . . .

. . . Although in most instances either knowledge or purpose should suffice for criminal liability, articulating the distinction puts to the test the issue whether an actual purpose is required and enhances clarity in drafting. . . .

3. *Recklessness*. An important discrimination is drawn between acting either purposely or knowingly and acting recklessly. As the Code uses the term, recklessness involves conscious risk creation. It resembles acting knowingly in that a state of awareness is involved, but the awareness is of risk, that is of a probability less than substantial certainty; the matter is contingent from the actor's point of view. . . .

The risk of which the actor is aware must of course be substantial in order for the recklessness judgment to be made. The risk must also be unjustifiable. . . . Some principle must, therefore, be articulated to indicate the nature of the final judgment to be made after everything has been weighed. . . . Some standard is needed for determining *how* substantial and *how* unjustifiable the risk must be in order to warrant a finding of culpability. There is no way to state this value judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the actor's conduct and determine whether it should be condemned. The Code proposes, therefore that this difficulty be accepted frankly, and that the jury be asked to measure the substantiality and unjustifiability of the risk by asking whether its disregard, given the actor's perceptions, involved a gross deviation from the standard of conduct that a law-abiding person in the actor's situation would observe.

Ultimately, then, the jury is asked to perform two distinct functions. First, it is to examine the risk and the factors that are relevant to how substantial it was and to the justifications for taking it. . . . Second, the jury is to make the culpability judgment in terms of whether the defendant's conscious disregard of the risk justifies condemnation. Considering the nature and purpose of his conduct and the circumstances known to him, the question is whether the defendant's disregard of the risk

involved a gross deviation from the standards of conduct that a law-abiding person would have observed in the actor's situation. . . .

4. *Negligence*. The fourth kind of culpability is negligence. It is distinguished from purposeful, knowing or reckless action in that it does not involve a state of awareness. A person acts negligently under this subsection when he inadvertently creates a substantial and unjustifiable risk of which he ought to be aware. He is liable if given the nature and degree of the risk, his failure to perceive it is, considering the nature and purpose of the actor's conduct and the circumstances known to him, a gross deviation from the care that would be exercised by a reasonable person in his situation. . . . The tribunal must evaluate the actor's failure of perception and determine whether, under all the circumstances, it was serious enough to be condemned. The jury must find fault, and must find that it was substantial and unjustified; that is the heart of what can be said in legislative terms.

5. *Offense Silent as to Culpability*. Subsection (3) provides that unless the kind of culpability sufficient to establish a material element of an offense has been prescribed by law, it is established if a person acted purposely, knowingly or recklessly with respect thereto. This accepts as the basic norm what usually is regarded as the common law position. More importantly, it represents the most convenient norm for drafting purposes. When purpose or knowledge is required, it is conventional to be explicit. And since negligence is an exceptional basis of liability, it should be excluded as a basis unless explicitly prescribed.

Appendix 2

Mens Rea Requirements by Jurisdiction

Jurisdiction	When Statute Does Not Specify Mens Rea	Default Mens Rea (when not defined)	Exceptions to Requirement of Mens Rea
Alabama	Mens rea must be proved if prohibited conduct necessarily involves culpable mental state	None	Definition of offense clearly indicates intent to impose strict liability
Alaska	Mens rea must be proved	Knowingly regarding conduct; recklessly regarding circumstance or result	• No mens rea listed and offense is violation • No mens rea listed and offense is designated strict-liability • Statute indicates legislative intent to dispense with mens rea requirement
Arizona	Mens rea must be proved if prohibited conduct necessarily involves culpable mental state	None	None
Arkansas	Mens rea must be proved	Purposely, knowingly, or recklessly	• Offense is violation, unless mens rea requirement is expressly included in definition • Offense is not part of criminal code and clearly indicates legislative intent to dispense with mens rea requirement
California	In every offense, there must be element of intent or criminal negligence	None	None
Colorado	Mens rea must be proved if prohibited conduct necessarily involves culpable mental state	None	None

Jurisdiction	When Statute Does Not Specify Mens Rea	Default Mens Rea (when not defined)	Exceptions to Requirement of Mens Rea
Connecticut	No requirement to prove mens rea for some crimes. Statute does not define which crimes require mens rea and which do not.	None	None
Delaware	Mens rea must be proved	Intentionally, knowingly, or recklessly	• Offense is violation and definition does not include mens rea requirement • Offense is not part of criminal code and legislative intent to impose strict liability plainly appears
Florida	No relevant mens rea provision	None	None
Georgia	In every offense, there must be element of intent or criminal negligence	None	None
Hawaii	Mens rea must be proved	Intentionally, knowingly, or recklessly	• Offense is violation, definition does not include mens rea requirement, and legislative purpose to impose such requirement does not appear • Offense is not part of criminal code and legislative intent to impose absolute liability plainly appears
Idaho	In every offense, there must be element of intent or criminal negligence	None	None
Illinois	Mens rea must be proved	Intentionally, knowingly, or recklessly	Offense imposes absolute liability
Indiana	No requirement to prove mens rea for some crimes. Statute does not define which crimes require mens rea and which do not.	None	None
Iowa	No relevant mens rea provision	None	None

Jurisdiction	When Statute Does Not Specify Mens Rea	Default Mens Rea (when not defined)	Exceptions to Requirement of Mens Rea
Kansas	Mens rea must be proved	Intent, knowledge, or recklessness	• Definition of offense plainly dispenses with any mental element • A misdemeanor, cigarette or tobacco infraction, or traffic infraction where the statute defining the crime clearly indicates a legislative purpose to impose absolute liability for conduct described • Felony where the statute defining the crime clearly indicates a legislative purpose to impose absolute liability for the conduct described • Violation of DUI laws or offender registration law
Kentucky	Mens rea must be proved if prohibited conduct necessarily involves culpable mental state	None	Mens rea of intentionally, knowingly, wantonly, or recklessly is not required when: • Offense is violation or misdemeanor and no mens rea is specified • Offense is outside penal code and statute clearly indicates legislative purpose to impose absolute liability
Louisiana	No requirement to prove mens rea for some crimes. Statute does not define which crimes require mens rea and which do not.	None	None
Maine	Mens rea of intentionally, knowingly, recklessly, or negligently must be proved	None	• Statute refers to offense as "strict liability crime" • Statute otherwise reflects legislative intent to impose criminal liability without proof of mens rea
Maryland	No relevant mens rea provision	None	None
Massachusetts	No relevant mens rea provision	None	None
Michigan	No relevant mens rea provision	None	None

Jurisdiction	When Statute Does Not Specify Mens Rea	Default Mens Rea (when not defined)	Exceptions to Requirement of Mens Rea
Minnesota	Mens rea is not a required element and is only an element when expressly indicated by terms "intentionally," "with intent to," "with intent that," or some form of words "know" or "believe."	None	None
Mississippi	No relevant mens rea provision	None	None
Missouri	Mens rea must be proved	Purposely or knowingly	• Offense is infraction and definition does not include mens rea • Offense is felony or misdemeanor, no mens rea prescribed, and imputing mens rea is clearly inconsistent with statute or may lead to an absurd or unjust result
Montana	Mens rea of knowingly, negligently, or purposely must be proved for every offense	None	• Offense is deliberate homicide • Offense is absolute-liability, i.e. punishable by fine not exceeding $500 or definition clearly indicates legislative purpose to impose absolute liability
Nebraska	No relevant mens rea provision	None	None
Nevada	In every offense, there must be element of intent or criminal negligence	None	None
New Hampshire	Mens rea of purposely, knowingly, recklessly, or negligently must be proved for every offense	None	Offense is violation
New Jersey	Mens rea must be proved if prohibited conduct necessarily involves culpable mental state	Knowingly	Statute offers clear indication of legislative intent to impose strict liability

Jurisdiction	When Statute Does Not Specify Mens Rea	Default Mens Rea (when not defined)	Exceptions to Requirement of Mens Rea
New Mexico	No relevant mens rea provision	None	None
New York	Mens rea must be proved if prohibited conduct necessarily involves culpable mental state	None	Statute clearly indicates legislative intent to impose strict liability
North Carolina	No relevant mens rea provision	None	None
North Dakota	Mens rea must be proved	"Willfully," defined as intentionally, knowingly, or recklessly	Statute explicitly states that a person may be found guilty without mens rea
Ohio	Mens rea must be proved	Recklessness	Legislature's intent to impose strict liability is plainly apparent
Oklahoma	No relevant mens rea provision	None	None
Oregon	Mens rea must be proved	Intentionally, knowingly, recklessly, or with criminal negligence	• Offense is violation and definition does not include mens rea • Offense is not part of criminal code and clearly indicates legislative intent to dispense with mens rea
Pennsylvania	Mens rea must be proved	Intentionally, knowingly, or recklessly	• Offense is summary offense, definition does not include mens rea, and court does not determine that application of mens rea is consistent with effective enforcement of the law defining the offense • Offense is outside criminal code and legislative purpose of imposing absolute liability is plainly apparent
Rhode Island	No relevant mens rea provision	None	None
South Carolina	No relevant mens rea provision	None	None
South Dakota	No relevant mens rea provision	None	None

Jurisdiction	When Statute Does Not Specify Mens Rea	Default Mens Rea (when not defined)	Exceptions to Requirement of Mens Rea
Tennessee	Mens rea must be proved	Intent, knowledge, or recklessness	Definition of offense plainly dispenses with mental element
Texas	Mens rea must be proved; certain offenses defined by municipal ordinance or county commissioners court cannot dispense with mens rea	Intent, knowledge, or recklessness	Definition of offense plainly dispenses with any mental element
Utah	Mens rea must be proved	Intent, knowledge, or recklessness	Offense is strict-liability
Vermont	No relevant mens rea provision	None	None
Virginia	No relevant mens rea provision	None	None
Washington	No relevant mens rea provision	None	None
West Virginia	No relevant mens rea provision	None	None
Wisconsin	Mens rea is not a required element and is only an element when expressly indicated by terms "intentionally," "with intent to," "with intent that," or some form of words "know" or "believe"	None	None
Wyoming	No relevant mens rea provision	None	None
District of Columbia	No relevant mens rea provision	None	None
United States Code	No relevant mens rea provision	None	None

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