

# Articles

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## Default Culpability Requirements: The Model Penal Code and Beyond

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## INTRODUCTION

For centuries, Anglo-American law has required culpability for criminal liability. Under one account, English common law began requiring culpability around the middle of the thirteenth century.<sup>1</sup> Originally, possibly under the influence of canon law, the common law simply required mens rea, thus asking only whether an actor had a guilty mind.<sup>2</sup> The substance of that requirement varied little from one offense to another,<sup>3</sup> and the common law generally demanded only that an actor have a state of mind characterized as a “vicious will” or an “intention to commit a crime.”<sup>4</sup> Over the centuries, however, the common law came to require different mental states for different offenses.<sup>5</sup> For example, larceny required an intent to steal, and arson required an intent to burn a dwelling.<sup>6</sup> Hence, the common law is often

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<sup>1</sup> Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 655 (1993); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 435–36 (1993); see also *Evans v. State*, 349 A.2d 300, 332 (Md. Ct. Spec. App. 1975), *aff'd*, 362 A.2d 629 (Md. 1976) (“By the middle of the 13th century, . . . the phrase ‘mens rea’ began to take on significance in terms of ultimate criminal responsibility.”). There is no scholarly consensus about the origin of the mens rea requirement, and some date it back as far as the tenth century. See Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 338 n.4 (1989). Nevertheless, most agree that, at a minimum, mens rea was “becoming necessary” by the middle of the thirteenth century. *Id.*

<sup>2</sup> Gardner, *supra* note 1, at 655. Some have questioned the influence of canon law on mens rea requirements. See, e.g., Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1, 7–14 (2002). The difference of opinion rests largely on whether the writings of Henry De Bracton influenced the early law of mens rea. See *id.* at 9–13.

<sup>3</sup> Gardner, *supra* note 1, at 667; Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 686 (1983); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 988–89 (1932); cf. Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting “Apparent Innocence” in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 7–8 (1995) (“One with a ‘guilty mind’ was not necessarily one who was cognizant of wrongdoing but was simply one who had consciously made a choice—any choice—to which moral blame (or fault) could justly be assigned.”).

<sup>4</sup> Sayre, *supra* note 3, at 1023–24.

<sup>5</sup> Gardner, *supra* note 1, at 667; Pilcher, *supra* note 3, at 8; Robinson & Grall, *supra* note 3, at 687.

<sup>6</sup> Gardner, *supra* note 1, at 668.

described as evolving from requiring mens rea to requiring mentes rea.<sup>7</sup>

Over time, the common law came to characterize most criminal offenses as requiring either “general intent” or “specific intent.”<sup>8</sup> Both concepts have long been rightly criticized for being vague and confusing.<sup>9</sup> The common law also developed numerous additional mentes rea for specific offenses, such as requiring a crime to be committed “willfully,” “maliciously,” “fraudulently,” or “feloniously.”<sup>10</sup> These culpability terms also proved to be quite problematic,<sup>11</sup> and, like general and specific intent, they generally applied to whole offenses rather than to specific elements.<sup>12</sup>

In 1962, the American Law Institute (ALI) published the Model Penal Code (MPC or “the Code”).<sup>13</sup> The MPC was a colossal undertaking, receiving funding from the Rockefeller Foundation,<sup>14</sup> enlisting many of the era’s greatest legal thinkers,<sup>15</sup> resulting in thirteen

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<sup>7</sup> *Id.*

<sup>8</sup> PAUL H. ROBINSON & MICHAEL T. CAHILL, *CRIMINAL LAW* § 4.1.1, at 154 (2d ed. 2014).

<sup>9</sup> Eric A. Johnson, *Understanding General and Specific Intent: Eight Things I Know for Sure*, 13 OHIO ST. J. CRIM. L. 521, 521 (2016); WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 5.6(b) (3d ed. 2017); ROBINSON & CAHILL, *supra* note 8, § 4.1.1, at 154–55. For example, “general intent” is a notoriously vague concept, and courts may easily define the term more broadly or narrowly to achieve desired results for specific offenses or cases. Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 367 (2001). “Specific intent” is clearer but also subject to manipulation. Often, a court may define specific intent to require purpose, knowledge, or some combination of purpose and knowledge. *Id.* at 380–81.

<sup>10</sup> LAFAVE, *supra* note 9, § 5.1(a).

<sup>11</sup> Miguel Angel Méndez, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS L. REV. 407, 408 (1995). Some of these terms were eventually codified as states enacted criminal codes in the late 1800s, but the terms typically remained undefined. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1100 (1952). During the twentieth century, many states kept common-law culpability terms on the books even though they otherwise modernized their codes’ culpability requirements. PAUL H. ROBINSON, 1 *CRIMINAL LAW DEFENSES* § 61(b)(1) (1984) (“Many jurisdictions that have adopted the Model Penal Code’s scheme of precisely defined culpability terms, still use undefined culpability terms such as ‘carelessly,’ ‘heedlessly,’ ‘wanton,’ ‘wilful,’ ‘intent,’ and ‘criminal negligence.’”).

<sup>12</sup> ROBINSON & CAHILL, *supra* note 8, § 4.1.1, at 155.

<sup>13</sup> MODEL PENAL CODE (AM. L. INST., Proposed Official Draft 1962).

<sup>14</sup> Sir Leon Radzinowicz, *Herbert Wechsler’s Role in the Development of American Criminal Law and Penal Policy*, 69 VA. L. REV. 1, 6 (1983).

<sup>15</sup> Harold Edgar, *Herbert Wechsler and the Criminal Law: A Brief Tribute*, 100 COLUM. L. REV. 1347, 1352–53 (2000).

tentative drafts with extensive commentary,<sup>16</sup> and requiring over a decade to complete.<sup>17</sup> When the drafters began their work in 1951, Louisiana was the only state that had significantly reformed its criminal code during the twentieth century.<sup>18</sup> The ALI succeeded where others had failed, and the Code's publication quickly inspired a new wave of criminal code reform projects across America.<sup>19</sup> In total, more than thirty states have adopted criminal codes influenced by the MPC.<sup>20</sup> The Code's greatest innovation is probably its General Part, which sets forth a series of general rules that apply to specific offenses defined in the Code's Special Part. The most important rules appear in section 2.02, which sought to revolutionize the common-law requirements of mens rea and mentes reae. Section 2.02 has deservedly been called "the most significant and enduring achievement of the Code's authors."<sup>21</sup>

Section 2.02 abandons both the common law's vast array of culpability requirements and its distinction between general intent and specific intent. In their place, section 2.02 introduces four culpability levels: purpose, knowledge, recklessness, and negligence.<sup>22</sup> (Some states have altered the precise terms, most commonly by replacing "purpose" with "intent."<sup>23</sup>) Significantly, section 2.02 also generally

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<sup>16</sup> Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098, 1140 (1978). Dean Kadish observes that the tentative drafts' commentary "furnished a text that revitalized criminal law scholarship, provided a new starting point for writing in the field and profoundly influenced the materials and direction of criminal law study in American law schools." *Id.*

<sup>17</sup> Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 323–24 (2007).

<sup>18</sup> Edgar, *supra* note 15, at 1353.

<sup>19</sup> Robinson & Dubber, *supra* note 17, at 326.

<sup>20</sup> In 1984, the MPC's Chief Reporter, Herbert Wechsler, identified thirty-four state criminal codes as having been "influenced in some part by the positions taken by the Model Code." MODEL PENAL CODE AND COMMENTARIES, PART I: GENERAL PROVISIONS, at xi (AM. L. INST. 1985) [hereinafter MPC COMMENTARIES, PART I]. Professor Wechsler's list included Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawai'i, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, and Wyoming. *Id.* The number of states influenced by the Code may be lower or higher, depending on how one counts. See Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1318 n.38 (2011) ("The MPC nose counting is complicated by the extent to which some states have adopted it with changes. Depending on the extent of those changes, some states are counted by some commentators as having adopted the MPC in whole, in part, or only being 'influenced' by it.").

<sup>21</sup> Robinson & Grall, *supra* note 3, at 691.

<sup>22</sup> MODEL PENAL CODE § 2.02(2) (AM. L. INST., Proposed Official Draft 1962).

<sup>23</sup> Danny Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact*

requires culpability for “each material element of the offense,”<sup>24</sup> meaning that a given offense definition will include multiple culpability requirements.<sup>25</sup> Paul Robinson and Michael Cahill have described this innovation as “a shift from offense analysis to element analysis.”<sup>26</sup>

The MPC’s default culpability provision, section 2.02(3), plays a central but often overlooked role in the Code’s celebrated culpability scheme. Section 2.02(3) applies “[w]hen the culpability sufficient to establish a material element of an offense is not prescribed by law.”<sup>27</sup> If a statute is silent about the mental state required for a given element, section 2.02(3) “reads in”<sup>28</sup>—meaning that it imposes—a default culpability requirement of recklessness.<sup>29</sup> Suppose, for example, that a criminal code defines criminal property damage to occur when a person “damages property of another.” Section 2.02(3) would apply because the offense definition fails to prescribe culpability requirements for any of the elements of the offense. Following section 2.02(3), a court would be required to read in the default requirement of recklessness for both the element of “damaging property” and the circumstance of the property belonging “to another.”<sup>30</sup> Hence, an actor would not be liable for damaging property the actor reasonably believes to be his or her own, even if acting purposely.<sup>31</sup>

Default culpability rules are important because criminal offenses routinely fail to prescribe culpability requirements. Without a default culpability rule like section 2.02(3), courts often interpret an offense’s silence about culpability as an authorization to impose strict liability. Unfortunately, the overwhelming majority of MPC states have failed to adopt default culpability provisions that are even substantially similar to section 2.02(3). Some MPC states never even enacted default culpability provisions, and numerous others have deviated from section

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*Doctrine*, 27 SW. U. L. REV. 229, 238 (1997) (finding that, as of 1997, approximately three-quarters of MPC states used “intentionally” in place of “purposely”).

<sup>24</sup> MODEL PENAL CODE § 2.02(1).

<sup>25</sup> ROBINSON & CAHILL, *supra* note 8, § 4.1.1, at 155.

<sup>26</sup> *Id.*

<sup>27</sup> MODEL PENAL CODE § 2.02(3).

<sup>28</sup> Robinson & Grall, *supra* note 3, at 700.

<sup>29</sup> MODEL PENAL CODE § 2.02(3).

<sup>30</sup> This example is a little simplified. The requirement of “damaging property” technically consists of multiple elements including the actor’s conduct, the result of causing “damage,” and the attendant circumstance of the damaged item being “property.”

<sup>31</sup> See MODEL PENAL CODE § 2.04(1)(a) (“[M]istake [precludes liability when it] negatives the . . . recklessness . . . required to establish a material element of the offense.”).

2.02(3) in ways that undermine the Code's vision for criminal liability. Moreover, section 2.02(3) itself has some shortcomings when applied to real-world criminal statutes.

In a previous survey, Professor Darryl Brown concluded that the MPC's culpability presumptions "have had surprisingly little effect on courts that define mens rea requirements when interpreting criminal statutes."<sup>32</sup> I agree, at least with respect to section 2.02(3). The problem is that even MPC states have largely failed to enact strong presumptions of recklessness. In the absence of strong default rules, courts have found ways to circumvent the Code's general requirement of culpability for each offense element. As a result, few American jurisdictions have yet to fully embrace the MPC's culpability scheme.

This Article examines section 2.02(3), both as proposed by the ALI and as modified by MPC states, and recommends new default culpability rules to replace it. Part I provides an overview of section 2.02(3), explains its strengths and role in the MPC's culpability scheme, and identifies its two main shortcomings. Next, Part II reviews the criminal codes and case law in the twenty-five states with culpability provisions influenced by the MPC; I find that even MPC states have largely deviated from section 2.02(3) in ways that significantly undermine the Code's norm of requiring recklessness for each offense element. Finally, Part III recommends new default culpability rules that improve on section 2.02(3), prevent the problems experienced in MPC states, and establish a strong presumption of recklessness that works for real-world statutes.

## I

### THE MODEL PENAL CODE'S DEFAULT CULPABILITY PROVISION

#### *A. Overview of Section 2.02(3)*

In introducing element analysis, the MPC's drafters wanted to establish a norm of requiring at least recklessness for each element of an offense. Section 2.02(1) generally requires that a person act culpably "with respect to each material element of the offense."<sup>33</sup> The focus of this Article is section 2.02(3), which plays a critical role in enforcing the Code's general requirement of culpability for each offense element. Section 2.02(3) acts as a default culpability provision for the Code, authorizing courts to read in a culpability requirement of recklessness

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<sup>32</sup> Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 285 (2012).

<sup>33</sup> MODEL PENAL CODE § 2.02(1).

when an offense definition is silent about the mental state required for an offense element.<sup>34</sup>

Section 2.02(3) states that when an offense fails to prescribe a culpability requirement for a given offense element, “such element is established if a person acts purposely, knowingly or recklessly with respect thereto.”<sup>35</sup> Under section 2.02(5), the Code’s culpability levels are hierarchical, such that purpose can satisfy a requirement of knowledge, and both purpose and knowledge can prove recklessness.<sup>36</sup> As a result, section 2.02(3) effectively requires recklessness for any offense element that lacks a stated culpability level.<sup>37</sup> Recklessness demands, at a minimum, that the actor “consciously disregard[] a substantial and unjustifiable risk that the material element exists or will result from his conduct.”<sup>38</sup> For example, suppose that a criminal code defines aggravated assault to occur when one “causes bodily harm to a police officer.” Note that the offense definition fails to state any culpability requirements at all. Under section 2.02(3), recklessness would be required for both the element of causing bodily harm and the circumstance of the victim being a police officer. Hence, under a proper application of section 2.02(3), an actor must at least consciously disregard a substantial and unjustifiable risk that the victim is a police

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<sup>34</sup> Section 2.02(4) also helps enforce section 2.02(1)’s requirement of culpability for each offense element. Section 2.02(4) provides that a prescribed culpability requirement usually applies “to all the material elements of the offense” if it is stated generally and “without distinguishing” between offense elements. For example, suppose that a criminal code defines aggravated assault as occurring when one “knowingly causes bodily harm to a police officer.” Note that the prescribed culpability requirement, knowledge, is stated generally and without distinguishing between the elements of the offense. Following section 2.02(4), knowledge is required for both the element of causing bodily harm and the circumstance of the victim being a police officer. Courts have struggled applying section 2.02(4). *See* Brown, *supra* note 32, at 297 (finding “widespread judicial endorsement of strict-liability elements” in MPC states and concluding that the Code’s culpability provisions “have had only modest effect”).

<sup>35</sup> MODEL PENAL CODE § 2.02(3).

<sup>36</sup> *Id.* § 2.02(5).

<sup>37</sup> In establishing recklessness as the Code’s default culpability level, the drafters reasoned that recklessness is “the most convenient norm for drafting purposes” because criminal statutes are traditionally explicit in requiring purpose or knowledge. MPC COMMENTARIES, PART I, *supra* note 20, § 2.02 cmt. 5, at 244. The drafters also rejected negligence as a default culpability level, calling it “an exceptional basis of liability.” *Id.* Hence, as with purpose and knowledge, a requirement of negligence must be explicitly stated. *Id.*

<sup>38</sup> MODEL PENAL CODE § 2.02(2)(c). The MPC generally defines the four culpability levels with respect to the three types of objective elements—conduct, results, and attendant circumstances. *See id.* § 2.02(2).

officer. One would not commit the aggravated assault by assaulting a victim he or she reasonably believes to be a civilian.

Significantly, section 2.02(3) does not provide any exceptions to the default culpability requirement of recklessness.<sup>39</sup> Moreover, section 2.02(1) recognizes only section 2.05 as an exception to the general rule that culpability is required for each offense element.<sup>40</sup> Section 2.05, in turn, authorizes such “absolute” liability—or strict liability—only in extremely limited circumstances.<sup>41</sup> In fact, section 2.05 permits absolute liability only for (1) offenses that constitute mere civil violations<sup>42</sup> and (2) criminal offenses that appear outside the criminal code and for which “a legislative purpose to impose absolute liability . . . plainly appears.”<sup>43</sup> Even when a legislature intends to impose absolute liability for a non-Code offense, section 2.05 automatically reduces the offense’s grade to a civil violation<sup>44</sup> unless the non-Code offense was enacted after the Code.<sup>45</sup> Hence, the drafters intended section 2.02(3) to apply to all existing criminal offenses, including ones that are defined outside a state’s criminal code.

Section 2.02(3) affects numerous criminal offenses in the MPC. For example, the Code grades burglary as a second-degree felony when “it is perpetrated in the dwelling of another at night,”<sup>46</sup> meaning that the actor must be at least reckless as to both the nature of a structure and the time of day.<sup>47</sup> In fact, reviewing just property offenses, section 2.02(3) requires recklessness for elements of nearly every such

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<sup>39</sup> *Id.* § 2.02(3).

<sup>40</sup> *Id.* § 2.02(1).

<sup>41</sup> *Id.* § 2.05.

<sup>42</sup> *Id.* § 2.05(1)(a). A separate provision of the MPC explicitly states that violations are not criminal offenses. *See id.* § 1.04(5) (“An offense defined by this Code or by any other statute of this State constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction or if it is defined by a statute other than this Code that now provides that the offense shall not constitute a crime. A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.”).

<sup>43</sup> *Id.* § 2.05(1)(b).

<sup>44</sup> *Id.* § 2.05(2)(a) (“[W]hen absolute liability is imposed with respect to any material element of an offense defined by a statute other than the Code and a conviction is based upon such liability, the offense constitutes a violation.”).

<sup>45</sup> *Id.* § 2.05(2) (providing an exception where a subsequent statute provides otherwise).

<sup>46</sup> MODEL PENAL CODE § 221.1(2).

<sup>47</sup> MPC COMMENTARIES, PART I, *supra* note 20, § 2.02 cmt. 6, at 246; *see also infra* notes 90–91 and accompanying text.



crime in the MPC, including arson,<sup>48</sup> causing a catastrophe,<sup>49</sup> criminal mischief,<sup>50</sup> criminal trespass,<sup>51</sup> robbery,<sup>52</sup> theft,<sup>53</sup> forgery,<sup>54</sup> and tampering with records.<sup>55</sup> For state criminal codes, a provision like section 2.02(3) stands to affect even more offenses simply because real-world codes define so many more crimes.<sup>56</sup> For example, from 1961 to 2003, the Illinois Criminal Code mushroomed from 23,970 words to 136,181 words,<sup>57</sup> making it 5.7 times wordier than the original code.<sup>58</sup> Additionally, as of 2003, Illinois had 153,347 words of criminal offenses outside its Criminal Code, and that was reviewing only felonies.<sup>59</sup> Almost twenty years later, countless criminal offenses in Illinois and elsewhere fail to prescribe culpability requirements for at least some offense elements.

As a result, section 2.02(3) has significant implications for thousands of criminal offenses in current MPC jurisdictions alone. After all, section 2.02(3) helps identify an offense's culpability requirements, which are offense elements<sup>60</sup> required nationwide to

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<sup>48</sup> MODEL PENAL CODE § 220.1(1) (“A person is guilty of arson . . . if he starts a fire or causes an explosion . . .”).

<sup>49</sup> *Id.* § 220.2(1) (“[A catastrophe occurs when one] causes by explosion, fire, flood, avalanche, collapse of building, release of poison gas, radioactive material or other harmful or destructive force or substance, or by any other means of causing potentially widespread injury or damage . . .”).

<sup>50</sup> *Id.* § 220.3(1)(a) (“[Criminal mischief occurs when one] damages tangible property of another . . . in the employment of fire, explosives, or other dangerous means . . .”).

<sup>51</sup> *Id.* § 221.2(1) (“A person commits [criminal trespass] . . . if [the offense] is committed in a dwelling at night.”).

<sup>52</sup> *Id.* § 222.1(1)(a) (defining robbery to occur when one commits theft and causes serious bodily injury to another person).

<sup>53</sup> *Id.* § 223.1(2)(a) (“Theft constitutes a felony of the third degree if the amount involved exceeds \$500, or if the property stolen is a firearm, automobile, airplane, motorcycle, motor boat, or other motor-propelled vehicle . . .”).

<sup>54</sup> *Id.* § 224.1(1)(a) (defining forgery to occur when one alters another's writing without authority).

<sup>55</sup> *Id.* § 224.4 (“A person [is guilty of tampering with records] if he falsifies, destroys, removes or conceals any writing or record . . .”).

<sup>56</sup> Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 768 (2004) (“The single most visible development in the substantive criminal law is that the sheer number of criminal offenses has grown exponentially.”).

<sup>57</sup> Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 172 n.16 (2003).

<sup>58</sup> *Id.* at 172.

<sup>59</sup> *Id.* at 172 n.16.

<sup>60</sup> LAFAYE, *supra* note 9, § 1.8(b) n.14 (stating that, with the exception of strict-liability crimes, offense elements include culpability requirements).

be proved beyond a reasonable doubt.<sup>61</sup> Indeed, the MPC defines “element of an offense” to include culpability requirements,<sup>62</sup> and it requires that each offense element must be proved beyond a reasonable doubt.<sup>63</sup> In many cases, criminal liability will turn on whether an objective element requires recklessness, some other level of culpability, or no culpability at all. Hence, for many defendants, section 2.02(3) can be the difference between guilt and innocence.

### *B. Strengths of Section 2.02(3)*

Section 2.02(3) has three main strengths in requiring at least recklessness for each element of an offense. First, the MPC is correct in generally requiring culpability for each element. That requirement is a hallmark of element analysis,<sup>64</sup> which permits a criminal code to more finely calibrate an offense’s culpability requirements by requiring different mental states for different elements. Moreover, absolute liability as to an offense element is generally undesirable because, by definition, it punishes actors who lack blameworthiness as to that element.<sup>65</sup> Some elements may ultimately matter more than others, given the nature of an offense or the facts of a case. Nevertheless, for default rules, it is most sensible to require culpability for each element. Such an approach best assures that only blameworthy offenders are punished.

Second, the MPC correctly chooses recklessness as the default culpability level. The commentary states that section 2.02(3) codifies “what usually is regarded as the common law position,” and it accurately calls recklessness “the most convenient norm for drafting purposes.”<sup>66</sup> Otherwise, the commentary does not directly justify the drafters’ preference for recklessness. The commentary shows much more concern for explaining why negligence liability is occasionally

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<sup>61</sup> *Id.* § 1.8(b) (“It is everywhere agreed that the prosecution has the burden of proving . . . the existence of each element [of the offense] beyond a reasonable doubt.”).

<sup>62</sup> MODEL PENAL CODE § 1.13(9)(b) (AM. L. INST., Proposed Official Draft 1962) (“[E]lement of an offense’ means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as . . . establishes the required kind of culpability . . .”).

<sup>63</sup> *Id.* § 1.12(12).

<sup>64</sup> See, e.g., MODEL PENAL CODE, *supra* note 24, § 2.02(1).

<sup>65</sup> See LAFAYE, *supra* note 9, § 5.5(c) (“For the most part, the commentators have been critical of strict-liability crimes. ‘The consensus can be summarily stated: to punish conduct without reference to the actor’s state of mind is both inefficacious and unjust.’”) (quoting Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109 (1962)).

<sup>66</sup> MPC COMMENTARIES, PART I, *supra* note 20, § 2.02 cmt. 5, at 244.

appropriate.<sup>67</sup> Indeed, criminal law scholars continue to question whether the law should ever impose criminal liability based on an actor's mere failure to perceive a risk.<sup>68</sup> Given that debate, it seems imprudent to use negligence as a default culpability level. On the other hand, knowledge is too demanding to serve as a default culpability requirement, given that it requires the prosecution to prove that an actor was aware of the attendant circumstances and practically certain of the offense's results.<sup>69</sup> Recklessness provides a happy medium, then, because it punishes sufficiently blameworthy conduct without requiring prosecutors to prove too much.

Third, the MPC properly confers little discretion to courts in deciding whether culpability is required for an element and what mental state is needed. As discussed later in this Article, several states read in a culpability requirement when an offense or element "necessarily involves" a mental state.<sup>70</sup> That standard is unclear, as shown by the fact that it has taken on so many different meanings in the six states that have adopted it. In general, though, the requirement has allowed many courts to impose absolute liability under the theory

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<sup>67</sup> See *id.* § 2.02 cmt. 4, at 243–44.

<sup>68</sup> See generally LAFAVE, *supra* note 9, § 5.4(a)(2) ("[T]here is something of a dispute as to whether criminal liability should, on principle, ever be based upon objective negligence.").

<sup>69</sup> MODEL PENAL CODE § 2.02(2)(b) (AM. L. INST., Proposed Official Draft 1962). Additionally, courts may be more reluctant to apply a default culpability provision that requires reading in a mental state of knowledge. After all, when a statute is silent about the culpability required for an element, a court generally must choose between absolute liability and the default culpability level. That gap is greater when a criminal code sets the default at knowledge. Additionally, a default requirement of knowledge is more likely to cause interpretive problems because numerous criminal statutes are explicit in requiring knowledge. As a result, when interpreting an offense that is silent about culpability, it is more likely that a related provision will prescribe the default culpability requirement. That leads to obvious problems of legislative intent because it is so widely accepted that a legislature acts deliberately when it includes language in one provision but omits it from another. See, e.g., *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (alteration in original)). My experience tells me that many courts would find ways to circumvent the default culpability provision, even if it does not provide a legislative-intent exception. Such problems are far less likely to occur if the default culpability level is recklessness.

<sup>70</sup> See, e.g., ALA. CODE § 13A-2-4(b) (2020); ARIZ. REV. STAT. ANN. § 13-202(B) (2020); COLO. REV. STAT. § 18-1-503(2) (2020); KY. REV. STAT. ANN. § 501.040 (West 2020); N.J. STAT. ANN. § 2C:2-2(c)(3) (West 2020); N.Y. PENAL LAW § 15.15(2) (McKinney 2019).

that offenses did not necessarily involve culpable mental states.<sup>71</sup> Similarly, several states permit courts to choose the mental state required for an element when an offense does not prescribe one. The resulting law is highly offense-specific, making offenses' culpability requirements inconsistent and somewhat unpredictable.<sup>72</sup> The MPC, in contrast, establishes a true default culpability requirement that guides courts, informs the public, and promotes uniformity between offenses.

### *C. Shortcomings of Section 2.02(3)*

In 1962, section 2.02(3) was well ahead of its time in reading culpability requirements into offense definitions. In fact, almost six decades later, the overwhelming majority of American criminal codes have yet to catch up, thus undermining the Code's norm of requiring at least recklessness for each offense element. Some of the blame lies with section 2.02(3) itself, which was written more for the MPC's own offenses than for real-world criminal statutes.

This Section discusses two shortcomings of section 2.02(3) as applied to state criminal codes. First, the Code's drafters simply did not anticipate the extent to which adopting states would continue to impose absolute liability for criminal offenses. Second, the MPC does not make it sufficiently clear that section 2.02(3) applies to all offense elements, including those that appear in grading provisions.

#### *1. Failing to Anticipate Absolute Liability for Serious Criminal Offenses*

The MPC did not anticipate the continued use of absolute liability for serious criminal offenses. The Code's drafters addressed their aversion to absolute liability most clearly in the commentary for section 2.05. As discussed above, section 2.05 authorizes absolute liability only for civil violations and for non-Code offenses that clearly indicate legislative intent to omit culpability requirements.<sup>73</sup> The commentary describes section 2.05 as presenting a "frontal attack" on absolute liability by generally grading absolute-liability offenses as civil violations, rather than criminal offenses.<sup>74</sup> The drafters firmly believed

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<sup>71</sup> See *infra* notes 120–35 and accompanying text.

<sup>72</sup> See *infra* notes 142–59 and accompanying text.

<sup>73</sup> See *supra* notes 42–45 and accompanying text.

<sup>74</sup> MPC COMMENTARIES, PART I, *supra* note 20, § 2.05 cmt. 1, at 283. Note that the MPC does permit criminal liability for non-Code offenses enacted after the Code. See MODEL PENAL CODE § 2.05(2) (providing exception when a subsequent statute provides otherwise).

that the criminal law's moral condemnation should be reserved for blameworthy defendants, deeming the principle "too fundamental to be compromised."<sup>75</sup>

In contrast, legislatures in MPC states have been quite willing to impose absolute liability even for serious offenses. Indeed, a strong majority of MPC jurisdictions authorize absolute liability for criminal offenses in their criminal codes.<sup>76</sup> For those states, the MPC provides little guidance about how to impose absolute liability because the MPC's drafters generally refused to budge on that critical issue.<sup>77</sup> After all, section 2.05 fails to even acknowledge that criminal offenses in the Code may impose absolute liability, much less explain how to do so.<sup>78</sup> Moreover, section 2.02(3) does not provide any exceptions to its default culpability requirement of recklessness.<sup>79</sup>

Without sufficient guidance from the MPC, many states have established their own exceptions to their default culpability provisions.<sup>80</sup> The most common exception authorizes absolute

<sup>75</sup> MPC COMMENTARIES, PART I, *supra* note 20, § 2.05 cmt. 1, at 283.

<sup>76</sup> As discussed in Part II, twenty-five states have enacted culpability provisions influenced significantly by the MPC. *See infra* note 95 and accompanying text. Of those twenty-five states, seventeen have provisions acknowledging the possibility of absolute liability for criminal offenses in their criminal codes. *See* ALA. CODE § 13A-2-4(b) (2020); ALASKA STAT. § 11.81.600(b) (2019); ARIZ. REV. STAT. ANN. § 13-202(B) (2020); COLO. REV. STAT. § 18-1-502 (2020); 720 ILL. COMP. STAT. 5/4-9 (2012); KAN. STAT. ANN. § 21-5203 (2020); KY. REV. STAT. ANN. § 501.050(1) (West 2020); ME. STAT. tit. 17-A, § 34(4) (2019); MO. REV. STAT. § 562.026(2) (2020); MONT. CODE ANN. § 45-2-104 (2019); N.J. STAT. ANN. § 2C:2-2(c)(3) (West 2020); N.Y. PENAL LAW § 15.15(2) (McKinney 2019); N.D. CENT. CODE § 12.1-02-02(2), (3) (2019); OHIO REV. CODE ANN. § 2901.21(B) (West 2020); TENN. CODE ANN. § 39-11-301(b) (2020); TEX. PENAL CODE ANN. § 6.02(b) (West 2019); UTAH CODE ANN. § 76-2-102 (West 2020). Additionally, Connecticut and Indiana do not explicitly address absolute liability offenses, but they do not need to because their codes lack default culpability provisions. *See* discussion *infra* Section II.A.

<sup>77</sup> Nevertheless, in Article 213, the MPC does allow for absolute liability with respect to a victim's age for sexual offenses. *See* MODEL PENAL CODE § 213.6(1) ("Whenever in this Article the criminality of conduct depends on a child's being below the age of 10, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than 10. When criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age.").

<sup>78</sup> *See id.* § 2.05(1)(a) (addressing absolute liability only for civil violations).

<sup>79</sup> *See id.* § 2.02(3).

<sup>80</sup> *E.g.*, ALA. CODE § 13A-2-4(b); ALASKA STAT. § 11.81.600(b); ARK. CODE ANN. § 5-2-204(c) (2020); DEL. CODE ANN. tit. 11, § 251(c)(2) (2020); HAW. REV. STAT. § 702-212 (2020); 720 ILL. COMP. STAT. 5/4-9; KAN. STAT. ANN. § 21-5203; KY. REV. STAT. ANN. § 501.050; MO. REV. STAT. § 562.026; MONT. CODE ANN. § 45-2-104; N.J. STAT. ANN. § 2C:2-2(c)(3); N.Y. PENAL LAW § 15.15(2); OHIO REV. CODE ANN. § 2901.21(B), (C); OR. REV. STAT. § 161.105(1) (2020); 18 PA. CONS. STAT. § 305(a) (2020); TENN. CODE ANN. § 39-11-301(b); TEX. PENAL CODE ANN. § 6.02(b); UTAH CODE ANN. § 76-2-102.

immunity based on legislative intent.<sup>81</sup> As discussed later in Section II.D., adopting states' legislative-intent exceptions significantly undermine the Code's culpability scheme.

## *2. Silence About Default Culpability Requirements for Grading Provisions*

The MPC also falls short because it does not make clear that section 2.02(3) applies to offense elements that appear in grading provisions. Section 2.02(3) reads in recklessness when a statute fails to state a culpability requirement for any "material element of an offense."<sup>82</sup> Section 1.13(10) defines a "material" element as one that has bearing on "(i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct."<sup>83</sup> As the Code's commentary explains, an offense's material elements therefore consist of its objective elements, which may require certain conduct, circumstances, or results.<sup>84</sup> That is consistent with section 1.13(9), which defines an "element" to mean the required conduct, circumstances, or results.<sup>85</sup>

Confusingly, though, the drafters assumed that all offense elements, including material elements, would appear only in an offense's definition. Specifically, section 1.13(9) defines "element" to mean conduct, circumstances, or results that are "included . . . in the definition of the offense."<sup>86</sup> But it is unclear from the provision's text whether an offense's definition includes its grading provisions, which may impose their own requirements for aggravating an offense. Unfortunately, the commentary for section 1.13 also fails to directly address whether offense elements may appear in grading provisions. Compounding the problem, numerous MPC offenses seem to distinguish between provisions that define offenses and provisions that

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<sup>81</sup> See, e.g., ALA. CODE § 13A-2-4(b); ALASKA STAT. § 11.81.600(b)(2); ARK. CODE ANN. § 5-2-204(c)(2); DEL. CODE ANN. tit. 11, § 251(c)(2); HAW. REV. STAT. § 702-212(2); 720 ILL. COMP. STAT. 5/4-9; KAN. STAT. ANN. § 21-5203(a), (b); KY. REV. STAT. ANN. § 501.050(2); MO. REV. STAT. § 562.026(2); MONT. CODE ANN. § 45-2-104; N.J. STAT. ANN. § 2C:2-2(c)(3); N.Y. PENAL LAW § 15.15(2); OHIO REV. CODE ANN. § 2901.21(B); OR. REV. STAT. § 161.105(1)(b); 18 PA. CONS. STAT. § 305(a)(2); TENN. CODE ANN. § 39-11-301(b); TEX. PENAL CODE ANN. § 6.02(b); UTAH CODE ANN. § 76-2-102.

<sup>82</sup> MODEL PENAL CODE § 2.02(3).

<sup>83</sup> *Id.* § 1.13(10).

<sup>84</sup> MPC COMMENTARIES, PART I, *supra* note 20, § 2.02 cmt. 1, at 229.

<sup>85</sup> MODEL PENAL CODE § 1.13(9).

<sup>86</sup> *Id.*

grade them. The latter are commonly titled “grading,” and the former are called “offense defined,” “definition,” and the like.<sup>87</sup>

But elsewhere, the commentary makes clear that section 2.02(3) does apply to grading provisions. For example, section 223.1(2) grades theft according to the stolen property’s value but without prescribing a culpability requirement. The commentary for section 223.1 explicitly states that culpability is still required as to value because it is a “material element of the offense.”<sup>88</sup> Moreover, because the offense fails to prescribe a culpability requirement, “the consequence under section 2.02(3) . . . is a minimum culpability standard of recklessness.”<sup>89</sup> Similarly, the MPC grades burglary as a more serious offense when it is committed “in the dwelling of another at night.”<sup>90</sup> The commentary confirms that section 2.02(3) applies to those elements, thus imposing a culpability requirement of recklessness.<sup>91</sup> It is unclear, however, how many states considered the MPC’s commentary when drafting their criminal codes. The official commentary was not fully published until 1985.<sup>92</sup> By that point, the

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<sup>87</sup> See, e.g., *id.* § 212.5 (criminal coercion); *id.* § 213.3 (corruption of minors and seduction); *id.* § 220.3 (criminal mischief); *id.* § 221.1 (burglary); *id.* § 222.1 (robbery); *id.* § 224.1 (forgery); *id.* § 240.2 (threats and other improper influence in official and political matters); *id.* § 241.8 (tampering with public records or information); *id.* § 242.6 (escape); *id.* § 250.2 (disorderly conduct); *id.* § 251.2 (prostitution and related offenses).

<sup>88</sup> MODEL PENAL CODE AND COMMENTARIES, PART II: DEFINITION OF SPECIFIC CRIMES, § 223.1 cmt. 3, at 144 (AM. L. INST., 1980) [hereinafter MPC COMMENTARIES, PART II] (“Since valuation is related to ‘the harm or evil . . . sought to be prevented by the law defining the offense,’ the dollar amounts that are specified in Subsections (2)(a) and (2)(b) are ‘material elements of the offense’ as that term is defined in Section 1.13(9) and (10) . . . . The culpability provisions of Section 2.02 thus are fully applicable to the values used to differentiate grades of theft.”).

<sup>89</sup> *Id.*

<sup>90</sup> MODEL PENAL CODE § 221.1(2).

<sup>91</sup> MPC COMMENTARIES, PART I, *supra* note 20, § 2.02 cmt. 6, at 246 (“Must the actor know that he is entering a dwelling house in order to be convicted of a second degree felony, or is some lesser culpability level sufficient? Section 2.02(3) should control elements of this character, and therefore recklessness should suffice in the absence of special provision to the contrary.”); MPC COMMENTARIES PART II, *supra* note 88, § 221.1 cmt. 4, at 81 (“It should be noted finally that the phrase ‘dwelling of another at night’ relates to the ‘harm or evil . . . sought to be prevented by the law defining the offense’ and is thus a ‘material element’ of the offense of burglary as that term is used in Sections 1.13(9), 1.13(10), and 2.02. The consequence is that a culpability level of recklessness is established by Section 2.02(3) for this element and that mistakes by the defendant will be governed by the general provisions of Section 2.04.”).

<sup>92</sup> Robinson & Dubber, *supra* note 17, at 327. The Special Part commentary was published in 1980, and the General Part commentary was published in 1985. *Id.*

MPC had already been adopted, at least in part, in more than thirty states.<sup>93</sup>

In any event, the MPC itself is silent about whether section 2.02(3) applies to offense elements that appear in grading provisions.<sup>94</sup> As discussed in Section II.E., numerous states have exacerbated the Code's problems by directly limiting their default culpability provisions to offense definitions. In deviating from the MPC in that way and others, states commonly permit absolute liability for serious criminal offenses. As a result, they have significantly weakened the Code's central requirement of culpability for each offense element.

## II

### DEFAULT CULPABILITY PROVISIONS IN MODEL PENAL CODE STATES

The overwhelming majority of MPC jurisdictions deviate significantly from the MPC, undermining the Code's norm of requiring recklessness for each offense element. Twenty-five states have enacted culpability provisions influenced significantly by the MPC: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Indiana, Kansas, Kentucky, Maine, Missouri, Montana, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, and Utah.<sup>95</sup> Of those

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<sup>93</sup> MPC COMMENTARIES, PART I, *supra* note 20, at xi. The Code's official commentary was largely based on the drafters' original commentary, *id.* at xli, which was written for tentative drafts of Code provisions published from 1953 to 1960, *id.* at xii. Even in some early-adopting states, then, drafters may have reviewed commentary for the Code that was substantially similar to the official commentary, but only if they had copies of the Code's tentative drafts.

<sup>94</sup> See MODEL PENAL CODE § 1.13(9) (defining "element of an offense"); *id.* § 2.02(3) (establishing default culpability of requirement of recklessness).

<sup>95</sup> See ALA. CODE §§ 13A-2-1 to -6 (2020); ALASKA STAT. §§ 11.81.600–620 (2019); ARIZ. REV. STAT. ANN. §§ 13-201 to -204 (2020); ARK. CODE ANN. §§ 5-2-201 to -206 (2020); COLO. REV. STAT. §§ 18-1-501 to -504 (2020); CONN. GEN. STAT. §§ 53a-5 to -6 (2020); DEL. CODE ANN. tit. 11, §§ 251–64 (2020); HAW. REV. STAT. §§ 702-204 to -220 (2020); 720 ILL. COMP. STAT. 5/4-3 to 4-9 (2012); IND. CODE § 35-41-2-2 (2020); KAN. STAT. ANN. §§ 21-5202 to -5204, -5207 (2020); KY. REV. STAT. ANN. §§ 501.010–070 (West 2020); ME. STAT. tit. 17-A, §§ 32–36 (2019); MO. REV. STAT. §§ 562.016–031 (2020); MONT. CODE ANN. §§ 45-2-101 to -104 (2019); N.H. REV. STAT. ANN. §§ 626:2–3 (2020); N.J. STAT. ANN. §§ 2C:2-2 to -4 (West 2020); N.Y. PENAL LAW §§ 15.00–20 (McKinney 2019); N.D. CENT. CODE §§ 12.1-02-02- to -05 (2019); OHIO REV. CODE ANN. §§ 2901.20–22 (West 2020); OR. REV. STAT. §§ 161.085–115 (2020); 18 PA. CONS. STAT. §§ 302–05 (2020); TENN. CODE ANN. §§ 39-11-301 to -302 (2020); TEX. PENAL CODE ANN. §§ 6.02–04 (West 2019); UTAH CODE ANN. §§ 76-2-102 to -104 (West 2020).

My list is the same as Professor Danyne Holley's. See *supra* note 23, at 249–53. Darryl Brown used a similar list for his survey of states that have codified some form of sections 2.02(3) and (4) of the MPC. See Brown, *supra* note 32, at 289 n.8. Professor Brown



twenty-five states, only a handful have default culpability rules that faithfully implement section 2.02(3).

MPC jurisdictions have deviated from section 2.02(3) in five principal ways. First, some MPC states still have failed to adopt a default culpability provision like section 2.02(3). Second, even among the states that have such provisions, many do not require culpability for each offense element. Third, half of the states with default culpability provisions authorize a culpability level other than recklessness. Fourth, unlike the MPC, most states provide exceptions allowing for absolute liability based on legislative intent. Finally, most jurisdictions explicitly limit their default culpability provisions to elements that appear in offense definitions, thus excluding elements in grading provisions. I conclude this Part with a summary of states' default culpability rules, ranking them from best to worst.

#### *A. States Without Default Culpability Provisions*

Nearly sixty years after the MPC's publication, most American criminal codes still lack a default culpability rule like section 2.02(3). Even among the twenty-five states with culpability provisions influenced by the MPC, three states—Connecticut, Indiana, and Maine—fail to impose culpability requirements unless they are explicitly stated.<sup>96</sup> The Connecticut Penal Code goes so far as to

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identified twenty-four states with “general principles” or “rules of construction” influenced by sections 2.02(3) and (4). *Id.* My survey differs from Professor Brown's only in including Montana. As Professor Brown noted, the Montana Criminal Code lacks a true read-in provision like section 2.02(3). *Id.* Nevertheless, Montana has enacted other culpability provisions influenced by the MPC. *See, e.g.*, MONT. CODE ANN. § 45-2-101 (defining “knowingly,” “purposely,” and “negligently”); *id.* § 45-2-103 (establishing hierarchy for culpability levels); *id.* § 45-2-104 (stating requirements for absolute liability). Most significantly for purposes of this Article, Montana generally requires at least negligence “with respect to each element described by the statute defining the offense.” *Id.* § 45-2-103(1). That requirement establishes a default culpability level of negligence even though it does not explicitly demand reading in a culpability requirement when an offense does not prescribe one.

<sup>96</sup> *See* CONN. GEN. STAT. § 53a-5; IND. CODE § 35-41-2-2; ME. STAT. tit. 17-A, § 34. New Hampshire also lacks a read-in provision similar to section 2.02(3). *See* N.H. REV. STAT. ANN. §§ 626:2–:3. But New Hampshire differs from Connecticut, Indiana, and Maine because its code requires at least negligence as to each objective element. *Id.* § 626:2(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.”). As discussed in Section II.C, New Hampshire courts have interpreted this provision as authorizing them to choose their own culpability levels when offenses fail to prescribe them. *See infra* text accompanying notes 153–55. This Article therefore treats the New Hampshire statute as a default culpability rule, even though it does not directly require courts to read in unstated culpability requirements. Finally, three states read in culpability

disclaim a default culpability requirement, stating that when a mental state is required for a particular offense element, “such mental state is ordinarily designated in the statute defining the offense.”<sup>97</sup> Similarly, the Maine Criminal Code requires culpability only “as the law defining the crime specifies.”<sup>98</sup>

Countless offenses in American criminal codes fail to explicitly state culpability requirements for offense elements.<sup>99</sup> Because only a minority of states have enacted a provision like section 2.02(3), most American courts interpret a statute’s silence about culpability to authorize absolute liability. Hence, most states have yet to fully embrace the MPC’s norm of requiring at least recklessness for each offense element.

### *B. States Fail to Require Culpability for Each Offense Element*

Even among the twenty-two states with default culpability rules influenced by section 2.02(3),<sup>100</sup> almost half fail to generally require culpability for each offense element. States have generally deviated from the MPC in two ways.

First, several states’ default culpability provisions apply only when an offense fails to require any culpability at all. Under section 2.02(3), a culpability level of recklessness applies “[w]hen the culpability sufficient to establish a material element of an offense is not prescribed by law.”<sup>101</sup> Section 2.02(3) thus helps to enforce section 2.02(1), which generally requires culpability for each material element of the

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requirements only for certain classes of offenses. *See* ALASKA STAT. § 11.81.640 (limiting culpability provisions to offenses in the criminal code); KY. REV. STAT. ANN. § 501.050(1) (permitting absolute liability for misdemeanors when the applicable statute does not mention a “culpable mental state”); N.D. CENT. CODE § 12.1-02-02(1) (limiting culpability provisions to offenses in the criminal code).

<sup>97</sup> CONN. GEN. STAT. § 53a-5.

<sup>98</sup> ME. STAT. tit. 17-A, § 34(1).

<sup>99</sup> Darryl K. Brown, *Strict Liability in the Shadow of Juries*, 67 SMU L. REV. 525, 525 (2014).

<sup>100</sup> *See* ALA. CODE § 13A-2-4(b); ALASKA STAT. § 11.81.610(b); ARIZ. REV. STAT. ANN. § 13-202(B); ARK. CODE ANN. § 5-2-203(b); COLO. REV. STAT. § 18-1-503(2); DEL. CODE ANN. tit. 11, § 251(b); HAW. REV. STAT. § 702-204; 720 ILL. COMP. STAT. 5/4-3(b); KAN. STAT. ANN. § 21-5202(b); KY. REV. STAT. ANN. § 501.040; MO. REV. STAT. § 562.021(3); MONT. CODE ANN. § 45-2-103(1); N.H. REV. STAT. ANN. § 626:2(1); N.J. STAT. ANN. § 2C:2-2(c)(3); N.Y. PENAL LAW § 15.15(2); N.D. CENT. CODE § 12.1-02-02(2); OHIO REV. CODE ANN. § 2901.21(C)(1); OR. REV. STAT. § 161.115(2); 18 PA. CONS. STAT. § 302(c); TENN. CODE ANN. § 39-11-301(c); TEX. PENAL CODE ANN. § 6.02(b); UTAH CODE ANN. § 76-2-102.

<sup>101</sup> MODEL PENAL CODE § 2.02(3) (AM. L. INST., Proposed Official Draft 1962).

offense.<sup>102</sup> In contrast, at least five states read in culpability requirements only when criminal offenses are completely silent about culpability. For example, Texas and Utah read in culpability requirements when an offense definition fails to prescribe “a culpable mental state.”<sup>103</sup> Similarly, Arizona establishes a default of absolute liability—rather than recklessness—when an offense “does not expressly prescribe a culpable mental state that is sufficient for commission of the offense.”<sup>104</sup> Kansas and Missouri go even further, explicitly providing that a stated culpability requirement “shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element.”<sup>105</sup> Significantly, all five states have failed to adopt section 2.02(1).<sup>106</sup>

Second, several states read in a culpability requirement when an offense or element “necessarily involves” a mental state. Colorado’s provision is typical, providing that “a culpable mental state may . . . be required for the commission of th[e] offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such mental state.”<sup>107</sup> Alabama, Arizona,

<sup>102</sup> *Id.* § 2.02(1).

<sup>103</sup> TEX. PENAL CODE ANN. § 6.02(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.”); UTAH CODE ANN. § 76-2-102 (“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.”). Arkansas’s default culpability provision has similar language. *See* ARK. CODE ANN. § 5-2-203(b) (reading in recklessness when an offense definition does not include a culpable mental state). But elsewhere, the Arkansas Criminal Code makes clear that culpability is ordinarily required for each offense element. *See id.* § 5-2-204(c) (requiring clear legislative intent for culpability to not be required for an element).

<sup>104</sup> ARIZ. REV. STAT. ANN. § 13-202(B) (“[Absolute liability applies when] a statute defining an offense does not expressly prescribe a culpable mental state that is sufficient for commission of the offense.”).

<sup>105</sup> KAN. STAT. ANN. § 21-5202(g); MO. REV. STAT. § 562.021(2).

<sup>106</sup> *See* ARIZ. REV. STAT. ANN. § 13-202; KAN. STAT. ANN. § 21-5202; MO. REV. STAT. § 562.021; UTAH CODE ANN. § 76-2-102. Texas has a provision that is analogous to section 2.02(1), but it provides that an offense need only require some culpability, rather than culpability for each offense element. *See* TEX. PENAL CODE ANN. § 6.02(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.”). Arkansas also lacks a provision like section 2.02(1). Additionally, its default culpability provision seems to apply only when an offense fails to prescribe any culpability at all. *See* ARK. CODE ANN. § 5-2-203(b). Elsewhere, however, the Arkansas Criminal Code makes clear that culpability is ordinarily required for each offense element. *See id.* § 5-2-204(c).

<sup>107</sup> COLO. REV. STAT. § 18-1-503(2) (2020).

Kentucky, New Jersey, and New York use nearly identical language.<sup>108</sup> The requirement seems to have originated in New York, which was the first of the six states to enact a new criminal code influenced by the MPC.<sup>109</sup> New York's provision was criticized as early as 1964 on the grounds that it was unclear when an offense or element necessarily involved a culpable mental state.<sup>110</sup> More than half a century later, the requirement remains confusing.

Complicating matters further, states have different approaches to incorporating the “necessarily involved” standard into their culpability schemes. In Arizona and Colorado, courts read in a mental state only if it is necessarily involved in an offense; hence, if a mental state is not necessarily involved, the offense imposes absolute liability.<sup>111</sup> The remaining four states depart from the MPC by reading in a mental state that is necessarily involved in an offense, but they still ostensibly require culpability for each offense element.<sup>112</sup> In such jurisdictions, it is unclear what purpose, if any, the “necessarily involved” standard should have. After all, if a code truly demands culpability for each offense element, there is no need to also require culpability for an element that necessarily involves a mental state. The requirement has

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<sup>108</sup> See ALA. CODE § 13A-2-4(b) (2020); ARIZ. REV. STAT. ANN. § 13-202(B); KY. REV. STAT. ANN. § 501.040 (West 2020); N.J. STAT. ANN. § 2C:2-2(c)(3) (West 2020); N.Y. PENAL LAW § 15.15(2) (McKinney 2019). Additionally, Ohio authorizes courts to read in a culpability requirement for “an element of an offense that is related to knowledge or intent or to which mens rea could fairly be applied.” OHIO REV. CODE ANN. § 2901.21(C)(1) (West 2020). No other state uses similar language, and the standard may be even more confusing than the “necessarily involved” standard. For example, it is unclear what it means for an offense element to be “related to knowledge or intent” even though neither culpability requirement is prescribed. Similarly, the Ohio provision is vague in permitting courts to read in culpability requirements that can “fairly be applied.”

<sup>109</sup> See Robinson & Dubber, *supra* note 17, at 326. The New York Penal Law became effective in 1967. *Id.*

<sup>110</sup> Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469, 1483 (1964) (“[For many offenses] it is not clear whether a culpable mental state is necessarily involved, and, if so, whether the crime must be committed intentionally, knowingly, recklessly or with criminal negligence.”).

<sup>111</sup> ARIZ. REV. STAT. ANN. § 13-202(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.”); COLO. REV. STAT. § 18-1-503(1) (providing that a required mental state “is ordinarily designated” by a statute’s use of culpability terms).

<sup>112</sup> See ALA. CODE § 13A-2-4(b) (providing that an offense definition generally “states a crime of mental culpability”); KY. REV. STAT. ANN. § 501.030(2) (generally requiring culpability for each element of the offense); N.J. STAT. ANN. § 2C:2-2(a) (generally requiring culpability for each material element of the offense); N.Y. PENAL LAW § 15.15(2) (providing that an offense definition generally states a crime of mental culpability).

meaning, however, if culpability is ordinarily not needed for all offense elements.

Predictably, courts often fail to read in culpability requirements when default culpability provisions weaken the MPC's norm of requiring culpability for each offense element. The Kansas Criminal Code, for instance, lacks a provision like section 2.02(1), and it fails to read in culpability requirements when an offense prescribes a culpable mental state for some elements but not others.<sup>113</sup> In *State v. White*, the Kansas Court of Appeals interpreted a statute defining aggravated burglary as “without authority, entering into or remaining within any building . . . in which there is a human being with intent to commit a felony, theft or sexually motivated crime therein.”<sup>114</sup> The defendant argued that the offense required culpability as to whether she lacked authority to enter the building at issue: a retail store she was banned from entering.<sup>115</sup> The court rejected the defendant's argument, holding that aggravated burglary did not require any culpability other than “intent to commit a felony, theft or sexually motivated crime.”<sup>116</sup> Addressing the state's default culpability provision, the court observed that an offense need only require “some culpable mental state,” rather than culpability for “every element of an offense.”<sup>117</sup> Hence, the jury did not need to be instructed on the defendant's culpability as to her authority to enter the store,<sup>118</sup> despite significant evidence she did not know she was banned from entering.<sup>119</sup>

Additionally, courts in some states have imposed absolute liability because offenses did not necessarily involve culpable mental states. In *State v. Gomez*, the Arizona Court of Appeals refused to read a culpability requirement into the offense of aggravated driving under the

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<sup>113</sup> KAN. STAT. ANN. § 21-5202(g) (2020).

<sup>114</sup> *State v. White*, No. 112,939, 2016 WL 1169435, at \*4, 367 P.3d 1284 (Kan. Ct. App. Mar. 25, 2016) (per curiam) (unpublished table decision) (quoting KAN. STAT. ANN. § 21-5807(b)). The court's decision is unpublished, but it highlights a critical flaw of Kansas's default culpability provision. Unfortunately for the defendant, the court applied the statute correctly.

<sup>115</sup> *Id.* at \*1.

<sup>116</sup> *Id.* at \*6.

<sup>117</sup> *Id.* at \*5.

<sup>118</sup> *Id.* at \*6.

<sup>119</sup> *Id.* at \*2. The defendant was banned from the store after an earlier incident in which she was accused of stealing goods. *Id.* at \*1. A store employee presented the defendant with a form explaining the ban's terms. *Id.* The defendant then signed the form without reading it. *Id.* At trial, the defendant testified that she could not read the form but believed that it was just a warning because the effective date had been left blank. *Id.* at \*2. The defendant also testified that she requested a copy of the form from the store but never received one. *Id.*

influence.<sup>120</sup> The defendant had been convicted for driving while intoxicated with “a person under fifteen years of age . . . in the vehicle.”<sup>121</sup> Affirming the defendant’s conviction, the appeals court held that the offense did not necessarily involve any culpability as to the passenger’s age.<sup>122</sup> Perplexingly, the court used the defendant’s ignorance about the passenger’s age against him, stating that “there was no evidence to suggest he necessarily knew she was only 14” and “not everyone who transports a child ‘necessarily’ knows whether the child is younger than 15.”<sup>123</sup> The court’s reasoning suggests that it is appropriate to read a culpability requirement into an offense only when it is impossible to commit a crime without that mental state. Such a restricted reading robs Arizona’s default culpability provision of any real meaning.

Courts in other states interpret the “necessarily involved” standard differently but usually still in ways that condone absolute liability.<sup>124</sup> For example, Colorado inquires whether an offense “implies” a particular mental state.<sup>125</sup> To determine whether a culpable mental state is necessarily involved in an offense, Colorado courts thus “examine the statute in context with other statutory provisions and seek to further the legislative intent represented by the statutory scheme.”<sup>126</sup> Applying that approach, the Colorado Supreme Court has held that a defendant must knowingly commit the act of contributing to the

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<sup>120</sup> *State v. Gomez*, 437 P.3d 896, 899 (Ariz. Ct. App. 2019).

<sup>121</sup> *Id.* at 897 (quoting ARIZ. REV. STAT. ANN. § 28-1383(A)(3) (2020)).

<sup>122</sup> *Id.* at 898.

<sup>123</sup> *Id.*

<sup>124</sup> New Jersey appears to be an outlier among states that have adopted the “necessarily involved” standard. New Jersey’s default culpability provision requires reading in “a culpable mental state” for an element when “the proscribed conduct necessarily involves such culpable mental state.” N.J. STAT. ANN. § 2C:2-2(c)(3) (West 2020). But the very next sentence then states that, in the absence of clear legislative intent to impose absolute liability, an offense should be interpreted to require knowledge. *Id.* Similarly, New Jersey generally requires culpability “with respect to each material element of the offense.” *Id.* § 2C:2-2(a). As discussed earlier, it is unclear what purpose the “necessarily involved” standard should have if culpability is generally required for each offense element. *See supra* text accompanying note 93. New Jersey courts have resolved the statute’s ambiguity by diluting the requirement that an offense necessarily involve knowledge. *E.g.*, *State v. Sewell*, 603 A.2d 21 (N.J. 1992). For example, the New Jersey Supreme Court has stated that knowledge is generally required for each element and “[t]hat culpable mental state is the specific culpable mental state ‘necessarily involved’ in the ‘proscribed conduct.’” *Id.* at 23.

<sup>125</sup> *People v. Manzo*, 144 P.3d 551, 556 (Colo. 2006); *Gorman v. People*, 19 P.3d 662, 665 (Colo. 2000).

<sup>126</sup> *Manzo*, 144 P.3d at 556.

delinquency of a minor,<sup>127</sup> but no culpability is required for the victim's age because "[t]he statute's purpose is the protection of minors."<sup>128</sup> In contrast, the MPC does not consider an offense's purpose at all in determining its culpability requirements, much less a purpose so broad.

Finally, in at least two states, courts have given meaning to the "necessarily involved" standard by devaluing their codes' general requirements of culpability for each offense element.<sup>129</sup> In *Saxton v. Commonwealth*, for example, the Kentucky Supreme Court examined a statute that criminalized selling a controlled substance within 1,000 yards of a school.<sup>130</sup> Such statutes are common, and this Article discusses several cases interpreting similar offenses because they often raise issues about what culpability, if any, is required as to proximity. Significantly, the Kentucky Penal Code ordinarily requires acting culpably "with respect to each element of the offense."<sup>131</sup> In *Saxton*, the court declined to apply that requirement, in part because Kentucky's default culpability provision applies where "the proscribed conduct necessarily involves such culpable mental state."<sup>132</sup> Reading the provision's language extremely narrowly, the court reasoned that proximity to a school was not conduct, but rather "a circumstance that can lead to harsher punishment."<sup>133</sup> Similarly, the New York Penal Code generally requires culpability "with respect to every material

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<sup>127</sup> *Gorman*, 19 P.3d at 665 (citing *People v. Trevino*, 826 P.2d 399, 402 (Colo. 1992)).

<sup>128</sup> *Id.* at 667. Similarly, in *People v. Manzo*, the Colorado Supreme Court imposed absolute liability for an aggravated form of leaving the scene of an accident. 144 P.3d at 557. The court reasoned that imposing absolute liability better advanced the legislative purpose of promoting safe driving. *Id.* at 556–57. In general, then, Colorado courts have used the "necessarily involved" standard to weaken the state's default culpability provision.

<sup>129</sup> It should be noted that Alabama law is unclear in this area. Alabama's default culpability provision authorizes courts to read in "an appropriate culpable mental state" for an element when "the proscribed conduct necessarily involves such culpable mental state." ALA. CODE § 13A-2-4(b) (2020). But the provision also states that an offense generally defines "a crime of mental culpability," *id.*, meaning that culpability is required for each element, *id.* § 13A-2-3. Alabama courts have not directly addressed the meaning of the phrase "necessarily involved," leaving the phrase unclear.

<sup>130</sup> *Saxton v. Commonwealth*, 315 S.W.3d 293 (Ky. 2010). The statute has since been amended to aggravate the offense for drug sales within 1,000 feet of a school. *See* KY. REV. STAT. ANN. § 218A.1411(1) (West 2020).

<sup>131</sup> KY. REV. STAT. ANN. § 501.030(2).

<sup>132</sup> *Saxton*, 315 S.W.3d at 299 (quoting KY. REV. STAT. ANN. § 501.040).

<sup>133</sup> *Id.*

element of an offense.”<sup>134</sup> Yet, at least on the trial court level, that requirement sometimes yields to New York’s demand that an unstated culpability requirement must be necessarily involved in the offense.<sup>135</sup> Hence, like Kentucky, New York sometimes imposes absolute liability where the MPC would not.

In sum, a significant number of MPC jurisdictions fail to require culpability for each offense element. In permitting absolute liability, such states have significantly weakened both the MPC’s read-in provision and its culpability scheme.

### C. States Read in Culpability Levels Other than Recklessness

When MPC states do read an unstated culpability requirement into a criminal offense, half of them authorize culpability levels other than recklessness.<sup>136</sup> Six states specify a different default culpability level in their criminal codes. On one end of the spectrum, Kentucky, Montana, New York, and Oregon permit courts to read in a requirement of negligence,<sup>137</sup> meaning that an actor may be held liable for merely failing to be aware of a risk that an offense element existed.<sup>138</sup> Approaching the other extreme, Missouri and New Jersey elevate the

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<sup>134</sup> New York generally requires construing an offense “as defining a crime of mental culpability.” N.Y. PENAL LAW § 15.15(2) (McKinney 2019). An offense defines a crime of “mental culpability” if it requires culpability for each material element. *Id.* § 15.10.

<sup>135</sup> For example, in *People v. Patterson*, 708 N.Y.S.2d 815, 821 (N.Y. Crim. Ct. 2000), the defendant moved to dismiss because the criminal complaint did not allege that he acted knowingly or intentionally in failing to register as a sex offender. The court held that the offense imposed strict liability. *Id.* at 825. It reasoned, in part, that the offense did not necessarily involve culpability because it was “easy to imagine any number of circumstances where a defendant might fail to register as a Sex Offender without consciously intending to violate the law.” *Id.* at 822. The court’s reasoning thus suggests that an offense necessarily involves a mental state only if the defendant’s conduct is highly corroborative of the required culpability. *See id.* That interpretation severely limits the read-in provision in a way that makes it all but useless for defendants who commit crimes unwittingly.

<sup>136</sup> Only eleven states follow the MPC in establishing recklessness as the default culpability level. *See* ALASKA STAT. § 11.81.610(b) (2019); ARK. CODE ANN. § 5-2-203(b) (2020); DEL. CODE ANN. tit. 11, § 251(b) (2020); HAW. REV. STAT. § 702-204 (2020); KAN. STAT. ANN. § 21-5202(b) (2020); N.D. CENT. CODE § 12.1-02-02(2) (2019) (using “willfully” in place of “recklessly”); OHIO REV. CODE ANN. § 2901.21(C)(1) (West 2020); 18 PA. CONS. STAT. § 302(c) (2020); TENN. CODE ANN. § 39-11-301(c) (2020); TEX. PENAL CODE ANN. § 6.02(b) (West 2019); UTAH CODE ANN. § 76-2-102 (West 2020).

<sup>137</sup> KY. REV. STAT. ANN. §§ 501.010(1)–.040 (requiring negligence but calling it “recklessness”); MONT. CODE ANN. § 45-2-103(1) (2019); N.Y. PENAL LAW § 15.15(2); OR. REV. STAT. § 161.115(2) (2020).

<sup>138</sup> KY. REV. STAT. ANN. § 501.020(4) (defining “recklessly” to mean negligence); MONT. CODE ANN. § 45-2-103(1) (defining “negligently” to include both recklessness and negligence); N.Y. PENAL LAW § 15.15(2); OR. REV. STAT. § 161.115(2).



required culpability all the way to knowledge.<sup>139</sup> Therefore, in both states, an actor must be aware of the nature of his or her conduct, know of the attendant circumstances, and be practically certain of the offense's results.<sup>140</sup> For example, the Missouri Supreme Court has required knowledge for the offense of distributing a controlled substance near government-assisted housing, meaning that a defendant must know he or she is within 1,000 feet of public housing to commit the offense.<sup>141</sup> In contrast, the MPC's recklessness requirement would impose liability for anyone who culpably disregards a risk that public housing is nearby.

Even more problematically, courts in at least five states can choose the required mental state when an offense does not prescribe one. In New Hampshire and Illinois, courts choose the required culpability because of problems peculiar to their criminal codes. New Hampshire's criminal code lacks a true read-in provision,<sup>142</sup> and Illinois's default culpability provision merely requires courts to read in any of the three culpability levels starting at recklessness.<sup>143</sup> In three other states, courts choose their own culpability requirements because their codes read in only mental states that are necessarily involved in offenses. Colorado authorizes courts to read in "a culpable mental state" if an offense "necessarily involves such a culpable mental state."<sup>144</sup> Likewise, Arizona provides that an offense without express culpability requirements "is [ordinarily] one of strict liability unless the proscribed

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<sup>139</sup> MO. REV. STAT. § 562.021(3) (2020); N.J. STAT. ANN. § 2C:2-2(c)(3) (West 2020).

<sup>140</sup> MO. REV. STAT. § 562.016(3); N.J. STAT. ANN. § 2C:2-2(b)(1).

<sup>141</sup> *State v. Minner*, 256 S.W.3d 92, 95 (Mo. 2008). Since the Missouri Supreme Court's decision, the statute has been moved and revised. *See* MO. REV. STAT. § 579.030.

<sup>142</sup> *See* N.H. REV. STAT. ANN. § 626:2 (2020). Nevertheless, New Hampshire does require a defendant to act "purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." *Id.* § 626:2(I).

<sup>143</sup> 720 ILL. COMP. STAT. 5/4-3(b) (2012). The Illinois Criminal Code also lacks a provision like section 2.02(5) of the MPC. Section 2.02(5) establishes a hierarchy among the Code's four culpable mental states, such that proof of a more culpable mental state will satisfy an offense's requirement of a less serious one. *See* MODEL PENAL CODE § 2.02(5) (AM. L. INST., Proposed Official Draft 1962). In the absence of such a provision, Illinois courts perceive knowledge and recklessness as being mutually exclusive, rather than hierarchical. *See, e.g.,* *People v. Fornear*, 680 N.E.2d 1383, 1387 (Ill. 1997) (reversing, as legally inconsistent, convictions for multiple offenses where one required knowledge and another required recklessness); *People v. Washington*, 141 N.E.3d 777, 784 (Ill. App. Ct. 2019) ("When the jury returns multiple guilty verdicts on knowing and reckless offenses for the same conduct, the verdicts are legally inconsistent, and the defendant is entitled to a new trial."). Such confusion may also lead Illinois courts to choose their own culpability requirements.

<sup>144</sup> COLO. REV. STAT. § 18-1-503(2) (2020).

conduct necessarily involves a culpable mental state.”<sup>145</sup> Finally, Alabama’s default culpability provision vaguely directs courts to require “an appropriate culpable mental state.”<sup>146</sup>

When permitted to choose the required culpability, courts select a variety of mental states using a variety of rationales. In Alabama, courts typically read in the lowest culpability level permitted by the offense, typically negligence.<sup>147</sup> At least one court, however, has suggested that the appropriate mental state might depend “on the facts of each case.”<sup>148</sup> In contrast, the Arizona Court of Appeals recently relied on the common law in holding that the offense of organized retail theft requires intent to deprive.<sup>149</sup> The court concluded that the offense necessarily involves an intent to deprive because larceny required it at common law.<sup>150</sup> And in Colorado, courts have sometimes relied on questionable indicia of legislative intent to determine whether an offense necessarily involves a mental state. In *People v. Hickman*, for instance, the Colorado Supreme Court read a culpability requirement of specific intent into a witness-retaliation statute even though the legislature had recently deleted the word “intentionally” from the offense definition.<sup>151</sup> The court ultimately relied on more attenuated evidence of legislative intent, such as the offense’s location in the Colorado statutes, vague testimony from a committee hearing about the

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<sup>145</sup> ARIZ. REV. STAT. ANN. § 13-202(B) (2020).

<sup>146</sup> ALA. CODE § 13A-2-4(b) (2020). Kentucky, New Jersey, and New York also read in mental states that are necessarily involved in offenses, and Ohio has a similar standard. *See supra* note 108 and accompanying text. This discussion does not address these four states because their default culpability provisions prescribe specific mental states. *See* KY. REV. STAT. ANN. §§ 501.010(1)–.040 (West 2020) (requiring negligence but calling it “recklessness”); N.J. STAT. ANN. § 2C:2-2(c)(3) (West 2020) (requiring knowledge); N.Y. PENAL LAW § 15.15(2) (McKinney 2019) (requiring negligence); OHIO REV. CODE ANN. § 2901.21(C)(1) (West 2020) (requiring recklessness).

<sup>147</sup> *See, e.g.*, *State v. Turner*, 96 So. 3d 876, 882 (Ala. Crim. App. 2011) (“Section 36-25-5(a) does not exclude any of those mental states; thus, the offense of using an official position or office for personal gain may be committed intentionally, knowingly, recklessly, or as the result of criminal negligence.”); *Sullens v. State*, 878 So. 2d 1216, 1222 (Ala. Crim. App. 2003) (“[W]e interpret the fact that the statute does not specifically *exclude* any states of mental culpability to be an indication of the Legislature’s intent to *include* any of the states of mental culpability . . .”).

<sup>148</sup> *Scott v. State*, 917 So. 2d 159, 173 (Ala. Crim. App. 2005) (discussing offense of displaying genitals for entertainment purposes).

<sup>149</sup> *State v. Veloz*, 342 P.3d 1272, 1276 (Ariz. Ct. App. 2015).

<sup>150</sup> *Id.*

<sup>151</sup> *People v. Hickman*, 988 P.2d 628, 644 (Colo. 1999) (“Even though the legislature deleted the word ‘intentionally’ from the statute, the statute nonetheless requires intentional conduct.”).

amendment, and the offense’s use of the terms “retribution” and “retaliation.”<sup>152</sup>

New Hampshire and Illinois courts also use various reasoning to impose culpability requirements that differ from one offense to another. New Hampshire reads in a culpability level that is “appropriate in light of the nature of the offense and the policy considerations for punishing the conduct in question.”<sup>153</sup> That standard typically requires the court to consider an offense’s culpability requirements at common law.<sup>154</sup> If an offense did not exist at common law, New Hampshire courts attempt to ascertain legislative intent based on legislative history.<sup>155</sup> Illinois courts sometimes also purport to effectuate legislative intent when choosing mental states.<sup>156</sup> In other instances, Illinois courts emphasize the legislature’s silence about culpability and then proceed to select their own mental states, sometimes without explanation.<sup>157</sup> Illinois courts have read in both recklessness and knowledge,<sup>158</sup> and New Hampshire courts have required negligence, knowledge, and purpose<sup>159</sup>—that is, everything but recklessness.

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<sup>152</sup> *Id.* at 644–46.

<sup>153</sup> *State v. Mandatory Poster Agency, Inc.*, 126 A.3d 844, 847 (N.H. 2015) (quoting *State v. Rollins-Ercolino*, 821 A.2d 953, 956 (N.H. 2003)) (quotation omitted in original).

<sup>154</sup> *See, e.g., Mandatory Poster*, 126 A.3d at 847; *State v. Bergen*, 677 A.2d 145, 146 (N.H. 1996); *State v. Ayer*, 612 A.2d 923, 925 (N.H. 1992).

<sup>155</sup> *Mandatory Poster*, 126 A.3d at 847; *Rollins-Ercolino*, 821 A.2d at 956.

<sup>156</sup> *See, e.g., People v. Sevilla*, 547 N.E.2d 117, 121 (Ill. 1989) (“In determining which mental state element is implied under the Act, we find it instructive to examine the language of the statute, as well as the language of any parallel statute.”).

<sup>157</sup> *See, e.g., People v. Gean*, 573 N.E.2d 818, 822 (Ill. 1991) (“According to the Illinois Criminal Code, when a statute neither prescribes a particular mental state nor creates an absolute liability offense, then either intent, knowledge or recklessness applies. In the case at bar, we believe knowledge is the appropriate mental element.”) (citation omitted); *People v. Terrell*, 547 N.E.2d 145, 158 (Ill. 1989) (“[T]he legislature clearly did not intend the aggravated criminal sexual assault statute to define a strict liability or public welfare offense. Accordingly, a mental state of either intent or knowledge implicitly is required for sexual penetration to occur.”) (citation omitted).

<sup>158</sup> *See, e.g., People v. Witherspoon*, 129 N.E.3d 1208, 1215 (Ill. 2019) (requiring knowledge for home invasion); *People v. Anderson*, 591 N.E.2d 461, 465 (Ill. 1992) (requiring recklessness for hazing); *Gean*, 573 N.E.2d at 822 (requiring knowledge for “chop shop” offenses); *Terrell*, 547 N.E.2d at 158 (requiring knowledge for aggravated criminal sexual assault); *Sevilla*, 547 N.E.2d at 122 (requiring knowledge for failing to file a tax return); *People v. Stanley*, 921 N.E.2d 445, 453 (Ill. App. Ct. 2009) (requiring knowledge for possession of a defaced firearm but imposing absolute liability as to the weapon’s character).

<sup>159</sup> *See, e.g., Mandatory Poster*, 126 A.3d at 849 (requiring purpose for criminal violations of the New Hampshire Consumer Protection Act); *Rollins-Ercolino*, 821 A.2d at 958 (requiring negligence for vehicular assault); *Bergen*, 677 A.2d at 147 (requiring knowledge for indecent exposure and lewdness); *Ayer*, 612 A.2d at 925 (requiring

When a criminal code fails to explain how to interpret offenses' culpability requirements, courts are forced to devise principles of their own. The resulting law often varies from one offense to another, and thus there is little rhyme or reason to offenses' basic requirements. In some cases, such inconsistency can affect prosecutors—and even the public—as it becomes difficult to ascertain what is and is not lawful. To provide guidance to courts and promote uniformity between offenses, criminal codes must establish true default culpability requirements. Moreover, as discussed earlier in Section I.B., recklessness is the best default culpability level because it punishes sufficiently blameworthy conduct without requiring prosecutors to prove too much. In departing from that standard, many states have undermined the MPC's culpability scheme.

#### *D. States Permit Absolute Liability Based on Legislative Intent*

In contrast to the MPC,<sup>160</sup> adopting states have been extremely tolerant of absolute liability, even permitting it for serious offenses in their criminal codes.<sup>161</sup> Most state criminal codes therefore deviate from the MPC by providing exceptions to their default culpability provisions. The most common exception is for statutes showing legislative intent to impose absolute liability. A dozen states recognize legislative-intent exceptions—even for offenses in their criminal codes.<sup>162</sup> An additional six states permit absolute liability based on legislative intent for offenses outside their codes.<sup>163</sup> Unlike the MPC, those states generally treat such non-Code offenses as crimes.

In nearly every state with a legislative-intent exception, absolute liability is permitted when a statute “clearly” or “plainly” indicates

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knowledge for aggravated sexual assault); *State v. Aldrich*, 466 A.2d 938, 941 (N.H. 1983) (requiring knowledge for escape).

<sup>160</sup> See, e.g., MODEL PENAL CODE § 2.02(3) (AM. L. INST., Proposed Official Draft 1962).

<sup>161</sup> See *supra* note 76.

<sup>162</sup> ALA. CODE § 13A-2-4(b) (2020); ALASKA STAT. § 11.81.600(b)(2) (2019); 720 ILL. COMP. STAT. 5/4-9 (2012); KAN. STAT. ANN. § 21-5203(a), (b) (2020); MO. REV. STAT. § 562.026(2) (2020); MONT. CODE ANN. § 45-2-104 (2019); N.J. STAT. ANN. § 2C:2-2(c)(3) (West 2020); N.Y. PENAL LAW § 15.15(2) (McKinney 2019); OHIO REV. CODE ANN. § 2901.21(B) (West 2020); TENN. CODE ANN. § 39-11-301(b) (2020); TEX. PENAL CODE ANN. § 6.02(b) (West 2019); UTAH CODE ANN. § 76-2-102 (West 2020). Additionally, Colorado courts consider legislative intent to determine whether an offense necessarily involves a mental state. See *supra* notes 125–28 and accompanying text.

<sup>163</sup> ARK. CODE ANN. § 5-2-204(c)(2) (2020); DEL. CODE ANN. tit. 11, § 251(c)(2) (2020); HAW. REV. STAT. § 702-212(2) (2020); KY. REV. STAT. ANN. § 501.050(2) (West 2020); OR. REV. STAT. § 161.105(1)(b) (2020); 18 PA. CONS. STAT. § 305(a)(2) (2020).

legislative intent to impose strict liability.<sup>164</sup> That standard is substantially similar to section 2.05 of the MPC, which allows absolute liability for non-Code offenses when “a legislative purpose to impose absolute liability . . . plainly appears.”<sup>165</sup> Significantly, the MPC’s drafters declined to clarify when a legislative purpose plainly appears.<sup>166</sup> Instead, the drafters explicitly left that determination “to the judgment of the courts.”<sup>167</sup> Similarly, in permitting absolute liability when legislatures clearly or plainly intend to impose absolute liability, MPC states have largely deferred to courts’ judgments about offenses’ culpability requirements.

All courts have their own standards for ascertaining legislative intent, which is a notoriously slippery concept.<sup>168</sup> The problem is that there is rarely conclusive evidence of what a legislature intended. Indeed, courts can find legislative intent based on various indicia, including a statute’s language, its structure, its apparent or stated purpose, and its legislative history.<sup>169</sup> Given the number of possible authorities and arguments, a court can easily find evidence to support nearly any interpretation of a legislature’s intent for a given statute.<sup>170</sup>

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<sup>164</sup> ALA. CODE § 13A-2-4(b) (“clearly indicating”); ARK. CODE ANN. § 5-2-204(c)(2) (“clearly indicates”); DEL. CODE ANN. tit. 11, § 251(c)(2) (“plainly appears”); HAW. REV. STAT. § 702-212(2) (“plainly appears”); 720 ILL. COMP. STAT. 5/4-9 (“clearly indicates”); KAN. STAT. ANN. § 21-5203(a), (b) (“clearly indicates”); KY. REV. STAT. ANN. § 501.050(2) (“clearly indicates”); MO. REV. STAT. § 562.026(2) (“clearly inconsistent” or “may lead to an absurd or unjust result”); MONT. CODE ANN. § 45-2-104 (“clearly indicates”); N.J. STAT. ANN. § 2C:2-2(c)(3) (“clearly indicates”); N.Y. PENAL LAW § 15.15(2) (“clearly indicates”); OHIO REV. CODE ANN. § 2901.21(B) (“plainly indicates”); OR. REV. STAT. § 161.115 (“clearly indicates”); 18 PA. CONS. STAT. § 305(a)(2) (“plainly appears”); TEX. PENAL CODE ANN. § 6.02(b) (“plainly dispenses”); UTAH CODE ANN. § 76-2-102 (“clearly indicates”). Alaska uses an even more relaxed standard, permitting absolute liability whenever legislative intent “is present.” ALASKA STAT. § 11.81.600(b)(2).

<sup>165</sup> MODEL PENAL CODE § 2.05(1)(b) (AM. L. INST., Proposed Official Draft 1962).

<sup>166</sup> MPC COMMENTARIES, PART I, *supra* note 20, § 2.05 cmt. 3, at 294.

<sup>167</sup> *Id.* The commentary concludes that “the . . . requirement that such a purpose ‘plainly appears’ goes as far as it is wise to go.” *Id.* The drafters suggested that requirement might be satisfied by “either a settled interpretation or an explicit statement in the statute.” *Id.*

<sup>168</sup> Many question whether legislative intent even exists. For example, Judge Frank Easterbrook has argued that legislatures, as bodies, cannot possibly have collective intents. Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (“Because legislatures comprise many members, they do not have ‘intents’ or ‘designs,’ hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes.”).

<sup>169</sup> See 2A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45:5 (7th ed. 2008).

<sup>170</sup> Frank B. Cross, *The Significance of Statutory Interpretation Methodologies*, 82 NOTRE DAME L. REV. 1971, 1975 (2007). As discussed earlier, Colorado courts have used questionable evidence of legislative intent in choosing the appropriate culpable level for

As a result, legislative-intent exceptions threaten to undermine the Code's norm of requiring culpability for each offense element, especially in the many jurisdictions that are willing to impose absolute liability for serious criminal offenses.<sup>171</sup>

Unsurprisingly, courts in MPC states have developed several different standards for determining whether statutes indicate legislative intent to impose absolute liability. In a few states, courts have emphasized, correctly, that such legislative intent must be clear or plain. For example, the Missouri Supreme Court requires that legislative intent to dispense with a culpability requirement be "clearly apparent."<sup>172</sup> The Hawai'i Supreme Court imposes an even stricter standard, requiring legislative intent to be evinced through either "express" statutory language or "unequivocal" legislative history.<sup>173</sup> Similarly, Utah permits absolute liability only when an offense "specifically states" that culpability is not required.<sup>174</sup> The Utah Supreme Court has also observed that the state's default culpability provision "is not merely a canon of interpretation or a non-binding suggestion," and the provision does not permit mere "educated guesswork based upon inferences drawn from the language of a criminal offense."<sup>175</sup> That admonition is in keeping with the MPC's commentary, which states that a legislative purpose to impose absolute liability "should not be discerned lightly."<sup>176</sup>

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offenses that "necessarily involve" mental states. *See supra* notes 151–52 and accompanying text.

<sup>171</sup> Out of the twenty-five states with culpability provisions significantly influenced by the MPC, seventeen authorize absolute liability for criminal offenses in their criminal codes. *See* sources cited *supra* note 76.

<sup>172</sup> *State v. Self*, 155 S.W.3d 756, 762 (Mo. 2005) (en banc). In *Self*, the court interpreted a statute mandating school attendance to require a parent's culpability in causing her child to miss school. *Id.* at 758. The court concluded that there was no evidence that the legislature intended to impose absolute liability. *Id.* at 762. Rather, the court reasoned, "the necessity of proof of some level of scienter is implicit in the requirement that the parent 'cause' their child to regularly attend school." *Id.* Hence, the prosecution was required to prove that the defendant knowingly or purposely caused her child to regularly fail to attend school. *Id.*

<sup>173</sup> *State v. Gonzalez*, 288 P.3d 788, 795 (Haw. 2012). In *Gonzalez*, the Hawai'i Supreme Court held that recklessness was required for the offense of driving at an excessive speed. *Id.* at 798. The court reasoned that "[t]he legislative history demonstrate[d] only an intent to punish severely those who are ultimately found guilty, not to increase the class of guilty persons to those lacking any culpable mental state." *Id.*

<sup>174</sup> *State v. Jimenez*, 284 P.3d 640, 643 (Utah 2012) (quoting *State v. Elton*, 680 P.2d 727, 728 (Utah 1984)). In *Jimenez*, the Utah Supreme Court required recklessness as to whether an accomplice possessed a dangerous weapon. *Id.* at 644. It reasoned that there was no evidence the legislature intended to impose absolute liability. *Id.* at 643–44.

<sup>175</sup> *State v. Loeffel*, 300 P.3d 336, 338–39 (Utah Ct. App. 2013).

<sup>176</sup> MPC COMMENTARIES, PART I, *supra* note 20, § 2.05 cmt. 3, at 293.

Most courts, however, have softened their states' requirements of clear legislative intent. The Oregon Supreme Court, noting the absence of legislative guidance about the requirement, has developed its own four-factor test.<sup>177</sup> The factors include the statute's text, including the structure of the statutory scheme;<sup>178</sup> "the nature of the element at issue";<sup>179</sup> the statute's legislative history;<sup>180</sup> and its purpose.<sup>181</sup> In some other jurisdictions, courts have relied on nonbinding authority concerning whether a crime is in the nature of a "regulatory" or "public welfare" offense. For example, relying on a popular criminal law treatise, Texas has adopted six factors, including "[t]he legislative history of the statute or its title or context"; "[t]he severity of the punishment"; "[t]he seriousness of harm to the public which may be expected to follow from the forbidden conduct"; "[t]he defendant's opportunity to ascertain the true facts"; "[t]he difficulty prosecuting officials would have in proving a mental state"; and "[t]he number of prosecutions to be expected."<sup>182</sup> The Alabama Supreme Court has endorsed similar considerations, relying on such nonbinding authorities as criminal law treatises and United States Supreme Court interpretations of the federal criminal code.<sup>183</sup>

In considering such a broad range of factors, courts seem to be determining whether the weight of evidence shows legislative intent to impose absolute liability, rather than whether such intent is clear or plain. Indeed, it is difficult to imagine how legislative intent could ever be clear if ascertaining the legislature's rationale requires balancing several factors that are themselves somewhat subjective. Moreover, courts violate the MPC's principles of statutory construction when they gloss over the requirement that legislative intent must be plain. Importantly, the Code requires construing provisions "according to the

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<sup>177</sup> *State v. Rainoldi*, 268 P.3d 568, 571 (Or. 2011) (en banc).

<sup>178</sup> *Id.* at 571–72.

<sup>179</sup> *Id.* at 572. Oregon courts are more likely to require culpability for conduct elements than for circumstance elements or elements that "pertain to the conduct of the defendant." *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 573.

<sup>182</sup> *Aguirre v. State*, 22 S.W.3d 463, 475–76 (Tex. Crim. App. 1999) (en banc) (quoting 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* 342–44 (2d ed. 1986)); *see also* *State v. Abdallah*, 64 S.W.3d 175, 177–78 (Tex. Ct. App. 2001).

<sup>183</sup> *Smith v. City of Tuscaloosa*, 666 So. 2d 101, 104–06 (Ala. Crim. App. 1995). In *Smith*, the court characterized two driving offenses, driving with a revoked license and driving with improper lights, as "public welfare offenses." *Id.* at 104. The court thus held that the trial court did not err in instructing the jury that both crimes were strict-liability offenses. *See id.* at 106.

fair import of their terms.”<sup>184</sup> Applying that principle, absolute liability should never be based on evidence of legislative intent that is ambiguous.

Nevertheless, several courts have weakened their states’ default culpability provisions by relying on questionable evidence of legislative intent.<sup>185</sup> One tactic is for a court to broadly characterize an offense’s purpose and then assert its own policy reasons for imposing absolute liability. For example, in *State v. Rutley*, the Oregon Supreme Court interpreted a statute that criminalizes selling drugs within 1,000 feet of a school.<sup>186</sup> The offense is graded as a Class A felony,<sup>187</sup> making it one of Oregon’s most serious criminal offenses.<sup>188</sup> The offense definition prescribes no mental state for the proximity element,<sup>189</sup> and Oregon’s default culpability provision ordinarily requires reading in a requirement of negligence.<sup>190</sup> Hence, to commit the offense, the defendant would need to be at least negligent as to the proximity of a school. Nevertheless, the court held that the jury did not need to be instructed about the defendant’s mental state because the legislature intended to dispense with all culpability requirements.<sup>191</sup> The court reasoned that the offense is a Class A felony, showing that “the legislature intended to protect children from drug use and the violence and other negative influences that accompany drug delivery.”<sup>192</sup> Requiring knowledge, the court continued, would

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<sup>184</sup> MODEL PENAL CODE § 1.02(3) (AM. L. INST., Proposed Official Draft 1962). Most of the states surveyed in this Article have adopted similar standards for interpreting provisions in their criminal codes. See ALA. CODE § 13A-1-6 (2020); ARIZ. REV. STAT. ANN. § 13-104 (2020); DEL. CODE ANN. tit. 11, § 203 (2020); HAW. REV. STAT. § 701-104 (2020); KY. REV. STAT. ANN. § 500.030 (West 2020); MONT. CODE ANN. § 45-1-102(2) (2019); N.H. REV. STAT. ANN. § 625:3 (2020); N.J. STAT. ANN. § 2C:1-2(c) (West 2020); N.Y. PENAL LAW § 5.00 (McKinney 2019); OR. REV. STAT. § 161.025(2) (2020); 18 PA. CONS. STAT. § 105 (2020); TENN. CODE ANN. § 39-11-104 (2020); TEX. PENAL CODE ANN. § 1.05(a) (West 2019). In the remaining states, it is likely even clearer that courts violate principles of statutory construction by disregarding requirements of “clear” or “plain” legislative intent to impose absolute liability. After all, criminal statutes are traditionally required to be construed strictly in favor of defendants. See 3 SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 59:3 (8th ed. 2020).

<sup>185</sup> E.g., *People v. Harris*, 74 N.E.3d 1, 10–12 (Ill. App. Ct. 2017); *People v. Mitchell*, 571 N.E.2d 701, 704 (N.Y. 1991); *State v. Rutley*, 171 P.3d 361, 364 (Or. 2007).

<sup>186</sup> *Rutley*, 171 P.3d at 365.

<sup>187</sup> OR. REV. STAT. § 475.904(2).

<sup>188</sup> See *id.* § 161.605(1) (authorizing imprisonment for up to twenty years for Class A felonies).

<sup>189</sup> See *id.* § 475.904(1).

<sup>190</sup> *Id.* § 161.115(2).

<sup>191</sup> *Rutley*, 171 P.3d at 365.

<sup>192</sup> *Id.*



undermine “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.”<sup>193</sup> Inexplicably, the court failed to address even the possibility of requiring negligence, even though that is Oregon’s default culpability level.<sup>194</sup>

The New York Court of Appeals has also justified absolute liability by broadly characterizing an offense’s purpose. In *People v. Mitchell*, the court examined New York’s offense for fourth-degree possession of stolen property.<sup>195</sup> The statute defines the offense to occur, in relevant part, when the actor “knowingly possesses stolen property” and when “[t]he property consists of a credit card.”<sup>196</sup> The court held that the defendant could be convicted of the offense without having any culpability as to whether the wallet he stole contained a credit card.<sup>197</sup> The court reasoned that the offense was enacted “to combat growing credit card theft and abuse,” and requiring knowledge “would sap the statute of its intended purpose.”<sup>198</sup> The court focused exclusively on knowledge even though New York, like Oregon, ordinarily requires reading in a requirement of negligence.<sup>199</sup>

Courts sometimes also infer legislative intent to impose absolute liability merely because related offenses are explicit in requiring culpability. For example, the Illinois Criminal Code criminalizes both vehicular hijacking and aggravated vehicular hijacking. The base offense requires “knowingly tak[ing] a motor vehicle from the person or the immediate presence of another by the use of force or by threatening the imminent use of force.”<sup>200</sup> The aggravated form of the offense can occur, among other circumstances, when the victim “is a person with a physical disability.”<sup>201</sup> In *People v. Harris*, the defendant was convicted of aggravated vehicular hijacking for stealing a car from a victim who was deaf.<sup>202</sup> On appeal, the Illinois Appellate Court held that no culpability was required as to the victim’s disability.<sup>203</sup> The

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<sup>193</sup> *Id.* (emphasis omitted).

<sup>194</sup> OR. REV. STAT. § 161.115(2).

<sup>195</sup> *People v. Mitchell*, 571 N.E.2d 701, 702 (N.Y. 1991).

<sup>196</sup> N.Y. PENAL LAW § 165.45 (McKinney 2019).

<sup>197</sup> *Mitchell*, 571 N.E.2d at 704.

<sup>198</sup> *Id.*

<sup>199</sup> N.Y. PENAL LAW § 15.15(2).

<sup>200</sup> 720 ILL. COMP. STAT. 5/18-3(a) (2012).

<sup>201</sup> *Id.* 5/18-4(a)(1).

<sup>202</sup> *People v. Harris*, 74 N.E.3d 1, 6 (Ill. App. Ct. 2017).

<sup>203</sup> *Id.* at 12.

court reasoned that, unlike ordinary vehicular hijacking, the aggravated offense “does not use the term ‘knowingly’ or any mental state language whatsoever.”<sup>204</sup> If the legislature had intended to require culpability, the court continued, it could have easily prescribed a culpability requirement.<sup>205</sup> In so reasoning, the court seemed to require that the legislature plainly indicate its intent to require culpability, rather than its intent to impose absolute liability.<sup>206</sup> Importantly, Illinois grades aggravated vehicular hijacking of a disabled victim as a Class X felony,<sup>207</sup> making it one of the most serious criminal offenses in the Illinois Criminal Code.<sup>208</sup>

If anything, serious criminal offenses should be construed to require culpability. Several MPC states, however, have permitted absolute liability by largely deferring to courts’ judgments about offenses’ culpability requirements. In doing so, they have strayed far from the MPC’s norm of requiring at least recklessness for each offense element.

#### *E. States Fail to Require Culpability for Grading Provisions*

In several MPC jurisdictions, courts refuse to apply default culpability provisions to grading provisions, thus imposing absolute liability for serious crimes. The problem occurs because adopting states have not only failed to correct the MPC’s deficiencies but have also exacerbated them. As discussed earlier, the MPC does not make it sufficiently clear that section 2.02(3) applies to offense elements that appear in grading provisions.<sup>209</sup> Section 2.02(3) reads in recklessness for a “material element of an offense.”<sup>210</sup> The Code defines “element,” in turn, to mean conduct, circumstances, or results that are “included . . . in the definition of the offense.”<sup>211</sup> Yet, as shown by their

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<sup>204</sup> *Id.* at 10 (emphasis omitted).

<sup>205</sup> *Id.* at 12.

<sup>206</sup> *See id.* Significantly, the Illinois Criminal Code generally requires culpability for each element of a criminal offense unless the statute “clearly indicates a legislative purpose to impose absolute liability.” 720 ILL. COMP. STAT. 5/4-9. Because there must be clear intent to dispense with culpability requirements, courts should never interpret mere silence about culpability as evincing intent to impose absolute liability. At least one other court has gotten the exception backwards by requiring that there be clear intent to require culpability, rather than clear intent to dispense with culpability requirements. *See State v. Bryant*, 15 A.3d 865, 871 (N.J. Super. Ct. App. Div. 2011) (stating that mental state of knowledge was not required absent express legislative intent).

<sup>207</sup> 720 ILL. COMP. STAT. 5/18-4(b).

<sup>208</sup> *See* 730 ILL. COMP. STAT. 5/5-4.5-10(a).

<sup>209</sup> *See supra* Section I.C.2.

<sup>210</sup> MODEL PENAL CODE § 2.02(3) (AM. L. INST., Proposed Official Draft 1962).

<sup>211</sup> *Id.* § 1.13(9).

commentary, the drafters intended for the Code’s culpability rules to apply to all offense elements, regardless of where they appear.

A strong majority of MPC jurisdictions deviate from section 2.02(3) by directly limiting their default culpability provisions to offense definitions. In fact, seventeen states read in culpability requirements only for an offense definition or a statute defining an offense;<sup>212</sup> additionally, North Dakota provides that culpability generally is “not required with respect to any fact which is solely a basis for grading.”<sup>213</sup>

The distinction between offense definitions and grading provisions can be somewhat fortuitous. For example, consider the offenses of assault and aggravated assault.<sup>214</sup> Both require causing bodily harm to another person,<sup>215</sup> and aggravated assault may occur when a defendant uses a weapon, causes great bodily harm, or injures a particular kind of victim. A criminal code could reasonably use various approaches to define and grade assault and aggravated assault. One approach would be to treat assault and aggravated assault as distinct offenses, giving them separate code sections with their own offense definitions and grading provisions. Alternatively, a criminal code could have just a single offense called assault. Under that approach, the offense definition might require only causing bodily harm to another person, and a grading provision might aggravate the offense when a defendant

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<sup>212</sup> See ALA. CODE § 13A-2-4(b) (2020); ALASKA STAT. § 11.81.610(b) (2019); ARIZ. REV. STAT. ANN. § 13-202(B) (2020); COLO. REV. STAT. § 18-1-503(2) (2020); 720 ILL. COMP. STAT. 5/4-3(b); KAN. STAT. ANN. § 21-5202(b) (2020); KY. REV. STAT. ANN. § 501.040 (West 2020); MO. REV. STAT. § 562.021(3) (2020); MONT. CODE ANN. § 45-2-103(1) (2019); N.J. STAT. ANN. § 2C:2-2(c)(3) (West 2020); N.Y. PENAL LAW § 15.15(2) (McKinney 2019); N.D. CENT. CODE § 12.1-02-02(2) (2019); OHIO REV. CODE ANN. § 2901.21(C)(1) (West 2020); OR. REV. STAT. § 161.115(2) (2020); TENN. CODE ANN. § 39-11-301(c) (2020); TEX. PENAL CODE ANN. § 6.02(b) (West 2019); UTAH CODE ANN. § 76-2-102 (West 2020).

<sup>213</sup> N.D. CENT. CODE § 12.1-02-02(3)(c). Similarly, the Maine Criminal Code states that culpability is generally not required for “[a]ny fact that is solely a basis for sentencing classification.” ME. STAT. tit. 17-A, § 34(4)(a) (2019). The provision seems unnecessary, however, because Maine lacks a default culpability provision. *Id.* § 34(1) (requiring culpability only if the statute specifies a culpable mental state).

<sup>214</sup> My examples use the modern terminology by calling the offenses “assault” and “aggravated assault.” Most states now define assault to include the common-law crime of battery. See LAFAVE, *supra* note 9, § 16.1 n.3 (citing twenty-eight states that define assault as what was battery under the common law).

<sup>215</sup> Francis X. Shen, *Mind, Body, and the Criminal Law*, 97 MINN. L. REV. 2036, 2045–46 (2013) (“Bodily injury is a part of many aspects of the criminal and quasi-criminal code, including simple assault; aggravated assault; unlawful arrest; aggravated robbery; menacing; civil commitment; and the burden of proof for release from civil commitment after finding of not guilty by reason of insanity.”).

uses a weapon, causes great bodily harm, or injures a particular kind of victim.

It would be most logical to treat the culpability requirements the same for both approaches to defining assault and aggravated assault. Hence, if either an offense definition or a grading provision aggravates the offense based on a circumstance or result, the actor would need to be culpable as to that element. But most jurisdictions risk a different result by limiting their default culpability provisions to offense definitions. In such jurisdictions, aggravated assault may require culpability for all elements if it has its own offense definition, but it may not if the same elements appear in a grading provision. That outcome is plainly arbitrary.

Nevertheless, courts in several MPC jurisdictions have imposed absolute liability for offense elements that appear in grading provisions. For example, Illinois courts have seized on narrow language in the state's default culpability provision, which requires culpability only for "each element described by the statute defining the offense."<sup>216</sup> Reading the provision strictly, Illinois courts have repeatedly held that defendants may be held liable for delivering controlled substances near protected places without having any culpability as to their proximity.<sup>217</sup> In *People v. Brooks*, for example, the Illinois Appellate Court interpreted a statute that used separate subsections to define a felony for knowingly selling cocaine and then aggravate the offense if it occurred within 1,000 feet of a housing authority site.<sup>218</sup> The court held that Illinois's default culpability provision did not apply to the aggravated offense because it requires a mental state only for elements in "the statute defining an offense."<sup>219</sup> Thus, the court concluded, the provision had "no relevance" to what it characterized as an "enhancing statute."<sup>220</sup> The Illinois Appellate Court

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<sup>216</sup> 720 ILL. COMP. STAT. 5/4-3(a).

<sup>217</sup> *People v. Daniels*, 718 N.E.2d 1064, 1072 (Ill. App. Ct. 1999); *People v. Pacheco*, 666 N.E.2d 370, 376 (Ill. App. Ct. 1996); *People v. Brooks*, 648 N.E.2d 626, 627 (Ill. App. Ct. 1995).

<sup>218</sup> *Brooks*, 648 N.E.2d at 627.

<sup>219</sup> *Id.* at 629 (quoting 720 ILL. COMP. STAT. 5/4-3(a)).

<sup>220</sup> *Id.*

has applied similar reasoning in holding that no culpability is required for a defendant's proximity to a school<sup>221</sup> or house of worship.<sup>222</sup>

Texas courts have also justified imposing absolute liability by distinguishing grading provisions from offense definitions. In *White v. State*, the Texas Court of Criminal Appeals examined a statute that, like the one in *Brooks*, used one provision to define a base offense for delivering a controlled substance and another provision to aggravate for selling drugs near a protected place.<sup>223</sup> The court held that no culpability was required as to the defendant's proximity to a youth center,<sup>224</sup> reasoning in part that the legislature had "not created a separate offense"<sup>225</sup> and that the default culpability provision applies to "an offense" but not "an enhancement statute."<sup>226</sup> The court found it important that proximity did not "render otherwise innocuous conduct wrongful" and thus failed to "separate lawful from unlawful conduct."<sup>227</sup> In *Rodriguez v. State*, the Texas Court of Criminal Appeals followed *White*, holding that aggravated assault did not require culpability for the element of "serious bodily injury."<sup>228</sup> The court reasoned, in part, that the requirement does not speak to the criminality

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<sup>221</sup> *Pacheco*, 666 N.E.2d at 376 ("We hold that the State was required to prove the substantive elements of the offense (the unlawful delivery of a controlled substance) as well as the enhancing factors including the proximity of the school, but the State was not required to prove that defendant knew or was aware of the proximity or distance of the school from the area where the offense was committed.").

<sup>222</sup> *Daniels*, 718 N.E.2d at 1072 ("We adopt the reasoning of *Brooks* and *Pacheco*. Applying section 4-3 of the Code, we find that section 401(d) of the Act is the statute defining the offense of which defendant was convicted. Section 401(d) requires the State to prove only that defendant knowingly delivered a controlled substance (cocaine). Section 401(d) does not refer to the enhancing factor at issue here.").

<sup>223</sup> *White v. State*, 509 S.W.3d 307, 309 (Tex. Crim. App. 2017) (addressing TEX. HEALTH & SAFETY CODE ANN. §§ 481.112(b), 481.134(d) (West 2019)).

<sup>224</sup> *Id.* at 315.

<sup>225</sup> *Id.* at 310.

<sup>226</sup> *Id.* at 312. The court also reasoned that the legislature did not intend to require culpability as to proximity because the base offense already required knowledge. *See id.* at 311 ("Section 481.134(d) makes no express mention of an additional knowledge requirement with respect to any of the drug free zones it identifies; it does not say a defendant must be aware that (or reckless with respect to whether) his delivery took place there. In the context of an offense that otherwise does prescribe a culpable mental state, the lack of express language requiring an additional *mens rea* with respect to other elements is a 'compelling' indication that the Legislature did not intend an additional culpable mental state."). As discussed earlier, Texas's default culpability provision applies only when an offense fails to require any culpability at all. *See supra* note 103 and accompanying text.

<sup>227</sup> *White*, 509 S.W.3d at 313.

<sup>228</sup> *Rodriguez v. State*, 538 S.W.3d 623, 629 (Tex. Crim. App. 2018).

of the actor's conduct because it merely enhances the offense of simple assault.<sup>229</sup>

Courts have also endorsed absolute liability for grading provisions in Alaska, Colorado, and New York. For example, the Alaska Court of Appeals permits absolute liability for grading provisions under the theory that they enhance punishment, rather than define offenses.<sup>230</sup> In *Knutsen v. State*, the court interpreted an offense for indecent photography; the offense was a misdemeanor if the victim was an adult but a felony if the victim was a minor.<sup>231</sup> The court held that no culpability is required as to victims' ages,<sup>232</sup> reasoning that "no culpable mental state need be proved regarding a circumstance or result if that circumstance or result does not alter the criminality of the defendant's conduct but instead serves only to trigger a greater punishment for the offense."<sup>233</sup> Similarly, the Colorado Court of Appeals held that a defendant did not need to know the amount of methamphetamine he possessed because "[s]tatutory provisions that increase the felony level of an offense are generally regarded and treated as sentence enhancement provisions, not essential elements of an offense."<sup>234</sup> Finally, in *People v. Mitchell*, discussed earlier in this Article,<sup>235</sup> the New York Court of Appeals suggested that culpability requirements should not be read into grading provisions because the state's criminal code is "replete" with sentence enhancements that fail to prescribe mental states.<sup>236</sup>

Indeed, most criminal codes have numerous grading provisions that lack express culpability requirements, just as they have numerous offense definitions that are silent about culpability. If anything, the prevalence of such statutes makes a default culpability provision like section 2.02(3) even more critical. The MPC drafters anticipated that section 2.02(3) would apply to all offense elements without prescribed culpability requirements, including elements in grading provisions. In treating grading provisions differently than offense definitions, courts have thus undermined section 2.02(3) and the MPC's culpability

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<sup>229</sup> *Id.* The court also reasoned that the legislature intended to dispense with a culpability requirement because it failed to prescribe one expressly. *Id.* at 628 ("[T]he . . . statute is conspicuously silent as to the aggravating element of 'serious bodily injury.'").

<sup>230</sup> *Knutsen v. State*, 101 P.3d 1065, 1069 (Alaska Ct. App. 2004).

<sup>231</sup> *Id.* at 1067.

<sup>232</sup> *Id.* at 1070.

<sup>233</sup> *Id.* at 1069.

<sup>234</sup> *People v. Scheffer*, 224 P.3d 279, 288 (Colo. App. 2009).

<sup>235</sup> See *supra* text accompanying notes 195–98.

<sup>236</sup> *People v. Mitchell*, 571 N.E.2d 701, 703 (N.Y. 1991).

scheme. In Part III, this Article proposes rules that more clearly require courts to read culpability requirements into grading provisions.

#### *F. Summary of States' Default Culpability Provisions*

Twenty-five states have adopted culpability requirements influenced by the MPC.<sup>237</sup> Only a few have adopted default culpability provisions that, like section 2.02(3), rigorously enforce the norm of requiring at least recklessness for each offense element.

The overwhelming majority of MPC jurisdictions have failed to adopt default culpability provisions that are even substantially similar to section 2.02(3). Connecticut, Indiana, and Maine deviate the most from the MPC. All three states' criminal codes lack default culpability provisions, meaning that culpability is required only if it is prescribed in a statute defining an offense.<sup>238</sup> Arizona is marginally better because it has a default provision, but the state effectively imposes a default of absolute liability rather than recklessness.<sup>239</sup> In the next tier are Colorado, Kansas, Kentucky, Missouri, Texas, and Utah,<sup>240</sup> followed by a group consisting of Alabama, Illinois, New Hampshire, and Ohio.<sup>241</sup> These rankings are admittedly somewhat subjective, but these

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<sup>237</sup> See *supra* note 95 and accompanying text.

<sup>238</sup> See CONN. GEN. STAT. § 53a-5 (2020); IND. CODE § 35-41-2-2 (2020); ME. STAT. tit. 17-A, § 34 (2019).

<sup>239</sup> See ARIZ. REV. STAT. ANN. § 13-202(B) (2020).

<sup>240</sup> Colorado reads in culpability requirements only if mental states are necessarily involved in offenses, and courts are permitted to choose their own culpability levels. See *supra* notes 107, 111, 144 and accompanying text. Kentucky also reads in a culpability requirement when an offense or element necessarily involves a mental state. See KY. REV. STAT. ANN. § 501.040 (West 2020). Additionally, Kentucky's default culpability level is mere negligence, see *id.* §§ 501.010(1)–.040, and the provision does not apply to misdemeanors, see *id.* § 501.050(1) (permitting absolute liability for misdemeanors when the definition of the offense is silent about culpability). Kansas, Missouri, Texas, and Utah rate lower because their default provisions apply only when offenses fail to prescribe any culpability requirements at all. See KAN. STAT. ANN. § 21-5202(g) (2020); MO. REV. STAT. § 562.021(2) (2020); TEX. PENAL CODE ANN. § 6.02(b) (West 2019); UTAH CODE ANN. § 76-2-102 (West 2020). All four states also fail to generally require culpability for each offense element. See KAN. STAT. ANN. § 21-5202; MO. REV. STAT. § 562.021; TEX. PENAL CODE ANN. § 6.02(a); UTAH CODE ANN. § 76-2-102.

<sup>241</sup> Alabama ostensibly requires culpability for each offense element, but its default culpability provision reads in only mental states that are necessarily involved in offenses or elements, and courts can choose their own culpability levels. See ALA. CODE § 13A-2-4(b) (2020). Similarly, courts in Illinois and New Hampshire can choose the required culpability when offenses are silent. See *supra* notes 142–43 and accompanying text. Finally, Ohio vaguely authorizes courts to read in a culpability requirement for “an element of an offense that is related to knowledge or intent or to which mens rea could fairly be applied.” OHIO REV. CODE ANN. § 2901.21(C) (West 2020).

states generally rate lower because they fail to require culpability for each offense element, permit courts to choose their own culpability requirements, or both.<sup>242</sup>

The next tier of states consists of Montana, New York, and Oregon, all of which set the default culpability level at negligence rather than recklessness.<sup>243</sup> Finally, four states deviate from the MPC principally in that they permit absolute liability based on legislative intent even for offenses in their criminal codes. Those states are Alaska, New Jersey, North Dakota, and Tennessee.<sup>244</sup> In total, twenty-one of the twenty-five states with culpability rules influenced by the MPC either lack default culpability provisions or have default rules that deviate significantly from section 2.02(3).

Only four states have default culpability provisions that are substantially similar to section 2.02(3): Arkansas, Delaware, Hawai‘i, and Pennsylvania.<sup>245</sup> Even those four states depart in some ways from section 2.02(3). Most importantly, all four jurisdictions permit absolute liability for criminal offenses outside their codes when there is clear legislative intent to impose strict liability.<sup>246</sup> The MPC, in contrast, generally permits absolute liability based on legislative intent only for civil violations.<sup>247</sup>

To summarize, I rank the state codes surveyed in this Article as follows, from best to worst:

Tier 1: Arkansas, Delaware, Hawai‘i, Pennsylvania

Tier 2: Alaska, New Jersey, North Dakota, Tennessee

Tier 3: Montana, New York, Oregon

Tier 4: Alabama, Illinois, New Hampshire, Ohio

Tier 5: Colorado, Kansas, Kentucky, Missouri, Texas, Utah

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<sup>242</sup> See *supra* Sections II.B and II.C.

<sup>243</sup> See KY. REV. STAT. ANN. §§ 501.010(1)–.040 (West 2020); MONT. CODE ANN. § 45-2-103(1) (2019); N.Y. PENAL LAW § 15.15(2) (McKinney 2019); OR. REV. STAT. § 161.115(2) (2020).

<sup>244</sup> ALASKA STAT. § 11.81.600(b)(2) (2019); N.J. STAT. ANN. § 2C:2-2(c)(3) (West 2020); N.D. CENT. CODE § 12.1-02-02(2), (3) (2019); TENN. CODE ANN. § 39-11-301(b) (2020).

<sup>245</sup> See ARK. CODE ANN. § 5-2-203(b) (2020); DEL. CODE ANN. tit. 11, § 251(b) (2020); HAW. REV. STAT. § 702-204 (2020); 18 PA. CONS. STAT. § 302(c) (2020).

<sup>246</sup> See ARK. CODE ANN. § 5-2-204(c)(2) (2020); DEL. CODE ANN. tit. 11, § 251(c)(2); HAW. REV. STAT. § 702-212(2) (2020); 18 PA. CONS. STAT. § 305(a)(2) (2020). Additionally, Arkansas departs from the MPC because it lacks a provision, like MPC section 2.02(1), that generally requires culpability for each element of an offense. See ARK. CODE ANN. § 5-2-203.

<sup>247</sup> See *supra* notes 42–45 and accompanying text.



Tier 6: Arizona

Tier 7: Connecticut, Indiana, Maine

Reviewing the statutory and case law in all twenty-five states, it is apparent that the few states that closely follow section 2.02(3) are far more effective in enforcing the norm of requiring recklessness for each offense element. When state codes deviate significantly from section 2.02(3), courts are less likely to apply default culpability requirements and more prone to impose absolute liability. I therefore reach a different conclusion than Darryl Brown, who has said that states' alterations "explain[] little of the trend of state decisions" concerning absolute liability.<sup>248</sup> My survey shows that states' culpability provisions can significantly influence courts' interpretations of criminal statutes. Section 2.02(3) has had little effect to date, but not because courts choose to ignore it. Rather, section 2.02(3) has yet to be fully adopted even in MPC states.

### III

#### PROPOSED DEFAULT CULPABILITY RULES

This Part recommends new default culpability rules that, like section 2.02(3), read in a requirement of recklessness for any offense element for which a culpability level is not stated. The proposed provisions also improve on the MPC in ways that prevent the problems that adopting states have experienced with their default culpability provisions. To that end, the proposed rules (1) generally require culpability for each offense element, (2) read in a culpability level of recklessness, (3) make clear that courts may read culpability requirements into

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<sup>248</sup> Brown, *supra* note 32, at 321. Professor Brown's assessment was based on his review of decisions interpreting both sections 2.02(3) and (4) of the MPC. *See id.* I may reach a different conclusion about the significance of states' deviations, in part, because section 2.02(4) is beyond the scope of this Article. In future research, I hope to comprehensively review state decisions interpreting section 2.02(4). Preliminarily, though, I will note that states' deviations from section 2.02(3) seem to have more impact on court decisions.

Professor Brown also rated states' default culpability provisions as part of his survey of criminal codes influenced by sections 2.02(3) and (4). With respect to section 2.02(3), Professor Brown coded each state as having a "[p]resumption to imply missing mens rea terms," a "[w]eak presumption to imply missing terms," or "[n]o presumption to imply missing terms." *See id.* at 319 tbl.2. Professor Brown concluded that seventeen states had presumptions to imply missing culpability terms, three states had weak presumptions, and four states lacked such a provision. *See id.* In rating criminal codes according to whether they implied missing culpability terms, Professor Brown focused primarily on whether the codes required reading in unstated culpability requirements. My rankings, in contrast, evaluate how closely state codes follow section 2.02(3)'s norm of requiring at least recklessness for each offense element. By that measure, most states rate much more poorly than they did in Professor Brown's survey.

grading provisions, and (4) eliminate exceptions permitting absolute liability based on legislative intent.

These proposed provisions address both of the MPC's weaknesses, and thus they better effectuate the Code's norm of requiring at least recklessness for each element of an offense. As discussed earlier, section 2.02(3) has two shortcomings as applied to state criminal codes. First, the MPC does not address how to impose absolute criminal liability. The Code's silence has led states to establish exceptions to their default culpability provisions for statutes indicating legislative intent to impose absolute liability. Second, the MPC does not make clear that section 2.02(3) applies to offense elements that appear in grading provisions. That shortcoming has also led to problems in many states, as several courts have permitted absolute liability for sentence enhancements. The following provisions would replace sections 2.02(1) and 2.02(3):

#### Culpability Requirements

- (1) To be guilty of an offense, a person must have some level of culpability, as defined in [cross-reference to culpability definitions], as to every objective element of the offense, except as provided in subsection (4).
- (2) \* \* \* \*
- (3) When no culpability requirement is specified with regard to an objective element, a requirement of recklessness is applicable, except as provided in subsection (4).<sup>249</sup>

The proposed provisions follow the MPC in generally requiring culpability for each offense element and in reading in a requirement of recklessness when an offense is silent. Importantly, though, subsection (1) requires culpability for each "objective element," rather than each "material element." Likewise, subsection (3) differs from section 2.02(3) in that it applies when a statute fails to state a culpability requirement for an objective element. Both changes are designed to refine the MPC's terminology and to clarify that culpability is required for elements in grading provisions.

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<sup>249</sup> This culpability provision is based on one proposed by the Illinois Criminal Code Rewrite and Reform Commission. Professor Paul Robinson was the Commission's Reporter and principal drafter, Dean Michael Cahill served as Staff Director, and I served as a staff attorney. See PAUL H. ROBINSON & MICHAEL T. CAHILL, FINAL REPORT OF THE ILLINOIS CRIMINAL CODE REWRITE AND REFORM COMMISSION § 205, 12 (2003), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1290&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1290&context=faculty_scholarship) [<https://perma.cc/G5N8-9S4K>].

Section 2.02(3) has failed, in part, because the Code defines “element” to mean conduct, circumstances, or results that are required “in the definition of an offense.”<sup>250</sup> Most adopting states have made matters even worse by directly limiting their default culpability provisions to offense definitions.<sup>251</sup> Proposed subsection (3) avoids that problem because it applies whenever a culpability requirement is not prescribed for an objective element, regardless of where the element may appear. To make it even clearer that culpability requirements apply to grading provisions, “objective elements” should be defined as follows:

“Objective elements” include such conduct, such attendant circumstances, and such a result of conduct as are contained in the definition of an offense, in a provision establishing an offense grade, or in a provision specifying the severity of the punishment for an offense. Objective elements do not include culpability requirements.<sup>252</sup>

The proposed definition eradicates any possible distinction between offense definitions and grading provisions. As discussed earlier, such a distinction can be arbitrary because a criminal code can reasonably enhance punishments for a base offense using either a grading provision or a separate offense definition.<sup>253</sup> Moreover, as a normative matter, criminal codes should generally require culpability with respect to all offense elements, including ones that aggravate conduct that is already criminal. Requiring culpability ensures consistency in grading and punishment because aggravating elements, like base elements, are relevant to an actor’s blameworthiness. It should matter, for example, whether a defendant is at least aware of the risk that he or she is assaulting a victim with a disability, or that he or she is selling drugs near a school. Such awareness makes the actor more blameworthy, thus justifying punishment that is more severe.<sup>254</sup> For similar reasons, the

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<sup>250</sup> MODEL PENAL CODE § 1.13(9) (AM. L. INST., Proposed Official Draft 1962).

<sup>251</sup> See *supra* notes 212–13 and accompanying text.

<sup>252</sup> This definition is based loosely on one proposed by the Illinois Criminal Code Rewrite and Reform Commission. See ROBINSON ET AL., *supra* note 249, § 202(1), at 11.

<sup>253</sup> See *supra* text accompanying notes 214–15.

<sup>254</sup> As Darryl Brown has observed, the “prevailing principle,” even in MPC jurisdictions, is that “no proof of culpability is required beyond that needed to ensure that an actor is not convicted for purely innocent conduct.” Brown, *supra* note 32, at 324–25 (emphasis omitted). Under current law, culpability requirements serve “primarily, and often exclusively, to distinguish innocent actors from guilty ones.” *Id.* at 325. The current approach to grading provisions is coherent even if it is misguided. As a matter of law, it makes sense for courts to decline to read culpability requirements into grading provisions, given that default culpability rules are currently limited to offense definitions. Additionally,

United States Supreme Court has held that facts affecting a defendant's maximum punishment are offense elements and thus must be proved to a jury beyond a reasonable doubt.<sup>255</sup>

Finally, proposed subsections (1) and (3) both recognize exceptions to their general rules that culpability is required for each offense element and that recklessness should be read in for elements without stated requirements. The following proposed provision would replace the MPC's absolute-liability provision, section 2.05:

- (4) When no culpability requirement is specified with regard to an objective element, no culpability is required as to that element if
  - (a) the offense is a violation; or
  - (b) the statute defining the offense or other statutory provision
    - (i) imposes absolute liability for that element by using the phrase "in fact,"
    - (ii) explicitly states that the offense imposes "absolute liability" or "strict liability" as to that element, or
    - (iii) otherwise explicitly states a person may commit the offense without having any level of culpability as to that element.<sup>256</sup>

Subsection (4) recommends significant changes to the MPC's rules on absolute liability. Under section 2.05, the MPC permits absolute liability for civil violations and for non-Code offenses for which "a legislative purpose to impose absolute liability . . . plainly appears."<sup>257</sup>

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as a normative matter, courts may reasonably dispense with culpability requirements for elements that simply aggravate punishment for actors who are blameworthy enough to justify criminal liability. Nevertheless, current law is fundamentally inconsistent with the drafters' vision for the MPC. The drafters anticipated that section 2.02(3) would apply to all elements, including ones that appear in grading provisions. *See supra* notes 88–90 and accompanying text. My own view is that grading distinctions, like those between guilt and innocence, should be based on actors' relative blameworthiness. For me, regardless of the context, blameworthiness depends in no small part on culpability.

<sup>255</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000).

<sup>256</sup> This proposed subsection is based in part on provisions from the Maine Criminal Code that clarify that an offense imposes absolute liability when it uses the phrase "in fact," states that it is a "strict liability crime," or when it otherwise explicitly states that a person may commit the crime without a culpable mental state. *See* ME. STAT. tit. 17-A, § 34(4)(B), (E) (2019). Such rules are probably unnecessary in Maine because the state lacks a default culpability provision. *See* ME. STAT. tit. 17-A, § 34 (2019). North Dakota also requires the legislature to be explicit in dispensing with culpability requirements. *See* N.D. CENT. CODE § 12.1-02-02(2) (2019) ("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.").

<sup>257</sup> MODEL PENAL CODE § 2.05(1) (AM. L. INST., Proposed Official Draft 1962).

The Code also automatically grades existing absolute-liability offenses as mere violations.<sup>258</sup> The proposed provision follows section 2.05 by authorizing absolute liability for civil violations, but it treats criminal offenses quite differently. First, subsection (4) anticipates the continued use of absolute liability for serious criminal offenses, including offenses in the criminal code. Second, subsection (4) eliminates the MPC's exception for non-Code offenses that plainly indicate legislative intent to impose absolute liability. Instead, the proposed provision authorizes absolute liability for any offense, including one in the criminal code, only if a statute explicitly states that the offense does not require culpability for an element. A statute may explicitly state that absolute liability is imposed for an element by using phrases like "absolute liability," "strict liability," and "in fact."

Importantly, subsection (4) requires an explicit statement rather than a showing of clear legislative intent. As discussed earlier, legislative intent is a vague concept that is highly susceptible to manipulation,<sup>259</sup> and several courts have used legislative-intent exceptions to weaken their states' default culpability provisions.<sup>260</sup> Additionally, in deferring to courts' judgments in this area, criminal codes risk creating a body of law with culpability requirements that vary from one offense to another. The proposed rule, in contrast, provides a clear standard that guides courts and promotes uniformity in culpability requirements of offenses.<sup>261</sup> In demanding explicit statutory language, subsection (4) also has the benefit of requiring evidence of legislative intent that is truly conclusive. For example, courts could no longer impose absolute liability by broadly characterizing an offense's purpose and asserting their own policy reasons for dispensing with culpability

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<sup>258</sup> *Id.* § 2.05(2)(a).

<sup>259</sup> See *supra* notes 168–70 and accompanying text.

<sup>260</sup> See *supra* notes 177–208 and accompanying text.

<sup>261</sup> The MPC's drafters considered the possibility of requiring that non-Code offenses explicitly state that they impose absolute liability. The commentary for section 2.05 calls the approach "tempting" but asserts that it is impractical because "so much existing legislation that would not satisfy the test has been construed to impose strict liability." MPC COMMENTARIES, PART I, *supra* note 20, § 2.05 cmt. 3, at 293–94. The commentary seems to assume that, based on "[l]egislative acquiescence in such constructions," a code provision could not affect courts' past interpretations of offenses' culpability requirements. *Id.* at 294. Yet the MPC's culpability provisions, including section 2.02(3), apply to such offenses, and thus they may supersede any previous interpretations by courts. Indeed, a legislature may reasonably decide to impose uniform culpability requirements for all offenses, including ones that have already been interpreted. The commentary's statement is puzzling, and I do not give it much weight.

requirements.<sup>262</sup> Similarly, subsection (4) would prevent courts from imposing absolute liability simply because an offense is silent about culpability, while related offenses are explicit.<sup>263</sup> Instead, a court should ordinarily interpret silence to require the default culpability level of recklessness.<sup>264</sup>

In sum, the proposed culpability rules retain and better enforce the MPC's norm of requiring at least recklessness for each offense element. The proposed default culpability rule applies to grading provisions, and absolute liability may not be imposed for a criminal offense without an explicit statement from the legislature. If the legislature truly intends to dispense with a culpability requirement, it can easily do so by stating that the offense imposes absolute liability.

#### CONCLUSION

The MPC has played an important role in modernizing culpability requirements in American criminal codes. Indeed, twenty-five states have enacted culpability provisions influenced significantly by the MPC. Only four jurisdictions, however, have enacted default culpability rules that are even substantially similar to section 2.02(3) of the Code. In general, MPC states have deviated from section 2.02(3) by failing to require culpability for each offense element, allowing courts to read in culpability levels other than recklessness, permitting absolute liability based on legislative intent, and failing to require culpability for grading provisions. As a result, most states have yet to fully embrace the Code's norm of requiring at least recklessness for each offense element. As a consequence of the shortcomings of state criminal codes, courts have commonly permitted absolute liability, affirming convictions for defendants who lack blameworthiness as to one or more offense elements.

This Article has proposed new default culpability rules that better effectuate the Code's norm of requiring recklessness for each offense element. The proposed provisions also improve on the MPC by instructing courts to read culpability requirements into grading provisions and by requiring legislatures to codify any intention to

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<sup>262</sup> See *supra* notes 185–99 and accompanying text.

<sup>263</sup> See *supra* notes 200–08 and accompanying text.

<sup>264</sup> Ideally, states would adopt new default culpability provisions as part of larger criminal-code reform projects. Such projects would provide states with opportunities to review all criminal offenses, including ones outside criminal codes, and clarify their culpability requirements. If states are thoughtful in drafting offenses, they can define and grade crimes in ways that leave little room for doubt about culpability requirements.

impose absolute liability. The proposed rules have implications for thousands of American criminal offenses, and they better ensure that the criminal law's moral condemnation is reserved for blameworthy defendants. As the MPC's drafters recognized, that principle is "too fundamental to be compromised."<sup>265</sup>

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<sup>265</sup> MPC COMMENTARIES, PART I, *supra* note 20, § 2.05 cmt. 1, at 283.

