STRICT LIABILITY ABOLITION

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This Article reinvigorates the case for abolishing strict liability in the criminal law. Undertaking an intellectual history of mens rea policy, I spotlight two assumptions that have fueled strict liability's historic rise and current deprioritization in criminal justice reform. One assumption is that eliminating culpable mental states from criminal statutes is an effective means of reducing crime. The other assumption is that adding culpable mental states to criminal statutes is an ineffective means of lowering prison rates or promoting racial justice. This Article argues that these assumptions are unsupported by available evidence and have no place in criminal policymaking. Synthesizing decades of social science research, I first explain why there is little reason to believe that strict liability promotes public safety. Next, building upon the first-ever legal impact study of mens rea reform, I explain how adding culpable mental states to criminal statutes could alter charging practices and conviction rates. I then demonstrate the racial justice benefits of universal mens rea standards by highlighting the concentration of strict liability in offenses disparately enforced against people of color. Through this deeper understanding of mens rea policy, the Article reveals the strength of the case against strict liability, and why culpable mental state requirements are an important tool in the fight against mass incarceration.

INTRODUCTION 113
I. STRICT LIABILITY ABOLITION: AN INTELLECTUAL HISTORY 120
A. *Strict Liability Abolition and the Model Penal Code* 121
1. *The Rise of Strict Liability* 123
2. *The Model Penal Code's Response* 127
B. *Strict Liability Abolition After the Model Penal Code* 129
1. *The Tough-on-Crime Era* 130

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2. *The Criminal Justice Reform Era: Generally* 132
3. *The Criminal Justice Reform Era: The Federal Mens Rea Reform Effort as a Case Study* 137
II. DECONSTRUCTING THE PUBLIC SAFETY ASSUMPTION ... 141
A. *Strict Liability and the Narrow Sense of Public Safety* 142
1. *General Deterrence and Incapacitation Arguments* 145
2. *Administrative Expediency Arguments* 151
B. *Strict Liability and the Broad Sense of Public Safety* 154
C. *The Empirics of Strict Liability and the Morality of Government Decisions* 159
III. DECONSTRUCTING THE MASS INCARCERATION ASSUMPTION 163
A. *The Impact of Culpable Mental States on Criminal Administration: A Case Study of an Individual Statute* 165
1. *Charging and Conviction Rates* 165
2. *Racial Disparities* 171
B. *The Impact of Strict Liability Abolition on Mass Incarceration* 178
1. *Penal Impact: Imprisonment and Racial Justice* 180
2. *Efficacy: Resources and Politics* 190
CONCLUSION 196

INTRODUCTION

Strict liability pervades U.S. criminal law.[1] People who are reasonably mistaken about the objects in their possession,[2] their past,[3]

[1] This Article uses the phrase "strict liability" to generically refer to the absence of a culpable mental state requirement as to a material element of an offense or an element that provides the basis for aggravating punishment. By contrast, the phrase "strict liability crimes" is used to refer to offenses for which no culpable mental state need be proven as to *any* material element. In the criminal law literature, the first form of strict liability is typically referred to as "impure" or "partial," whereas the second form of strict liability is typically referred to as "pure." *See, e.g.*, Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1081 (1997). This technical terminology is incorporated later in the Article. *See infra* notes 38, 47–50 and accompanying text.

[2] *See, e.g.*, Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829 (2001) (highlighting the scope of strict liability in drug and gun possession laws nationwide); *see also infra* notes 320–25, 334–50 and accompanying text.

the ages of other people,[4] or the risks they are imposing upon other people[5] are all subject to felony convictions in jurisdictions across the country. Facing the prospect of years in prison, those charged with felonies may find it hard to believe they could be punished when their intentions were good or their choices reasonable. But the absence of a blameworthy state of mind is irrelevant for strict liability crimes. The government can secure convictions against morally innocent actors so long as a wrongful act occurred, even if the accused neither knew nor had reason to know about it.

This same "principle of tough luck"[6] governs how we punish the blameworthy. U.S. criminal codes[7] often hold those who culpably do *something* wrong strictly liable for *everything* bad that occurs. Under this "in for a penny, in for a pound" approach, small-time drug dealers are severely punished for large quantities of narcotics they had no idea existed,[8] the dealers' unexpected proximity to a school zone,[9] and the unforeseeable harms suffered by their customers.[10] Likewise,

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[3] *See, e.g.*, Brief of Amicus Curiae Everytown for Gun Safety in Support of Respondent at 12, Rehaif v. United States, 139 S. Ct. 2191 (2019) (No. 17-9560) (highlighting the breadth of strict liability as to the legal status element in state felon-in-possession laws).

[4] *See, e.g.*, Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313 (2003) (highlighting the breadth of strict liability in statutory rape statutes nationwide); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401 (1993) (discussing how people who make reasonable efforts to assess the age of employees can be punished under federal law).

[5] *See, e.g.*, Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137 (2008) (discussing application of the civil negligence standard to state homicide statutes); Eric A. Johnson, *The Crime That Wasn't There: Wyoming's Elusive Second-Degree Murder Statute*, 7 WYO. L. REV. 1 (2007) (discussing de facto strict liability interpretation of state homicide statutes); *see also infra* notes 357–67 and accompanying text.

[6] *See, e.g.*, Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 267 (1987) ("If a principle is at work [with strict liability crimes], it is the principle of 'tough luck.'").

[7] By "U.S. criminal codes" this Article refers to both state and federal criminal codes.

[8] *See, e.g.*, Douglas A. Berman, *The Second Circuit: Attributing Drug Quantities to Narcotics Offenders*, 6 FED. SENT'G REP. 247, 251 (1994) ("[M]ost drug sentencing disputes focus on fairly arbitrary questions about how the drugs involved in an offense are to be classified or quantified instead of on a defendant's actual culpability."); Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENT'G REP. 121, 121 (1994) ("[M]ens rea has been all but eliminated from the sentencing of drug offenders.").

[9] *See, e.g*, Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 298–302 (2012) (discussing the breadth of strict liability in school zone proximity enhancements for drug crimes).

[10] This is reflected in the growth of drug-induced homicide statutes across the United States. *See infra* notes 326–28 and accompanying text. For further discussion of the increased use of these statutes and their strict liability status, see generally Kaitlin S. Phillips, Note, *From Overdose to Crime Scene: The Incompatibility of Drug-Induced*

those who accidentally kill in the course of committing a felony are punished as though they are intentional murderers, even when they exercise extreme caution and specifically intend that nobody get hurt.[11] Indeed, the same is true for those who accidentally *aid* a homicide. Strict liability felony murder statutes punish getaway drivers, lookouts, and general encouragers of offenses like intentional murderers.[12]

Strict liability stands in direct opposition to well-established legal principles.[13] For centuries, courts and legislators have trumpeted the importance of limiting criminal convictions to those "blameworthy in mind,"[14] and of imposing sentences that reflect the extent of an actor's psychological blameworthiness.[15] "[U]niversal and persistent in mature systems of law," these mens rea principles are proclaimed to be as fundamental as our belief in an individual's ability to "choose between good and evil"[16] and "essential if we are to retain 'the relation between criminal liability and moral culpability on which criminal justice depends.'"[17] But this soaring rhetoric has not stopped lawmakers from enacting strict liability statutes.

Resolving this tension was once the animating cause of progressive criminal justice reformers, who set out in the first half of the twentieth century to develop the first modern mens rea reform

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Homicide Statutes with Due Process, 70 DUKE L.J. 659 (2020); JEREMIAH GOULKA, VALENA ELIZABETH BEETY, ALEX KREIT, ANNE BOUSTEAD, JUSTINE NEWMAN & LEO BELETSKY, HEALTH IN JUST., DRUG-INDUCED HOMICIDE DEFENSE TOOLKIT (3d ed. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3265510 [https://perma.cc/BJ2A-VMJT].

[11] *See, e.g.*, PAUL H. ROBINSON & TYLER SCOT WILLIAMS, MAPPING AMERICAN CRIMINAL LAW: VARIATIONS AMONG THE 50 STATES, ch. 5 (2017) (providing an overview of the breadth of strict liability felony murder statutes across the United States); *see also infra* notes 68–74, 354–55 and accompanying text.

[12] *See* RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 25–27 (2019) (observing how felony murder laws problematically "lump disparate categories of people together," although they act with materially different forms of culpability).

[13] *See generally* Michael Serota, *Blaming Minds*, 83 MD. L. REV. (forthcoming 2023) (manuscript at 160–66) (on file with the *New York University Law Review*); STEPHEN P. GARVEY, GUILTY ACTS, GUILTY MINDS (2020); ELIZABETH PAPP KAMALI, FELONY AND THE GUILTY MIND IN MEDIEVAL ENGLAND (2019); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (2000); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932).

[14] Morissette v. United States, 342 U.S. 246, 252 (1952).

[15] *See generally* Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201 (2017) (discussing the principle of proportional mens rea in U.S. criminal legislation and doctrine).

[16] *Morissette*, 342 U.S. at 250.

[17] Tison v. Arizona, 481 U.S. 137, 171 (1987) (Brennan, J., dissenting) (quoting People v. Washington, 62 Cal. 2d 777 (1965)).

agenda.[18] The document they produced, the Model Penal Code ("MPC"), offered a straightforward legislative solution to the problem of strict liability: abolish it. By requiring proof of a culpable mental state for every element of an offense,[19] the drafters of the MPC intended to launch a self-described "frontal attack" on strict liability.[20] But while publication of the MPC in 1962 birthed a wave of criminal code reform,[21] the idea of imposing universal mens rea requirements failed to garner support in state capitols or courthouses. In a time of tough-on-crime politics, lawmakers had little appetite for reforms that would make it more difficult for prosecutors to secure convictions.[22]

Today, the politics of criminal law reform have changed, but support for abolishing strict liability has not. Increasingly large segments of the public understand our legal system to be "defined by widespread criminalization, an epidemic of racialized police violence, and an astronomical population of people caged or under state correctional supervision."[23] And increasing numbers of criminal justice reformers view abolitionist solutions—categorically eliminating common carceral practices—as the right response.[24] But the MPC's proposal to abolish strict liability has not gained traction,[25] while a comparatively modest effort to limit strict liability in the federal criminal code recently failed due to opposition from progressive

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[18] *See* Angela P. Harris & Cynthia Lee, *Teaching Criminal Law from a Critical Perspective*, 7 OHIO ST. J. CRIM. L. 261, 264 (2009) ("[The Model Penal Code ("MPC") project] encapsulated the aspirations of a generation of progressives who hoped to bring criminal law, and law generally, fully into the twentieth century by situating it within the social sciences.").

[19] *See, e.g.*, MODEL PENAL CODE § 2.02(1) (AM. L. INST. 1985).

[20] *Id.* § 2.05 cmt. 1.

[21] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 320 (2007) ("Promulgated in 1962, the code prompted a wave of state code reforms . . . , each influenced by the Model Penal Code.").

[22] *See infra* Section I.B.1.

[23] Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 521 (2019).

[24] *See, e.g.*, Alexandra Natapoff, Atwater *and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 149 (2020); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1618 (2019) (describing abolitionism as "'a long-term political vision with the goal of eliminating imprisonment, policing, and surveillance and creating lasting alternatives to punishment and imprisonment'" (quoting CHARLENE A. CARRUTHERS, UNAPOLOGETIC: A BLACK, QUEER, AND FEMINIST MANDATE FOR RADICAL MOVEMENTS 9 (2018))); Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html [https://perma.cc/BLD2-8244].

[25] *See* Benjamin Levin, *Decarceration and Default Mental States*, 53 ARIZ. ST. L.J. 747, 764 (2021) (observing that "[m]ens rea reform hardly has been a cause embraced by abolitionist activists, nor is its scholarly treatment framed in abolitionist terms," but arguing that it could be).

lawmakers and reformers.[26] As a result, strict criminal liability remains pervasive and shows few signs of abating.

What explains the perennial conflict between mens rea principles and criminal policy? This Article spotlights two ideas that have fueled strict liability's historic rise and current deprioritization in criminal justice reform. One idea, what I refer to as the "Public Safety Assumption," holds that removing culpable mental states from criminal statutes is an effective means of reducing crime. Another idea, what I refer to as the "Mass Incarceration Assumption," holds that adding culpable mental states to criminal statutes is an ineffective means of reducing prison rates or promoting racial justice. These are both empirical claims about the impact of culpable mental state requirements on our criminal systems.[27] And there is little reason to believe either is true.

This Article reinvigorates the case for abolishing strict liability in the criminal law. Synthesizing decades of social science research, I first explain why there is little reason to believe that strict liability promotes public safety. Next, building upon the first-ever legal impact study of an individual mens rea reform, I outline how adding culpable mental states to individual criminal statutes could alter charging practices and conviction rates. I then demonstrate the racial justice benefits of universal mens rea standards by highlighting the concentration of strict liability in offenses disparately enforced against people of color. Through this deeper understanding of mens rea policy, the Article reveals the strength of the case against strict liability and why culpable mental state requirements are an important tool in the fight against mass incarceration.

In so doing, the Article contributes to three lines of scholarship. The first is a narrow body of research situating mens rea policy in historical, political, and empirical context.[28] The second is a quickly

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[26] *See, e.g.*, Michael Serota, *How Criminal Law Lost Its Mind*, BOS. REV. (Oct. 27, 2020), https://bostonreview.net/law-justice/michael-serota-how-criminal-law-lost-its-mind [https://perma.cc/482E-VT9T]; *see also infra* Section I.B.3.

[27] For use of the term "criminal systems," see Jenny E. Carroll, *If Only I Had Known: The Challenges of Representation*, 89 FORDHAM L. REV. 2447, 2447 n.2 (2021) ("[T]he term 'criminal systems' . . . accurately encapsulates the different subdivisions within the various systems of criminal law, procedure, policing, and punishment."); Sharon Dolovich & Alexandra Natapoff, *Introduction* to THE NEW CRIMINAL JUSTICE THINKING 4 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

[28] *See, e.g.*, KAMALI, *supra* note 13; Levin, *supra* note 23; Brown, *supra* note 9; Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59 (2004); James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429 (1994); 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 (1993); Richard G. Singer, *The Resurgence of Mens Rea: I—*

expanding interdisciplinary literature on the ideological forces shaping U.S. criminal justice policy.[29] And the third is a long line of normative scholarship arguing for culpable mental state requirements and against strict liability in the criminal law.[30]

The Article unfolds in three Parts. Part I provides an intellectual history of strict liability abolition. I first examine the beliefs fueling the rise of strict liability in the early twentieth century and the MPC's subsequent efforts to eradicate it through comprehensive mens rea reform. Next, I examine the beliefs contributing to the demise of the MPC's mens rea reform agenda in state legislatures and courts during the second half of the twentieth century. Finally, using the recent controversy over federal mens rea reform as a case study, I examine the

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Provocation, Emotional Disturbance, and the Model Penal Code, 27 B.C. L. REV. 243 (1986); Richard G. Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459 (1987) [hereinafter Singer, *Resurgence II*]; Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337 (1989) [hereinafter Singer, *Resurgence III*]; Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980).

[29] For important contributions from legal scholars, see Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631 (2020) [hereinafter Ristroph, *Curriculum*]; Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949 (2019) [hereinafter Ristroph, *Intellectual History*]; JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007); Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997). For important contributions from the social sciences, see, for example, MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015); MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA (2006) [hereinafter GOTTSCHALK, THE PRISON AND THE GALLOWS]; BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001). And for important contributions from historians, see KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010); Kelly Lytle Hernández, Khalil Gibran Muhammad & Heather Ann Thompson, *Introduction: Constructing the Carceral State*, 102 J. AM. HIST. 100 (2015).

[30] For an illustrative selection of important contributions, see, for example, GIDEON YAFFE, THE AGE OF CULPABILITY: CHILDREN AND THE NATURE OF CRIMINAL RESPONSIBILITY (2018); DOUGLAS HUSAK, THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS (2010); LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW (2009); H.L.A. HART, PUNISHMENT & RESPONSIBILITY (2d ed. 2008); FLETCHER, *supra* note 13; MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (1997); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992); JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960). For an outstanding edited volume on strict liability in the criminal law, see APPRAISING STRICT LIABILITY (A.P. Simester ed., 2005).

beliefs driving the contemporary lack of interest in abolishing strict liability. This analysis finds that two ideas are principally responsible for strict liability's historic rise and current deprioritization in criminal justice reform: a Public Safety Assumption and a Mass Incarceration Assumption.

Part II deconstructs the Public Safety Assumption. Canvassing relevant social science research, I explain why there is little reason to believe that strict liability is an effective strategy for deterrence or incapacitation—the two justifications that comprise the unduly narrow conception of public safety employed in conventional criminal discourse. By contrast, I explain why a more capacious understanding of public safety—one that accounts for the impact of perceived fairness on voluntary legal compliance—indicates that strict liability may be criminogenic. More fundamentally, I argue that a holistic assessment of criminal justice research reveals insufficient evidence for lawmakers to justify the use of strict criminal liability.[31]

Part III deconstructs the Mass Incarceration Assumption. Central to this analysis are the results of the first-ever legal impact study of an individual mens rea reform, which I recently conducted with a team of social scientists at the RAND Corporation.[32] Focusing on the U.S. Supreme Court's watershed decision in *Rehaif v. United States*, the study assesses the effects of adding a culpable knowledge requirement to the federal felon-in-possession statute on criminal administration.[33] Viewing our study's main findings alongside the literature on race and prosecutorial decisionmaking indicates the potential for culpable mental states to meaningfully curb charging, convictions, and racial disparities in the enforcement of individual statutes. Considering the breadth of strict liability and its concentration in offenses disparately enforced against people of color, I explain why adopting universal culpable mental state requirements could be an efficient and politically effective tool in the fight against mass incarceration.

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[31] This argument draws on my prior work with Ethan Leib and David Ponet conceptualizing legal and political actors as public fiduciaries. *See, e.g.*, Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699 (2013) [hereinafter Leib, Ponet & Serota, *A Fiduciary Theory of Judging*]; Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91 (2013).

[32] Matthew L. Mizel, Michael Serota, Jonathan Cantor & Joshua Russell-Fritch, *Does Mens Rea Matter?*, 2023 WIS. L. REV. (forthcoming 2023) (on file with the *New York University Law Review*) (internal and external peer review facilitated by the RAND Corporation).

[33] Rehaif v. United States, 139 S. Ct. 2191, 2194 (2019) (interpreting 18 U.S.C. § 922(g) and holding that the word "knowingly" applies both to the defendant's conduct and to the defendant's status).

I
Strict Liability Abolition: An Intellectual History

Why have strict liability policies proliferated in the face of widely-accepted mens rea principles? There is no simple answer to this question, given the intricate web of factors that influence the creation of public policy. Nevertheless, ideology—that is, the ideas and beliefs motivating those involved with policymaking—provides a particularly useful lens for understanding the shape of the law, and, in particular, the *criminal* law.[34] "[L]arge-scale violence by some against others is," as Alice Ristroph recently observed, "usually accompanied by a theory or rationale, often held in good faith, about why the violence is appropriate."[35] Punishing the morally innocent is its own kind of violence, and the legal actors who sustain the practice have their own reasons for doing so. This Part unearths those reasons through an intellectual history of the failed movement to abolish strict liability.

Section A begins that history with the development of the MPC's mens rea reform agenda. During the nineteenth and early twentieth centuries, courts and legislators frequently embraced strict criminal liability policies motivated by a basic idea: Eliminating mens rea requirements is an effective means of promoting public safety. Informed by the insights of twentieth century social science and legal scholarship, the MPC drafters argued that mens rea was "too fundamental to be compromised" by this empirically suspect assumption.[36] Promulgated in 1962, the MPC offered a straightforward solution to the rise of strict liability: abolish it. To do so, the MPC required proof of a culpable mental state for every element of an offense.

Over the next sixty years, the MPC's broad array of codification recommendations reshaped U.S. criminal law;[37] however, the drafters' proposal to abolish strict liability had comparatively little influence on criminal policy. Section B explains why. The latter half of the twentieth century was a time of rising crime rates, civil rights backlash, and tough-on-crime politics. In this environment, lawmakers had little

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[34] *See, e.g.*, Dolovich & Natapoff, *supra* note 27; *see also* Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983) (exploring the relationship between narrative, ideology, and law); Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 Stan. L. Rev. 821, 824 (2021) ("It has never been clearer how ideas birthed in and by social movements are fundamental forces in law and politics in the United States.").

[35] Ristroph, *Curriculum*, *supra* note 29, at 1706–07; *see* Ristroph, *Intellectual History*, *supra* note 29.

[36] Model Penal Code § 2.05 cmt. 1 (Am. L. Inst. 1985).

[37] *See generally* Robinson & Dubber, *supra* note 21 (providing an overview of the MPC's influence).

appetite for abolishing strict liability policies that they assumed improved public safety. Today, the politics of criminal justice reform have changed, but the lack of interest in MPC-style mens rea reform has not. Strict liability abolition has failed to garner support due to the influence of another assumption: Adding culpable mental states to criminal statutes would do little to promote decarceration or racial justice. This assumption is illustrated by the recent failed federal mens rea reform effort.

A. Strict Liability Abolition and the Model Penal Code

In 1962, a group of progressive criminal justice reformers led by Herbert Wechsler had a novel idea: to require the government to prove that a person charged with a crime acted with a culpable mental state—purpose, knowledge, recklessness, or negligence—as to every material element of an offense.[38] This new idea, although simple, was conceptually revolutionary: It sought to completely upend the blunt common law understanding of mens rea and replace it with something more analytically precise.

At the time the drafters of the MPC were at work, culpability evaluations revolved around vague mens rea terms—for example, general intent, specific intent, and malice—which were understood to apply in a general way to the offense as a whole.[39] However, this offense-level conceptualization of mens rea systematically failed to clarify the specific states of mind that would support a criminal conviction. And in the absence of that clarity, common law courts frequently struggled to assess the impact of recurring culpability issues, such as mistakes, ignorance, and intoxication, on the government's burden of proof.[40] The result was an "amorphous . . . quagmire" of confusing and inconsistent mens rea policies driven by "a thin surface of general terminology denoting wrongfulness."[41]

The drafters of the MPC understood the source of the problem: "Clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately

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[38] *See, e.g.*, MODEL PENAL CODE § 2.02(1) (AM. L. INST. 1985). Both here and throughout this Article, the phrase "element of an offense" refers to the nature of the conduct, result, and circumstance elements required by a criminal statute to incur liability or aggravate punishment.

[39] *See, e.g.*, PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW 155 (2d ed. 2012).

[40] *See, e.g.*, Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

[41] Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, 575 (1988).

with respect to *each material element* of the crime."[42] For example, instead of generally asking whether the accused intended[43] to commit a crime, government decisionmakers need to focus on whether someone charged with a crime intended to commit each of its constituent parts.[44] By analyzing culpability on an element-by-element basis, the MPC approach to mens rea offered significantly greater precision and consistency in culpability evaluations. But ultimately, these conceptual advancements were intended to be the vehicle for the drafters' substantive mens rea reform agenda. And that agenda was ambitious: It sought to eradicate strict liability from the criminal law.[45]

This abolitionist agenda was a direct response to a groundswell of strict liability policies enacted during the late nineteenth and early twentieth centuries.[46] "Pure" strict liability crimes authorized the government to secure convictions against morally innocent actors absent proof of a culpable mental state as to any element in an offense.[47] This violated the historically venerated principle of threshold mens rea, which limited criminal liability to those "blameworthy in mind."[48] "Partial" strict liability doctrines imposed extreme sentences by omitting culpable mental state requirements for individual offense ele-

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[42] MODEL PENAL CODE § 2.02 cmt. 1 (AM. L. INST. 1985) (emphasis added).

[43] I use the term "intended," both here and throughout the Article, to generally reference the existence of *some* culpable mental state.

[44] One might, for example, intend to strike someone in a bar fight, yet be unaware that the person struck is an undercover police officer. Under these circumstances, one can question whether the assaulter acted with the mens rea necessary to justify a conviction for the more serious crime of assaulting a police officer (APO). Without differentiating between the culpable mental state governing the result element of APO (causing bodily injury) and the culpable mental state governing the circumstance element of APO (that the injury be inflicted upon a police officer), it is all too easy to mistake one intent for another—or miss the question entirely. *See, e.g.*, Robinson & Cahill, *supra* note 39, at 155 (discussing the shortcomings of offense-level mens rea analysis and the virtues of analyzing mens rea on an element-by-element basis).

[45] *See, e.g.*, Guyora Binder & Brenner Fissell, *Judicial Application of Strict Liability Local Ordinances*, 53 ARIZ. ST. L.J. 425, 425 (2021) ("The criminal code reform movement inspired by the Model Penal Code had, among other goals, the aim of eliminating strict liability offenses.").

[46] Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1439 (1968) (observing "the widespread use of strict liability in penal law—not only in the constantly proliferating corpus of the regulatory statutes but even with respect to some of the elements of the more serious offenses, such as bigamy and statutory rape"); David Wolitz, *Herbert Wechsler, Legal Process, and the Jurisprudential Roots of the Model Penal Code*, 51 TULSA L. REV. 633, 669–70 (2016) ("At the time the Code was being drafted, strict liability crimes were already widespread in state and federal law and were, in fact, increasing along with the growth in regulations more generally.").

[47] Simons, *supra* note 1, at 1081.

[48] Morissette v. United States, 342 U.S. 246, 252 (1952).

ments which provided the basis for aggravating punishment.[49] This violated the equally well-established principle of proportionate mens rea, which requires punishment to reflect the extent of an actor's psychological blameworthiness.[50] While cutting across multiple areas of criminal regulation, this rising tide of strict liability was driven by the same assumption: Eliminating culpable mental states from criminal statutes is an effective means of promoting public safety. Below, I discuss three common law examples of the Public Safety Assumption at work—public welfare offenses, morality offenses, and the felony murder doctrine—and the MPC drafters' proposed legislative response.

1. The Rise of Strict Liability

The most common variety of strict liability confronted by the MPC drafters was the "public welfare offense."[51] Public welfare offenses were enacted in response to the breakneck speed of economic development and growing unease with changes wrought by the industrial revolution.[52] To deal with these societal changes, nineteenth and early twentieth century lawmakers increasingly chose to strictly regulate potentially dangerous or risky forms of commercial activity, including the production and labeling of food, milk, liquor, and medicines, the sale of securities, and the operation of motor vehicles.[53] In a departure from the prevailing principle of threshold mens rea, this class of offenses relieved the government of its burden to prove a guilty mind, thereby making reasonable mistakes and unavoidable accidents legally irrelevant.[54] Merely engaging in the conduct prohibited by statute was sufficient to support a criminal conviction.[55]

In authorizing this pure form of strict liability, lawmakers clearly understood that morally innocent actors inevitably would be punished.[56] However, they saw this as a necessary cost to be borne lest the

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[49] Simons, *supra* note 1, at 1081.

[50] *Id.*

[51] Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 55 (1933) ("[W]e are witnessing today a steadily growing stream of offenses punishable without any criminal intent whatsoever."); Singer, *Resurgence II*, *supra* note 28, at 467; *Morissette*, 342 U.S. at 255.

[52] Levenson, *supra* note 4, at 419; Sayre, *supra* note 51, at 68–69; Gardner, *supra* note 28, at 672.

[53] Levenson, *supra* note 4, at 419; Sayre, *supra* note 51, at 68–69; Kadish, *supra* note 6, at 265.

[54] Kadish, *supra* note 6, at 267.

[55] *See id.*

[56] *See, e.g.*, United States v. Dotterweich, 320 U.S. 277, 281 (1943) ("[Strict liability] legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at

government "impair the efficiency of controls deemed essential to the social order as presently constituted."[57] In effect, legislators believed that the injustice inherent in strict liability could be justified in the interests of the larger good.[58] And that larger good was understood in terms of public safety; the operative assumption was that eliminating mens rea was an effective strategy for furthering it.

This same logic, but a different set of social pressures, fueled the rise of pure strict liability outside of the commercial context during the late nineteenth and early twentieth centuries: the so-called "morality crime."[59] Inspired by Victorian concerns about changing sexual norms and a moral panic around perceived threats to children, legislatures increasingly sought to strictly regulate the boundaries of sexually intimate conduct.[60] Illustrative examples of these morality crimes include adultery, bigamy, and statutory rape.[61]

To appreciate the strict liability nature of a morality crime, it is important to keep in mind that the critical aspect of this class of offenses is the legal status circumstance element that transforms what is normally innocuous conduct—for example, engaging in sexual intimacy or getting married—into a morally objectionable act. For example, in a statutory rape prosecution, the key circumstance element is whether one of the parties is old enough to consent, whereas in an adultery or bigamy prosecution, the critical circumstance element is whether one of the parties is already married. Under the principle of threshold mens rea, proof that the accused knew—or at least should have known—about the most morally salient aspect of their conduct would have been deemed essential. However, in the case of morality crimes which were often punished as serious felony offenses, lawmakers simply chose to set this principle aside.[62]

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hazard upon a person otherwise innocent but standing in responsible relation to a public danger."); United States v. Balint, 258 U.S. 250, 253–54 (1922).

57 Morissette v. United States, 342 U.S. 246, 256 (1952).

58 *Balint*, 258 U.S. at 253–54 ("Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided.").

59 *See, e.g.*, Levenson, *supra* note 4, at 422–24; Brian Kennan, *Evolutionary Biology and Strict Liability for Rape*, 22 LAW & PSYCH. REV. 131, 175 (1998).

60 *See, e.g.*, Britton Guerrina, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1259–60 (1998) ("At the turn of the century, reformers and families used statutory rape laws both to protect and to control the sexuality of working class girls laboring in the new urban centers."); Singer, *Resurgence III*, *supra* note 28, at 340–73.

61 *See, e.g.*, Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1109 (1952) (observing the use of strict liability to address these issues); Sayre, *supra* note 51, at 73–75.

62 *See, e.g.*, Levenson, *supra* note 4, at 424–25; Singer, *Resurgence III*, *supra* note 28, at 407.

What explains this patent disregard of mens rea requirements? The answer, in short, is public safety. Lawmakers believed the defense of sexual mores—for example, protecting "young females' virginity in order to ensure their eligibility for marriage"[63]—was "sufficiently great as to override the undesirable effect of punishing those who might in some other sense be 'innocent.'"[64] Never mind the fact that legislatures rarely specified the pathways through which strict liability would actually prevent the conduct prohibited by morality crimes from occurring. The Public Safety Assumption typically operated as a tenet of faith; most lawmakers simply believed that through "devious, unknown ways some good results from strict liability in 'penal' law" could be expected to come about.[65]

This tenet of faith simultaneously drove the degradation of another critical function served by mens rea requirements: ensuring that sentences reflect the extent of an actor's psychological blameworthiness.[66] This principle of proportional mens rea is the animating idea behind our centuries-old homicide laws, which go to great lengths to differentiate between mental states and ultimately to lessen sentences for those whose choices are less blameworthy than in the paradigmatic case of a cold-blooded, premeditated murder.[67] Belief in the crime-control efficacy of strict liability drove the rise of common law policies in conflict with this well-established mens rea principle. Eschewing considerations of proportionality, lawmakers sought to severely aggravate punishment for unforeseen occurrences that arose in the course of perpetrating crimes.

Felony murder doctrine provides an illustrative example of this kind of "partial" strict liability policy. "In its classic form, the operation of the rule follows a compellingly simple, almost mathematical, logic: a felony + a killing = a murder."[68] Conspicuously absent from this formula is proof of a culpable mental state as to the key result element, *a killing*, which supplies the basis for aggravating normal

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[63] Guerrina, *supra* note 60, at 1259–60.

[64] Levenson, *supra* note 4, at 423 n.113 (quoting Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 739 (1960)).

[65] HALL, *supra* note 30, at 304–05.

[66] *See, e.g.*, Serota, *supra* note 15, at 1203 (noting the commitment of Anglo-American legal scholarship and case law to the basic idea that "all else being equal, those who act with a more blameworthy state of mind should receive more punishment"); Serota, *supra* note 26 (noting that centuries-old American homicide laws are animated by the idea that "all else being equal, punishment should track the guiltiness of a defendant's state of mind").

[67] *See, e.g.*, Serota, *supra* note 26; *see also* Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 702 (1937).

[68] Tomkovicz, *supra* note 28, at 1429–30.

felony liability to what is typically the most serious offense in a criminal code: intentional murder.[69]

This approach to punishment "yield[s] startling results."[70] For example, under felony murder, "a seller of liquor in violation of a statutory felony becomes a murderer if his purchaser falls asleep on the way home and dies of exposure."[71] Along similar lines, "a person who communicates disease during felonious sexual intercourse is guilty of murder if his partner subsequently dies of infection."[72] Most disproportionate of all, felony murder doctrine extends murder liability to those who merely intend to *facilitate* the underlying felony.[73] Under this "in for a penny in for a pound" approach, the getaway driver or lookout to a robbery or home invasion can be treated as a murderer if the principal actor accidentally drops a gun, thereby killing a bystander or occupant in the process.[74]

No conception of justice supports equating accidental killings—let alone those unwittingly aided—with those intentionally perpetrated.[75] But for the mid-twentieth-century lawmakers who supported felony murder policies, justice was never the point. The point, instead, was to maximize public safety—something that legislators and courts of the era believed they could achieve by incentivizing (allegedly) rational actors to desist from committing felonies in the first instance.[76] Alternatively, those who couldn't be deterred through extreme sentences were thought to be so dangerous that their long-term imprisonment at least would be a good way to keep the public safe from future wrongdoing. Whether the conditions necessary for strict liability policies such as felony murder doctrine to effectively

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[69] For a discussion of the numerous ways in which legislatures have circumscribed the scope of felony murder liability, see generally Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403 (2011).

[70] MODEL PENAL CODE § 210.2 cmt. 6 (AM. L. INST. 1980).

[71] *Id.*

[72] *Id.*

[73] *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.06 (8th ed. 2012).

[74] Wesley M. Oliver, *Limiting Criminal Law's "In for a Penny, in for a Pound" Doctrine*, 103 GEO. L.J. ONLINE 8, 8–9 (2013).

[75] *See, e.g.*, MODEL PENAL CODE § 210.2 cmt. 6 (AM. L. INST. 1980) ("Lesser culpability yields lesser liability, and a person who inadvertently kills another under circumstances not amounting to negligence is guilty of no crime at all. The felony murder rule contradicts this scheme.").

[76] *See, e.g.*, Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 97–98 (1990); People v. Washington, 402 P.2d 130, 133 (Cal. 1965); Tomkovicz, *supra* note 28, at 1450–51. For further discussion of the deterrent ideals behind felony murder doctrine, see *infra* notes 174–76 and accompanying text.

serve these crime control principles actually existed was never carefully investigated.

2. *The Model Penal Code's Response*

The MPC vehemently rejected these strict liability policies, along with the "social control at any cost" logic driving them. "Crime does and should mean condemnation," the drafters reasoned, "and no court should have to pass that judgment unless it can declare that the defendant's act was culpable."[77] The drafters viewed the idea of promoting public safety through the abandonment of culpable mental state requirements to be "indefensible" and understood the criminal law's commitment to mens rea to be "too fundamental to be compromised."[78]

The MPC's rejection of strict liability is a reflection of its penological philosophy.[79] Although the drafters believed the criminal law should pursue utilitarian objectives—namely, rehabilitating those with criminogenic propensities[80]—they viewed the pursuit of these objectives to be constrained by the demands of justice.[81] And one of those

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[77] MODEL PENAL CODE § 2.05 cmt. 1 (AM. L. INST. 1985).

[78] *Id.*

[79] The MPC's chief architect, Herbert Wechsler, believed that the criminal law of the nineteenth and early twentieth centuries was driven by populist passions, shaped by a shallow and unsophisticated sense of crime control, and disconnected from the prevailing academic insights. *See generally* Herbert Wechsler, *American Law Institute II: A Thoughtful Code of Substantive Law*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 524 (1955); *id.* at 525 (discussing how Wechsler and the MPC drafters hoped to bring a mix of "legal wisdom" and the "knowledge, insight and experience offered by" all other scholarly enterprise to bear on the era's misguided criminal justice policies). For broad discussion of the MPC's ideological origins, see, for example, Wolitz, *supra* note 46; Anders Walker, *American Oresteia: Herbert Wechsler, the Model Penal Code, and the Uses of Revenge*, 2009 WIS. L. REV. 1017 (2009); Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53 (2000).

[80] *See, e.g.*, Markus D. Dubber, *The Model Penal Code, Legal Process, and the Alegitimacy of American Penalty*, *in* FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 239, 239–61 (Markus D. Dubber ed., 2014); Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319 (2007). Not all agree with this utilitarian assessment of the MPC, however. *See* Wolitz, *supra* note 46, at 638 ("[T]he Code has often been seen as thoroughly utilitarian in its theory of punishment . . . . In fact, the Code reflects the value pluralism of Wechsler and the Legal Process School throughout, and it does not subscribe to any single normative theory of punishment.").

[81] MODEL PENAL CODE, Intro. to Arts. 6 & 7 (AM. L. INST. 1985) ("These constraints of the Code might be defended as a kind of retributive limit on utilitarian objectives, the notion being that as a general matter people should not be punished more severely than they deserve if such punishment would have beneficial social consequences."); *see, e.g.*, Frank Remington, *The Future of the Substantive Criminal Law Codifications Movement—Theoretical and Practical Concerns*, 19 RUTGERS L. REV. 867, 868 (1988) ("The Model Penal Code's premise is the principle that 'punishment may not be imposed in the absence of blameworthy conduct' and the extent of punishment should not exceed that deserved because of the blameworthiness of the conduct." (quoting Sanford H. Kadish, *Codifiers of*

demands, as the MPC drafters understood it, was proof of mens rea. "If fault is to be found with human conduct because it is offensive in its nature, potentialities or consequences," the MPC drafters argued, "it surely is essential that the actor knew or should have known the facts that give it this offensive character."[82] Imposing punishment in the absence of a guilty mind, the drafters believed, "would deny all moral force to the proscriptions of criminal law and generate in individuals a sense of gross injustice."[83]

Following this logic, the MPC proposes near-complete abolition of strict liability, which is accomplished through three interlocking general mens rea provisions.[84] The first provision, MPC § 2.02(1), requires proof of a culpable mental state—whether purpose, knowledge, recklessness, or negligence—for every element of an offense,[85] with the exception of "violations" for which no criminal liability or punishment can be imposed.[86] The second provision, MPC § 2.02(3), requires courts to infer recklessness for any material element for which a culpable mental state requirement is not specified.[87] Third, the MPC provides a carry-forward rule of interpretation, MPC § 2.02(4), which establishes that an explicitly stated culpable mental state requirement applies to all material elements "unless a contrary purpose plainly appears."[88]

Although these provisions suffer from important ambiguities,[89] their collective thrust is clear: waging a "frontal attack" on strict liability in the criminal law.[90] Applying a culpable mental state require-

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the Criminal Law: Wechsler's Predecessors, 78 COLUM. L. REV. 1098, 1142 (1978))); Andrew Ingram, *Pinkerton Short-Circuits the Model Penal Code*, 64 VILL. L. REV. 71, 72 (2019) ("The belief that criminal liability should not exceed culpability was a basic premise of the drafters of the Model Penal Code."); *see also* MODEL PENAL CODE § 1.02(1) (AM. L. INST. 1985) (noting that purposes of the MPC include "to safeguard conduct that is without fault from condemnation as criminal" and "to differentiate on reasonable grounds between serious and minor offenses").

82 Wechsler, *supra* note 46, at 1435.

83 *Id.*

84 The MPC does authorize pure strict liability on one occasion: sexual conduct involving victims under the age of ten. *See* MODEL PENAL CODE § 213.6 (AM. L. INST. 1980). This appears to have been a pragmatic decision, rather than one based on moral principle, as the MPC commentary explicitly recognizes the injustice of applying strict liability in this context. *See id.* cmt. 2 ("[T]he actor who reasonably believes that his partner is above that age lacks culpability . . . . Punishing him anyway . . . postulates [an inaccurate] relation between criminality and immorality . . . .").

85 MODEL PENAL CODE § 2.02(1) (AM. L. INST. 1985).

86 *Id.* § 2.05(2).

87 *Id.* § 2.02(3).

88 *Id.* § 2.02(4).

89 *See generally* Robinson & Grall, *supra* note 40, at 705–19 (describing ambiguities that persist in modern culpability schemes based on the MPC).

90 MODEL PENAL CODE § 2.05 cmt. 1 (AM. L. INST. 1985).

ment to every element of an offense would abolish pure and partial strict liability offenses alike in one fell swoop. All told, the future of mens rea reform looked bright—provided lawmakers were willing to turn on the lights.

B. Strict Liability Abolition After the Model Penal Code

When the American Legal Institute published the MPC and its accompanying commentary in 1962, the criminal law community celebrated it as a "tremendous advance."[91] This was due in large part to the MPC's general mens rea provisions, which accomplished "what no legal system had ever expressly tried to do: orchestrate the noise of culpability into a reasonably uniform and workable system."[92] These, among other MPC innovations, spawned a revolution in substantive criminal law and a wave of criminal law reform efforts that swept the nation.[93]

The criminal codes adopted through these efforts reflected the prescriptions of the MPC to varying degrees.[94] However, one constant is an embrace of the Code's overarching elemental framework for addressing mens rea issues. For example, a strong majority of the thirty-five states that successfully modernized their codes adopted some version of the MPC's culpable mental state hierarchy, rules of interpretation, and general culpability principles.[95] And even in juris-

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[91] Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions System Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 180 (2003).

[92] Francis X. Shen, Morris B. Hoffman, Owen D. Jones, Joshua D. Greene & René Marois, *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1315–16 (2011).

[93] *See* MODEL PENAL CODE, Foreword (AM. L. INST. 1985) (describing the legislative codifications of criminal law passed in the wake of the MPC's completion); Roger A. Fairfax, Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597, 603 (2011) ("The American Law Institute's drafting and adoption of the Model Penal Code (MPC) began an era of reform efforts focused on the substantive criminal law . . . ."). Between 1962 and 1983, thirty-four jurisdictions adopted comprehensive criminal codes that "were influenced in some part by the Model Penal Code." Robinson & Dubber, *supra* note 21, at 326. Thereafter, in 1989, one additional jurisdiction, Tennessee, joined this group—a point often overlooked in the history of U.S. code reform. *See generally* State v. Williams, 38 S.W.3d 532, 535 (Tenn. 2001) (observing the state's adoption of a revised criminal code in 1989). All of the successful code reform projects occurred at the state level; however, there was a prominent decades-long effort to reform the federal criminal code that was never enacted. For more on that effort, see Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45 (1998).

[94] *See, e.g.*, Robinson & Dubber, *supra* note 21, at 319 (describing the "enormous diversity among the fifty-two American penal codes").

[95] *See* Dannye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. UNIV. L. REV. 229, 236, 241, 247 (1997) (identifying twenty-two states that adopted the MPC's four-tiered hierarchy of culpability, twenty-two that adopted

dictions that failed to overhaul their codes, courts and legislators frequently rely on the MPC's understanding of mens rea when creating criminal policy.[96] With this broad influence, the MPC approach to mens rea has become the "representative modern American culpability scheme"[97] and "a standard part of the furniture of the criminal law."[98]

This is the conventional accounting of the MPC's mens rea reform agenda, and in one sense it is incontrovertibly true: The drafters' rethinking of mens rea clearly left its mark on U.S. criminal legislation and practice. In reality, however, this mark principally reflects the MPC's *conceptual* innovations—for example, the Code's culpable mental state hierarchy and element analysis framework for applying it. By contrast, the MPC's substantive mens rea reform agenda—centered around the wholesale abolition of strict liability—has had surprisingly little influence on criminal policy during two very ideologically different eras of criminal law reform.

As discussed below, the Public Safety Assumption fueled the continued expansion of strict liability during the tough-on-crime era and has driven legislative resistance to even modest curtailments of the scope of strict liability during our current era of criminal justice reform. At the same time, a Mass Incarceration Assumption has prevented contemporary criminal justice reformers from picking up the cause of strict liability abolition where the MPC drafters left it off. The recent failure of federal mens rea reform provides a case study in the assumptions that gave rise to and continue to sustain strict liability in U.S. criminal law.

1. The Tough-on-Crime Era

While publication of the MPC in 1962 sparked criminal law reform efforts across the nation, those efforts occurred in a political context that was inhospitable to abolishing strict liability.[99] Just as state legislatures were rewriting their criminal codes, crime rates were rising, as was social disorder fueled by backlash to the civil rights

its guidelines for determining the requisite culpability for a crime, and twenty that adopted its mistake of fact provision); Brown, *supra* note 9, at 289 (identifying twenty-four states the criminal codes of which "resemble the MPC, especially as to the central culpability rules").

[96] *See* Robinson & Dubber, *supra* note 21, at 326–27 (describing the influence of the MPC).

[97] Robinson & Grall, *supra* note 40, at 692.

[98] Shen et al., *supra* note 92, at 1318.

[99] For an in-depth and illuminating exploration of this point, see Brown, *supra* note 9.

movement.[100] This societal upheaval brought with it a more punitive way of thinking about criminal justice and an even more strident commitment to the "law as social control" model that fueled the rise of strict liability policies during the late nineteenth and early twentieth centuries.[101]

This tough-on-crime ideology embraced what Jonathan Simon has aptly characterized as "imprisonment on a mass basis of whole portions of the population with little aspiration to individualize or reclaim."[102] In replacing the individual with dangerous classes as the target of penal power, this ideology supplanted careful policy analysis with a rhetoric of deterrence and incapacitation[103] while repudiating rehabilitation as an achievable ideal.[104] Tough-on-crime adherents had little interest in the recommendations of criminologists or the caution urged by legal scholars; instead, their central goal was to enact the harshest policies as quickly as possible.[105] Critical to achieving this goal was the strategic use of fear and a broader politics of law and order, which advertised a crusade "to win the war against crime" and ever "more powerful weapons designed to bring crime under control."[106]

The tough-on-crime ideology birthed an unprecedented "severity revolution,"[107] along with the continued growth of strict liability. In the latter half of the twentieth century, the vast majority of jurisdic-

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[100] *See, e.g.*, Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230 (2007) (describing this backlash and its lasting impact); Lawrence Glickman, *How White Backlash Controls American Progress*, THE ATLANTIC (May 22, 2020, 10:41 AM), https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914 [https://perma.cc/95SY-8F5W] (describing this dynamic in areas beyond criminal justice reform).

[101] For broader discussion, see, for example, GOTTSCHALK, THE PRISON AND THE GALLOWS, *supra* note 29; GARLAND, *supra* note 29.

[102] Jonathan Simon, *Wechsler's Century and Ours: Reforming Criminal Law in a Time of Shifting Rationalities of Government*, 7 BUFF. CRIM. L. REV. 247, 265 (2003) [hereinafter Simon, *Wechsler's Century*]. Simon has developed this idea in multiple venues. *See, e.g.*, SIMON, *supra* note 29; Jonathan Simon, *Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-First*, 84 TEX. L. REV. 2135 (2006) [hereinafter Simon, *Positively Punitive*].

[103] *See, e.g.*, Simon, *Positively Punitive*, *supra* note 102, at 2137–38.

[104] *See, e.g.*, Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, *in* 42 CRIME & JUSTICE IN AMERICA, 1975–2025, at 299 (Michael Tonry ed., 2013) (tracing the rise, fall, and future of the rehabilitation paradigm).

[105] *See* Michael Serota, *Improving Criminal Justice Decisions*, 52 ARIZ. ST. L.J. 693, 700–03 (2020) (arguing that expertise and empiricism have been marginalized in the creation of criminal justice policy in recent decades).

[106] Tomkovicz, *supra* note 28, at 1461–62.

[107] Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 832 (2000).

tions either outright rejected or substantially watered down the MPC provisions intended to abolish strict liability.[108] At the same time, lawmakers reinforced through codification some of the most egregious violations of mens rea principles developed by courts, while legislating new and increasingly aggressive forms of strict liability.[109]

In retrospect, this state-level rejection of strict liability abolition was entirely predictable given the Public Safety Assumption's broad influence on criminal lawmaking during the tough-on-crime era. Consideration of the MPC's mens rea reform recommendations took place in an ideological climate that understood increased penal severity to be indistinguishable from effective crime control.[110] And in a broader policy context centered around warehousing "dangerous" populations, lawmakers found it all too easy to abandon notions of "individualized culpability in the assessment of worthiness for punishment."[111] As a result, "[w]hen the MPC reform movement conflicted with the tough-on-crime movement, it was, unsurprisingly, the MPC's reform efforts—the efforts of legal professionals and academics more than politicians—that lost."[112]

2. The Criminal Justice Reform Era: Generally

More surprising is how strict liability abolition has fared during the twenty-first century, in our current era of criminal justice reform. Although it can be difficult to pin down what exactly distinguishes this era from the last, three themes are illustrative: recognition, rejection, and abolition. Today, there is a growing recognition of the social costs

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[108] *See* Brown, *supra* note 9, at 317–21 (discussing the various ways in which the MPC's culpability requirements have been ignored or marginalized in jurisdictions with criminal codes based on the MPC); Scott England, *Default Culpability Requirements: The Model Penal Code and Beyond*, 99 OR. L. REV. 43, 58–81 (2020) (cataloguing the default culpability provisions in MPC states).

[109] *See, e.g.*, Levenson, *supra* note 4, at 414 n.76 (observing increased pace of enactment of and prosecution for public welfare offenses during the 1980s); Michael G. Heyman, *The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform*, 15 BERKELEY J. CRIM. L. 388 (2010) (describing failed legislative attempts to limit strict liability for accomplices in Illinois); Leo Beletsky, *America's Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis*, 2019 UTAH L. REV. 833, 869–70 (noting the rise of strict liability drug-induced homicide statutes during the 1980s and 90s); Brown, *supra* note 9, at 321–23 ("Legislatures endorse strict liability not only by enacting weaker alternatives to the MPC culpability canons or by acquiescing to state court strict-liability interpretations. They also do so by enacting specific strict-liability rules.").

[110] *See, e.g.*, Tomkovicz, *supra* note 28, at 1463 ("In the world of American politics, logical consistency and fairness to felons are not very potent weapons against the charge that one is soft on crime and hostile to law and order. In part, felony-murder's continued survival must be rooted in the politics of law and order.").

[111] Simon, *Wechsler's Century*, *supra* note 102, at 265.

[112] Brown, *supra* note 9, at 287–89.

imposed by the tough-on-crime policies of the twentieth century. There is also a growing rejection of the "social control at any cost" ideology motivating them. And there is an emerging desire to categorically abolish carceral practices that grow out of this ideology.

Let's begin with the recognition. Statistics only capture part of the story, but it is an important part. Every morning, around two million people wake up in a U.S. prison or jail, while another four million people continue living their lives under some form of correctional supervision.[113] These two numbers make the United States the world leader in incarceration,[114] yet they fail to capture the untold millions of people cycling in and out of our criminal systems each year.[115]

Even more striking are the racial disparities associated with these data.[116] The scholarly literature on racial bias finds, for example, that people of color (and particularly Black men) are significantly more likely to be stopped by police,[117] more likely to be held in pretrial detention,[118] less likely to get a fair trial,[119] and more likely to receive

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[113] Serota, *supra* note 26.

[114] JOHN F. PFAFF, LOCKED IN 1, 239 n.1 (2017).

[115] *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CALIF. L. REV. 1313, 1314–15 (2012) (observing that "[a]pproximately one million felony convictions are entered in the U.S. each year," while "[a]n estimated ten million misdemeanor cases are filed annually, flooding lower courts, jails, probation offices, and public defender offices"); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 746 & n.81 (2018) (estimating that misdemeanors comprise at least seventy-four percent of criminal caseloads).

[116] *See, e.g.*, Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272–73 (2004); Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DÆDALUS, Summer 2010, at 74, 78 (arguing "mass" incarceration is a misnomer because policing and imprisonment do not indiscriminately entrap all Americans, but rather target low-income Black men); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016) (identifying causes of police violence against Black Americans). For an easily accessible compilation of studies, see Radley Balko, Opinion, *There's Overwhelming Evidence that the Criminal Justice System Is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system [https://perma.cc/NP63-75CJ]. For discussion of the intersectionality of race, gender, and poverty in criminal policymaking and enforcement, see Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418 (2012).

[117] *See, e.g.*, Philip J. Levchak, *Stop-and-Frisk in New York City: Estimating Racial Disparities in Post-stop Outcomes*, 73 J. CRIM. JUST. 1 (2021) (detailing racial disparities in pedestrian stops perpetrated by New York police against people of color between 2008 and 2012); MICHAEL D. WHITE & HENRY F. FRADELLA, STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICING TACTIC 4–5 (2016) (describing the heavy toll of stop-and-frisk policies on minority citizens of New York City and Newark, New Jersey).

[118] *See, e.g.*, CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM 146 (2019).

longer sentences.[120] Perhaps most troubling of all is the extent to which Black men suffer comparatively high levels of police violence, facing one in one thousand odds of being killed by law enforcement.[121]

Confronted with these realities, a large segment of society has effectively said: "enough." They are unwilling to tolerate the costs—human, moral, and fiscal—of an approach to criminal law premised upon the idea that America can simply punish its way out of social problems.[122] This emerging criminal justice consensus "is reflected in our nation's major political parties, endorsed by our most prominent institutions, and held by many members of the public."[123] It also extends to a broad coalition of reformers, including every major civil rights organization involved in criminal policy issues, major left-leaning and right-aligned think tanks, influential financial backers of the Democratic and Republican parties, and a number of non-partisan organizations that traditionally have not focused on criminal justice reform.[124]

It is important not to overstate the extent of this consensus[125] (or what it has actually achieved[126]). While criminal justice reformers are

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[119] *See, e.g.*, SAMUEL WALKER, CASSIA SPOHN & MIRIAM DELONE, THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA 251–92 (6th ed. 2018) (detailing racial inequities in criminal trial procedures).

[120] *See, e.g.*, *id.* at 293–358 (detailing racial disparities in sentencing).

[121] Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, 116 PNAS 16793, 16793 (2019), https://www.pnas.org/content/pnas/116/34/16793.full.pdf [https://perma.cc/NT3Z-AB75]; *see also* Gabriel L. Schwartz & Jaquelyn L. Jahn, *Mapping Fatal Police Violence Across U.S. Metropolitan Areas: Overall Rates and Racial/Ethnic Inequities, 2013–2017*, PLOS ONE, June 24, 2020, at 5, https://doi.org/10.1371/journal.pone.0229686 [https://perma.cc/Y6TG-QU6X] (finding that nationwide, Black people are 3.23 times more likely to be killed during police contact than white people).

[122] *See, e.g.*, Eric Holder, *Remarks at the National Press Club*, 27 FED. SENT'G REP. 297, 297 (2015) (lamenting the "serious financial ramifications" and "human and moral toll" of "America's overreliance on incarceration"); Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 390 (2017) (noting increased public awareness of and political interest in addressing mass incarceration).

[123] *See* Serota, *supra* note 105, at 693–94.

[124] *See* Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 126–27 (2017).

[125] *See, e.g.*, Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018) (arguing that criminal justice reformers actually fall into two distinct camps that reflect fundamentally different beliefs about the role of criminal law in society).

[126] Looking at the legislative branch, for example, Michael Tonry observes that there have been many hundreds of changes that have occurred across the states in recent years, but "almost all are minor." MICHAEL TONRY, SENTENCING FRAGMENTS 9 (2016). As a result, the objective impact of contemporary criminal justice reform has been fairly

unified by their rejection of the status quo, they hold a range of views on what ought to replace it.[127] But there is also an important thread running through many contemporary reform discussions: What penal institutions and policies can we safely do without? Abolish the police. Abolish prison. Abolish mandatory minimum sentences. Abolish the death penalty. Abolish cash bail. Abolish misdemeanors. The prospect of doing away with these and many other carceral practices has defined some of the most salient contemporary debates within the criminal policy world. Missing from this list? Abolishing strict liability.

In a time of criminal justice reform, there have been only a handful of mens rea-focused initiatives, and all fall short of the kind of wholesale eradication of strict liability envisioned by the MPC. For example, in 2013, the legislatures in Michigan and Ohio successfully enacted weak default presumptions of mens rea that were subject to a number of carve-outs and exceptions.[128] (The Michigan version "specifically does not apply to the Penal Code," among other sources of criminal liability in the state.)[129] In 2016, by contrast, the U.S. Congress failed to enact a comparable default rule within the federal

modest. *See* Ram Subramanian & Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, 26 FED. SENT'G REP. 198, 203 (2014) (predicting that the impact of state-level sentencing reforms will be minimal due to stringent eligibility criteria and discretionary application); Rachel E. Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*, 104 MINN. L. REV. 2625, 2626 (2020) (reviewing FRANKLIN ZIMRING, THE INSIDIOUS MOMENTUM OF MASS INCARCERATION (2020)) (noting that states' lowering of incarceration rates "is not a story of large-scale change happening everywhere"). There are, however, some examples of concrete success. *See, e.g.*, Barkow, *supra*, at 2632 (discussing the unanimous decision of four Democrats and three Republicans on the U.S. Sentencing Commission to lower the drug sentencing guideline); J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2462–63 (2020) (discussing the bipartisan effort to mitigate the reentry barriers faced by people with criminal records); Douglas A. Berman, *A First Look at the First Step Act*, 32 FED. SENT'G REP. 63, 63 (2019) (noting that thousands of people in federal prison had already benefited from the First Step Act approximately one year after its passage).

[127] *See* Levin, *supra* note 125, at 308–18 (describing how different modes of criminal justice critique tend toward different, even conflicting policy outcomes).

[128] Michael J. Reitz, *Michigan Legislature Unanimously Passes Criminal Intent Reform*, MACKINAC CTR. FOR PUB. POL'Y BLOG (Dec. 17, 2015), https://www.mackinac.org/22003 [https://perma.cc/KH2T-4FZ6]; Josh Siegel, *How Michigan and Ohio Made It Harder to Accidentally Break the Law*, DAILY SIGNAL (Jan. 27, 2016), https://www.dailysignal.com/2016/01/27/how-michigan-and-ohio-made-it-harder-to-accidently-break-the-law [https://perma.cc/9DFV-FPQ6].

[129] HOUSE FISCAL AGENCY, ESTABLISH MENS REA AS DEFAULT STANDARD IN CRIMINAL STATUTES, H.B. 4713, 2015 Sess. (Mich. 2016), https://www.legislature.mi.gov/documents/2015-2016/billanalysis/House/pdf/2015-HLA-4713-4C86284E.pdf [https://perma.cc/3765-RK49].

criminal code.[130] In 2018, the California legislature passed a narrow version of felony murder reform that precludes liability for some accomplices.[131] And in 2021, Illinois enacted a comparably modest version of felony murder reform prohibiting the aggravation of liability where a third party, like a police officer or a homeowner, causes a death during the commission of a felony.[132] Finally, that same year, former President Trump released an Executive Order directing federal agencies to "consider administrative or civil enforcement of strict liability regulatory offenses, rather than criminal enforcement of such offenses."[133]

The absence of strict liability abolition from contemporary criminal justice reform is puzzling. One might have thought that the current generation of progressive reformers would have picked up the cause of mens rea reform where the drafters of the MPC left off. After all, the two generations share ideological and moral commitments. For

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130 Matt Ford, *Could a Controversial Bill Sink Criminal-Justice Reform in Congress?*, THE ATLANTIC (Oct. 26, 2017), https://www.theatlantic.com/politics/archive/2017/10/will-congress-reform-criminal-intent/544014 [https://perma.cc/R4W6-LV9G].

131 *See* Jazmine Ulloa, *California Sets New Limits on Who Can Be Charged with Felony Murder*, L.A. TIMES (Sept. 30, 2018, 9:40 PM), https://www.latimes.com/politics/la-pol-ca-felony-murder-signed-jerry-brown-20180930-story.html [https://perma.cc/98R7-HEUS].

132 Emanuella Evans & Rita Oceguera, *Illinois Criminal Justice Reform Ends Cash Bail, Changes Felony Murder Rule*, INJUSTICE WATCH (Feb. 23, 2021), https://www.injusticewatch.org/news/2021/illinois-criminal-justice-reform-cash-bail-felony-murder [https://perma.cc/7225-RVMQ]. In January 2023, the D.C. Council—the District of Columbia's local legislative body—gave final approval to a sweeping overhaul of the District of Columbia's local criminal code, which contains a number of significant mens rea reforms. *See* Martin Austermuhle, *D.C. Lawmakers Override Bowser's Veto Of Criminal Code Rewrite, Decry 'Fear-Mongering' Around Bill*, DCIST (Jan. 17, 2023, 5:20 PM), https://dcist.com/story/23/01/17/dc-council-override-bowser-veto-criminal-code-overhaul [https://perma.cc/88L2-WATX] (discussing the 12-1 override of mayoral veto of the revised D.C. Code); *see also* sources cited *infra* note 378. However, it is currently unclear whether the revised D.C. Code will survive the congressional review process. *See* Cuneyt Dil, *D.C. Mayor Stands By as Congress Intervenes in Crime Law*, AXIOS (Feb. 10, 2023), https://www.axios.com/local/washington-dc/2023/02/10/dc-mayor-congress-criminal-code-andrew-clyde [https://perma.cc/VR36-HXEP] ("Congress is closer to overturning a D.C. law for the first time since 1991, after the House on Thursday approved blocking controversial reforms to the city's criminal code.").

133 Exec. Order No. 13980, 86 Fed. Reg. 6817, 6817 (Jan. 18, 2021). For discussion of this regulation, see Douglas A. Berman, *Intriguing (and Significant?) Executive Order from Prez Trump on "Protecting Americans from Overcriminalization Through Regulatory Reform*," SENT'G L. & POL'Y (Jan. 19, 2021, 4:58 PM), https://sentencing.typepad.com/sentencing_law_and_policy/2021/01/intriguing-and-significant-executive-order-from-prez-trump-on-protecting-americans-from-overcriminal.html [https://perma.cc/8MKE-MKHL]. For more general mens rea reform efforts from conservative organizations, see *Criminal Intent Protection Act*, ALEC, https://alec.org/model-policy/criminal-intent-protection-act [https://perma.cc/FNS2-KX6G] (Model "Criminal Intent Protection Act"); John Malcolm, *The Pressing Need for Mens Rea Reform*, HERITAGE FOUND. (Sept. 1, 2015), https://www.heritage.org/crime-and-justice/report/the-pressing-need-mens-rea-reform [https://perma.cc/W4HN-MSD4].

example, both emphasize the demands of justice, the benefits of rehabilitation, and the importance of evidence-based decisionmaking. These values animated the MPC's substantive mens rea reform agenda, which, for understandable ideological reasons, never came to fruition during the tough-on-crime era. However, today's generation of reformers rejects the carceral mentality characteristic of that era and supports replacing tough-on-crime policies with a more just and humane approach. Strict liability abolition would thus seem to be an obvious place to turn.[134] Yet in practice few left-leaning reformers view culpable mental state requirements as an important instrument of moral progress in the criminal law, while some Democratic lawmakers seem to view mens rea reform as standing in the way of it. These progressive perspectives are shaped by the Public Safety and Mass Incarceration Assumptions.

3. *The Criminal Justice Reform Era: The Federal Mens Rea Reform Effort as a Case Study*

This dynamic is illustrated by the last decade's most high-profile mens rea initiative: the failed congressional effort to limit strict liability under the federal criminal code.[135] Recognizing that many federal crimes do not explicitly require proof of mens rea, congressional Republicans proposed House and Senate bills in 2015 seeking to establish default culpable mental state requirements.[136] On its face, this attempt to limit federal criminal liability to individuals who were aware of the facts that made their conduct criminal seemed relatively innocuous.[137] Nevertheless, these proposals generated strong pushback from those for whom criminal justice reform is arguably the most natural fit: the progressive wing of the Democratic Party.[138]

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[134] *See* Simon, *Wechsler's Century*, *supra* note 102, at 265 ("Reformers who would challenge the legal strategies underlying mass imprisonment would find in the MPC and its commentaries a weapon with which to challenge the legitimacy of mass imprisonment within the tradition of American penal law.").

[135] *See, e.g.*, Mike DeBonis, *The Issue That Could Keep Congress from Passing Criminal Justice Reform*, WASH. POST (Jan. 20, 2016, 5:54 PM), https://www.washingtonpost.com/news/powerpost/wp/2016/01/20/the-issue-that-could-keep-congress-from-passing-criminal-justice-reform [https://perma.cc/EHT8-J2C2] (describing vigorous political debate over a federal mens rea reform proposal).

[136] *See, e.g.*, Alexander F. Sarch, *Beyond Willful Ignorance*, 88 U. COLO. L. REV. 97, 99 (2017) (discussing House and Senate versions of the bills); Gideon Yaffe, *Mens Rea by the Numbers*, 12 CRIM. L. & PHIL. 393, 394–95 (2018) (same).

[137] Aside from the default culpable mental state requirement governing offense elements, the bills also "included a *knowledge of illegality provision*: a fairly narrowly identified class of crimes would be taken to require for guilt proof of knowledge of the illegality of one's conduct." Yaffe, *supra* note 136, at 394–95. That kind of provision is more controversial. *See id.* at 395.

[138] Levin, *supra* note 23, at 517–28.

Two main lines of argument fueled that pushback. One was the idea that adding culpable mental state requirements to strict liability white-collar, environmental, and regulatory offenses would diminish public safety. For example, Senator Elizabeth Warren critiqued federal mens rea reform on the basis that it would "make it much harder for the government to prosecute hundreds of corporate crimes—everything from wire fraud to mislabeling prescription drugs."[139] Marshalling the Public Safety Assumption, Senator Warren argued that raising proof requirements in white-collar prosecutions would not only lead to less accountability in individual cases, but would also detract from the principal benefits of corporate crime policies: "to deter future criminal activity by making would-be lawbreakers think twice before breaking the law . . . ."[140] Along similar lines, then-President Barack Obama asserted in the *Harvard Law Review* that federal mens rea reform "could undermine public safety and harm progressive goals," presumably by making it more difficult to prosecute white-collar crime and hold corporate wrongdoers accountable.[141]

The second line of argument revolved around a novel assumption about who benefits when strict liability is eliminated. During the federal mens rea reform debate, progressive activists began forwarding the claim that mens rea reform's beneficiaries are exclusively (or at least predominantly) wealthy corporate actors. By contrast, these activists asserted, strengthening mens rea requirements in the federal criminal code would not meaningfully benefit the poor, the vulner-

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[139] Ford, *supra* note 130 (quoting 162 CONG. REC. S535 (daily ed. Feb. 3, 2016) (statement of Sen. Elizabeth Warren)).

[140] OFF. OF SEN. ELIZABETH WARREN, RIGGED JUSTICE 1 (2016), https://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf [https://perma.cc/A6XC-L2KD].

[141] Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 829 n.89 (2017). Federal prosecutors similarly pushed this line of attack. In what Rachel Barkow and Mark Osler characterize as a case study on "why the Department is precisely the wrong entity to put in charge of reform efforts," DOJ officials held multiple briefings complaining that the federal mens rea reform legislation would lead to new litigation, and, more fundamentally, make it too difficult to secure convictions in cases involving regulatory and white-collar crime. Barkow & Osler, *supra* note 122, at 392; Matt Apuzo & Eric Lipton, *Rare White House Accord with Koch Brothers on Sentencing Frays*, N.Y. TIMES (Nov. 24, 2015), https://www.nytimes.com/2015/11/25/us/politics/rare-alliance-of-libertarians-and-white-house-on-sentencing-begins-to-fray.html [https://perma.cc/98ER-P7M9]. In this case study we also find a classic illustration of one particularly potent driver of the Public Safety Assumption: prosecutorial complaints expressed in private briefings to lawmakers. *See generally* Carissa Byrne Hessick, Ronald F. Wright & Jessica Pishko, *The Prosecutor Lobby*, WASH. & LEE L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4082497 [https://perma.cc/P763-XD6K] (discussing the influence of prosecutors in the legislative process).

able, and underserved communities of color.[142] Voicing this Mass Incarceration Assumption in the pages of the *New York Times*, the Executive Director of the ACLU argued that intent is "relatively simple for drug and property crimes," so passage of federal mens rea reform "will do little to help the vast majority of the 2.2 million people behind bars in America and those soon to be incarcerated."[143]

Not all left-leaning reformers embraced the Mass Incarceration Assumption. For example, David Patton, Executive Director and Attorney-in-Chief of Federal Defenders of New York, pushed back against progressive opposition to federal mens rea reform, arguing that poor people of color disproportionately suffer the harms of unjust laws and thus would meaningfully benefit from bolstering culpable mental state requirements in the federal code.[144] Others, including scholars such as Gideon Yaffe[145] and Alex Sarch,[146] voiced similar views in support of federal mens rea reform, along with "prominent progressive voices, such as the National Association of Criminal Defense Lawyers and U.S. Representatives John Conyers and Bobby Scott."[147]

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142 Levin, *supra* note 23, at 495.

143 Anthony D. Romero, Letter to the Editor, *Criminal Justice Reforms*, N.Y. TIMES (Feb. 16, 2016), https://www.nytimes.com/2016/02/17/opinion/criminal-justice-reforms.html [https://perma.cc/668K-XKYE].

144 Press Release, Senators Hatch, Lee, Cruz, Perdue, and Paul Introduce Bill to Strength Criminal Intent Protections (Oct. 2, 2017), https://www.lee.senate.gov/2017/10/senators-hatch-lee-cruz-perdue-and-paul-introduce-bill-to-strength-criminal-intent-protections [https://perma.cc/9Y99-NLW6] [hereinafter Lee Press Release] ("Over 80 percent of people charged with federal crimes are too poor to afford a lawyer, and nearly 80 percent of people charged with federal crimes are Black, Hispanic, or Native American. . . . [They] are subject to laws that are neither fair nor consistent with traditional principles of criminal liability." (statement of David Patton, Executive Director and Attorney-in-Chief, Federal Defenders of New York, Inc.)).

145 Gideon Yaffe, *A Republican Crime Proposal That Democrats Should Back*, N.Y. TIMES (Feb. 12, 2016), https://www.nytimes.com/2016/02/12/opinion/a-republican-crime-proposal-that-democrats-should-back.html [https://perma.cc/2ZKT-5SY3].

146 Alex Sarch, *How to Solve the Biggest Issue Holding Up Criminal Justice Reform*, POLITICO (May 16, 2016), https://www.politico.com/agenda/story/2016/05/criminal-justice-reform-mens-rea-middle-ground-000120 [https://perma.cc/Y6CF-QBA6].

147 Vikrant P. Reddy, Commentary, *Dear President Trump: Here's How to Get Right on Crime, Part 2*, THE MARSHALL PROJECT (Jan. 18, 2017), https://www.themarshallproject.org/2017/01/18/dear-president-trump-here-s-how-to-get-right-on-crime-part-2 [https://perma.cc/33EP-QM4Y]. It is important to note that "federal mens rea reform" was actually comprised of two components—(1) a provision that would strengthen culpability requirements as to the facts constituting an offense and (2) a provision that could require culpability as to the illegality of one's conduct. *See generally* Sarch, *supra* note 146. Among the scholarly and legal supporters of federal mens rea reform, some only supported the first of these two components. *See id.* ("The Senate bill would make it too hard to convict culpable actors because it says that for crimes without an explicit mens rea requirement, prosecutors must prove *willfulness*—defined as 'knowledge that the person's conduct was unlawful.' This standard has scary implications.").

Ultimately, the arguments of defense attorneys, criminal law professors, and a few congressmen were insufficient to overcome the charge that—as Ben Levin succinctly phrases it—"mens rea reform is a political project that has nothing to do with mass incarceration and everything to do with deregulation."[148] By the end of the debate, progressive activists had successfully construed the proposed default culpable mental state requirements as "a misdirection of reformist energy which does not speak to the problems faced by the poor, people of color, and other marginalized groups that suffer as a result of mass incarceration."[149] As a result, federal mens rea reform was stopped dead in its tracks.

This episode says a lot about strict liability in U.S. criminal law. Historically, lawmakers' embrace of the Public Safety Assumption led to the proliferation of strict criminal liability. That a recent U.S. President and current Senator—both law professors with reputations for evidence-based decisionmaking—would advocate for strict criminal liability on the basis of its purported crime-control benefits suggests that the Public Safety Assumption remains entrenched. It also signals to other lawmakers that the assumption is sound and need not be further investigated.

This episode also helps us understand why strict liability abolition has failed to garner robust support within the criminal reform world. While reformers bring to the table diverse objectives, most share a common desire to lower prison populations and address racial disparities.[150] If, as many reformers seem to believe, strict liability abolition will do little to address either of these goals, then reformers have little reason to embrace it.[151] Indeed, in a time of mass incarceration, it

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148 Levin, *supra* note 23, at 524. Importantly, other critiques were made against the federal mens rea reform bills, including the questionable motivations behind them and drafting issues they reflected. *See id.* at 527; Sarch, *supra* note 146.

149 Levin, *supra* note 23, at 523.

150 *See id.* at 519.

151 That is particularly so given the growing skepticism, in some quarters, about the document from which strict liability abolition originates. For example, in a pair of recent articles, Alice Ristroph makes the case that the MPC (among other American legal texts) was a major contributor to a "criminal law exceptionalism" that—by imbuing thousands of law enforcement officials with a sense that the criminal law is uniquely just, important, and necessary—helped make mass incarceration possible. Ristroph, *Intellectual History*, *supra* note 29, at 1976–78; Ristroph, *Curriculum*, *supra* note 29, at 1707. One aspect of the MPC's contribution, Ristroph argues, is that it places too much emphasis on aspects of the criminal law that have little practical effect on the day-to-day administration of the criminal law, including the topic of mens rea. *See, e.g.*, Ristroph, *Curriculum*, *supra* note 29, at 1648 n.77 (noting that the MPC gives "little attention to minor offenses or the parameters of criminal law"); *id.* at 1663 ("[G]limpses at a systemic overview are far overshadowed by the relentless inquiry, in case after case, into the culpability of an individual defendant.").

would be highly problematic to invest in a reform strategy with little to offer the poor, the vulnerable, and the underserved communities of color who have suffered the greatest. But ultimately, mens rea reform's impact on mass incarceration is an empirical question, which—like the relationship between strict liability and public safety—merits more careful examination than it has thus far received.

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Reflecting on the history of strict liability in U.S. criminal law reveals the influence of two central ideas: a Public Safety Assumption and a Mass Incarceration Assumption. Are these assumptions accurate? The balance of this Article brings the current state of social science research to bear on this question, with the hopes of offering a more informed sense of how strict liability impacts crime rates and criminal administration. By deconstructing both of these assumptions, the Article reveals just how strong the case against strict liability is, and why universal culpable mental state requirements are an important tool in the fight against mass incarceration.

II
Deconstructing the Public Safety Assumption

For more than a century, U.S. lawmakers have enacted strict liability statutes on the assumption that omitting culpable mental state requirements is an effective way to control crime. This Part critically evaluates that Public Safety Assumption.

Section A analyzes the pathways through which strict liability is typically understood to control crime: deterrence and incapacitation. I first situate crime control arguments in support of strict liability within our broader understanding of criminal law's effects. Thereafter, I unpack the two most common versions of deterrence and incapacitation arguments offered in support of strict liability—what I refer to as the conventional and administrative expediency varieties. After identifying the empirical claims about human behavior grounding these popular utilitarian arguments, I evaluate the social science research relevant to each. A broad synthesis of empirical studies reveals minimal support for the idea that strict liability improves public safety in the narrow sense of effectively deterring wrongdoers or incapacitating dangerous offenders.

Section B explains what this narrow sense of public safety misses—the crime control benefits of fairness—and how strict liability might actually be criminogenic under a broader understanding of public safety. Central to the discussion is the theory of empirical

desert, which holds that punishments perceived as unjust by the community may lead to more crimes by making people less likely to voluntarily comply with the law. Because it is difficult to assess the relationship between strict liability and community sentiment, empirical desert does not prove that the Public Safety Assumption is wrong. But it does reveal there is little reason to think that it is right.

Section C deploys this more informed understanding of strict liability's impact on human behavior to argue that government decisionmakers lack the kind of evidence necessary to justify abandoning culpable mental state requirements. Drawing on fiduciary political theory, I contend that the ethics of political representation prohibit the intentional infliction of state-sanctioned violence upon morally blameless actors absent a reasonable belief that doing so is necessary to promote the public good. The current state of criminal justice research provides no basis for policymakers to hold that belief, and some reason to think that the abandonment of mens rea is detrimental to society. So, unless and until our understanding of strict liability's impact on human behavior changes, the application of universal culpable mental state requirements is the appropriate default choice for policymakers.

A. Strict Liability and the Narrow Sense of Public Safety

Does strict liability promote public safety? The idea that it does has been expressed so frequently, by so many different actors across both time and place, that it is tempting to assume it must. And there are also intuitively appealing reasons to think that it might: the utilitarian theories of general deterrence and incapacitation.

The theory of general deterrence holds that the threat of criminal sanctions disincentivizes rational actors from engaging in particular forms of conduct to avoid punishment.[152] According to this theory, removing culpable mental state requirements from criminal statutes strengthens the perceived threat of criminal sanctions, thereby incentivizing rational actors to exercise greater care when engaging in strictly regulated behaviors—or perhaps to abstain from engaging in them altogether.[153]

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[152] *See, e.g.*, Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 3–4 (1998) (explaining various forms of criminal deterrence and the "impediments" to assessing the effectiveness of deterrence policy choices). General deterrence is to be distinguished from specific deterrence, which only impacts offenders who have been caught, convicted, and incarcerated. David S. Abrams, *The Imprisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 917 (2013).

[153] *See, e.g.*, Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 738 (1960). *But see, e.g.*, Simons, *supra* note 30, at 504 ("If an actor lacks a

Whereas general deterrence focuses on promoting public safety by disincentivizing criminal activity, incapacitation seeks to achieve the same by taking away people's ability to engage in criminal activity altogether. By placing dangerous individuals in prison, the incapacitation theory posits, we can prevent them from committing crimes for as long as they are incarcerated.[154] The incapacitation argument in support of strict liability holds that those who engage in criminally prohibited conduct, although lacking a culpable mental state, may still be exceptionally dangerous. Therefore, incarcerating these dangerous individuals is assumed to be an effective way to protect society from the future crimes they might otherwise commit.[155]

These general deterrence and incapacitation arguments—along with the administrative expediency versions of them discussed below—ground the Public Safety Assumption. Time and time again, lawmakers have relied on them to enact (or defend) strict liability statutes. Yet there is little reason to believe these arguments are accurate, and good reason to think that they are false,[156] once we identify, unpack, and analyze the empirical claims behind these arguments. Prior to engaging in this deconstruction, however, it is helpful to first briefly discuss the nature of the claims that are (and are not) analyzed in this Part.

Broadly speaking, there are two kinds of empirical claims that can be made about criminal policy's impact on human behavior. One is macro-level. It focuses on the impact that substantive criminal law as an institution—that is, as a collective body of rules and social prac-

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minimal awareness of the nature or likely results of his conduct, he cannot be deterred and should not be punished . . . ."); GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 30 (2d ed. 1961).

154 *See, e.g.*, Abrams, *supra* note 152, at 936 (discussing how incapacitation seeks to reduce crime by removing inmates from society); ARTHUR W. CAMPBELL, LAW OF SENTENCING 42 (3d ed. 2004).

155 *See, e.g.*, Lisa Rachlin, *The Mens Rea Dilemma for Aiding and Abetting a Felon in Possession*, 76 U. CHI. L. REV. 1287, 1300 (2009) (noting that strict liability provides law enforcement benefits through incapacitation); Dru Stevenson, *Effect of the National Security Paradigm on Criminal Law*, 22 STAN. L. & POL'Y REV. 129, 156 (2011) ("[O]ur criminal justice system has grown more comfortable with strict liability as a valuable tool in the incapacitation of dangerous individuals."). *But see* Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL'Y 1065, 1112 (2014) ("[S]trict liability obviously does not advance incapacitation . . . because a morally blameless individual . . . certainly is not an ongoing threat to society and does not possess a wicked state of mind that is in dire need of correction."); MARK H. MOORE, SUSAN ESTRICH, DANIEL MCGILLIS & WILLIAM SPELMAN, DANGEROUS OFFENDERS: THE ELUSIVE TARGET OF JUSTICE 65–66 (1984).

156 For early recognition of the dubious epistemic origins of strict liability, see HALL, *supra* note 30, at 304–05; *see also* Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 423 (1958).

tices—has on the public (and in particular on those individuals with criminal propensities). Many claims of this type are largely uncontroversial and find broad support in the scholarly literature.[157] For example, both contemporary social science research and the lessons of history indicate that "systems of punishment are *effective* as general deterrents: [T]here are some who refrain from crime because of the threat of punishment, and who would commit crimes were that threat removed."[158] Similarly well-established is the idea that incapacitating criminal wrongdoers promotes public safety by preventing dangerous individuals from committing crimes in the general population.[159] The only question—and it is a contested one—is the size of the crime reduction achieved through incapacitation, as well as the point at which those public safety benefits begin to dissipate.[160]

Macro-level claims about substantive criminal law's societal effects are important to our general understanding of criminal systems, but as criminologist Daniel Nagin has noted, they are also "of limited value in formulating policy."[161] That's because "[p]olicy options to prevent crime generally involve targeted and incremental changes,"[162] instead of the kind of sweeping reforms that macro-level

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[157] *See, e.g.*, Emily G. Owens, *More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements*, 52 J.L. & ECON. 551, 552 (2009) ("[A] general consensus has emerged that the criminal justice system as a whole (including policing, sentencing, and incarceration) reduces the amount of crime in society . . . ."). For good overviews of the current state of empirical research on the relationship between criminal justice and public safety, see NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 130–56 (2014), https://nap.nationalacademies.org/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes [https://perma.cc/LJ3T-TGYA]; COUNCIL OF ECON. ADVISERS, EXEC. OFF. OF THE PRESIDENT, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 35–43 (2016).

[158] R.A. Duff, *In Defence of One Type of Retributivism: A Reply to Bagaric and Amaraskara*, 24 MELBOURNE U. L. REV. 411, 421 (2000); *see, e.g.*, Nagin, *supra* note 152, at 3 ("[T]he collective actions of the criminal justice system exert a very substantial deterrent effect.").

[159] *See, e.g.*, Abrams, *supra* note 152, at 917; *Special Issue: Incapacitation*, 23 J. QUANTITATIVE CRIMINOLOGY (Peter Reuter & Shawn D. Bushway eds., 2007) (providing multiple perspectives on how and the extent to which the criminal law promotes public safety through effective incapacitation).

[160] *See* Alex R. Piquero & Alfred Blumstein, *Does Incapacitation Reduce Crime?*, 23 J. QUANTITATIVE CRIMINOLOGY 267, 270 (2007) ("Estimates of the crime-reduction potential of incapacitation are both numerous and diverse, reflecting different assumptions made by different researchers . . . ."); COUNCIL OF ECON. ADVISERS, *supra* note 157, at 36 ("Researchers who study crime and incarceration believe that the true impact of incarceration on crime reduction is small, with a 10 percent increase in incarceration decreasing crime by just 2 percent or less . . . though economic studies have found a range of estimates for the effect of incarceration on crime . . . .").

[161] Nagin, *supra* note 152, at 3.

[162] *Id.*

claims might help inform.[163] In other words, for policymakers operating within a pre-existing criminal system, "the issue is not whether [that] system in its totality prevents crime" but rather, whether "a specific policy, grafted onto the existing structure, will materially add to the preventive effect."[164]

It is this micro-level focus that matters the most to criminal lawmaking. Nearly all policy arguments offered in support of the creation of a new crime or the expansion of a pre-existing crime are reducible to one or more micro-level claims, namely, that the proposed reform will lower crime rates by positively impacting human behavior. Arguments in support of strict liability policies are no exception. The idea is that by omitting culpable mental state requirements from individual offenses, particular elements within individual offenses, and specific doctrines, strict liability yields less crime by deterring would-be wrongdoers and incapacitating dangerous offenders. As it turns out, these are precisely the types of claims for which empirical support is wanting—in just about any area of the substantive criminal law, but particularly so in the context of mens rea policy.

1. General Deterrence and Incapacitation Arguments

Look behind the Public Safety Assumption and you will immediately encounter a conventional general deterrence argument: By strictly regulating a particular form of conduct, the criminal law incentivizes rational actors to exercise greater caution when engaging in it—or perhaps to abstain from the conduct altogether. This logic, while intuitively appealing, confronts a basic problem: human psychology.[165]

For marginal general deterrence to work, an actor must meet a few cognitive conditions. First, they must know of the rule and sanction.[166] Second, they must be willing and able to rationally calculate

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[163] For example, whether to establish a criminal system in the first instance, or to completely abolish a pre-existing one.

[164] *Id.*; *see, e.g.*, Abrams, *supra* note 152, at 912 ("In order to make concrete policy recommendations about incarceration, it is necessary to have specific policy changes in mind."); Sonja B. Starr, *On the Role of Cost-Benefit Analysis in Criminal Justice Policy: A Response to* The Imprisoner's Dilemma, 98 IOWA L. REV. BULL. 97, 103 (2013) ("[L]egislatures usually consider sentencing questions in the context of particular crimes.").

[165] *See, e.g.*, Tracey L. Meares, Neal Katyal & Dan M. Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1180 (2004) ("Traditional understandings of deterrence ignore a wealth of research from psychology about the way in which people frame choices.").

[166] *See, e.g.*, Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953 (2003).

the personal cost of violating the rule, discounted by the likelihood of detection, and weigh that against the benefits of engaging in criminal action.[167] Third, they must be willing and able to conform their conduct to the output of that calculus.[168] How often are these requirements satisfied? Not often, it appears. "The social science literature suggests that potential offenders commonly do not know the law, do not perceive an expected cost for a violation that outweighs the expected gain, and do not make rational self-interest choices."[169]

Unsurprisingly, there is scant empirical evidence to support the assertion that marginal changes to individual substantive criminal laws deter would-be offenders.[170] Much of the research that has been done in this area focuses on the deterrent effects of increased sentences and leads to a single conclusion: "[D]ifferences in sentence lengths have no discernible effects on behavior."[171] This appears to be true, moreover, even for white-collar crime, which is the area of the law in which the psychological prerequisites of deterrence are most likely to be met by the corporate criminals who are presumed to be comparatively rational and informed.[172]

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167 *See, e.g.*, *id.* at 953–54.

168 *See, e.g.*, *id.* at 955–56.

169 *Id.* at 953.

170 Most work on general deterrence "typically find[s] a non-zero, but relatively small, general deterrent effect." Abrams, *supra* note 152, at 920; *see, e.g.*, COUNCIL OF ECON. ADVISERS, *supra* note 157, at 36 ("[M]arginal increases in incarceration may have small and declining benefits."); Meares et al., *supra* note 165, at 1186 ("Empirical evidence on the deterrent effects of punishment remains speculative and inconclusive, and the ability of formal punishment alone to deter crime appears to be quite limited.").

171 TONRY, *supra* note 126, at 31 (2016); *see, e.g.*, NAT'L RSCH. COUNCIL, *supra* note 157, at 90 ("[I]nsufficient evidence exists to justify predicating policy choices on the general assumption that harsher punishments yield measurable deterrent effects."); COUNCIL OF ECON. ADVISERS, *supra* note 157, at 37 ("Research on the impact of sentence length has found that longer sentences are unlikely to deter prospective offenders or reduce targeted crime rates . . . ."). Note also that even when there is a deterrent effect due to high penalties, substitution effects may still frustrate the goal of public safety by increasing the rates of offending for other offenses. Meares et al., *supra* note 165, at 1177–78.

172 *See, e.g.*, David Weisburd, Elin Waring & Ellen Chayet, *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 CRIMINOLOGY 587, 589 (1995) ("White-collar crime is seen as a highly rational form of criminality, in which the risks and rewards are carefully evaluated by potential offenders, and white-collar criminals are assumed to have much more to lose through sanctions than more common law violators."). For scholarship questioning the extent to which white-collar criminalization and punishment deters, see, for example, Peter J. Henning, *Is Deterrence Relevant in Sentencing White-Collar Criminals?*, 61 WAYNE L. REV. 27, 47 (2015) ("Research shows . . . that the deterrent effect of punishment is minimal for both street crimes and white-collar offenses . . . ."); MODEL PENAL CODE: SENTENCING § 1.02(2) (AM. L. INST., Proposed Final Draft 2017) ("The empirical evidence of deterrence is thin even for white-collar offenders, who are commonly supposed to act with greater calculation than most other criminals."); Natalie Schell-Busey, Sally S. Simpson, Melissa Rorie & Mariel Alper, *What Works? A Systematic Review of Corporate Crime Deterrence*, 15 CRIMINOLOGY & PUB. POL'Y 387,

And yet, however strained the relationship between deterrence and criminal laws generally, the case for thinking that *strict liability* criminal laws would meaningfully deter is even more attenuated. This is a function of what deterrence would effectively require: public knowledge of strict liability. That is, for strict criminal liability to deter, the person must not only know that a given form of conduct is criminally prohibited or triggers elevated punishment—what the general deterrence argument, just noted, entails—but even more specifically, that a given statute omits proof of culpable mental state requirements.

Given just how unrealistic this and the other theoretical assumptions behind deterrence theory are, it is unsurprising that "[t]here is no evidence that strict criminal liability deters."[173] That appears to be true, moreover, for both street and white-collar crime, as well as whether one is talking about the application of strict liability to individual offenses, particular offense elements, or specific criminal law doctrines. Indeed, it even appears to be true in the context of what is arguably the most well-known variety of strict liability in the United States: felony murder.

Although felony murder doctrine is frequently justified on deterrence grounds, in decades of criminal policy research, there appears to be only one publicly-available empirical assessment of felony murder's deterrent value ever conducted: an unpublished paper, *Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data*, by Anup Malani.[174] Malani's paper analyzes, and ultimately disclaims, the two deterrent ideals animating felony murder doctrine: that strict liability deters people from engaging in qualifying criminal felonies and that it induces greater care in the perpetration of those felonies.[175] Analyzing state-level data on felonies and felony homicides from

397 (2016) (conducting a meta-analysis of existing studies of deterrence in the corporate setting finding inconclusive evidence of the effectiveness of criminal penalties as a deterrent to illegal behavior).

173 Singer, *Resurgence III*, *supra* note 28, at 403; *see also* Wasserstrom, *supra* note 153, at 735 ("The notion that strict liability statutes can be defended as efficacious deterrents has been consistently rejected.").

174 For relevant research on strict liability in the civil context, see, for example, Anna Alberini & David H. Austin, *Strict Liability As a Deterrent in Toxic Waste Management: Empirical Evidence from Accident and Spill Data*, 38 J. ENV'T ECON. & MGMT. 20 (1999).

175 Anup Malani, *Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data* 25 (U. Va. Sch. L., Working Paper, 2002), https://graphics8.nytimes.com/packages/pdf/national/malani.pdf [https://perma.cc/BY6J-CRQ7]; *see* Guyora Binder, Brenner Fissell & Robert Weisberg, *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1212 n.435 (2017) ("As for the somewhat fanciful theory that felony murder liability encourages committed felons to commit their crime more carefully, the only empirical study of the deterrent effect of felony murder rules on killing found none.").

1970–98, Malani's study finds that while the felony murder rule appears to minimally reduce the number of deaths that occur during burglaries, larcenies, and auto thefts, it has little effect on rapes, and the perverse effect of producing a *greater number of deaths* that occur during robberies, thereby leading to an *overall increase* in the number of deaths that occur during the perpetration of felonies.[176]

Whether and to what extent the shortcomings of American criminal justice data limit the predictive value of a study like Malani's is an open question,[177] but, at the very least, this much seems clear: "Robust empirical support for the deterrence hypothesis does not exist."[178] That is so in the context of any marginal change to our criminal laws, but particularly so when it comes to omitting mens rea from criminal statutes and doctrines.

Similar evidentiary problems confront the second conventional policy argument behind the Public Safety Assumption: that strict liability is an effective means of incapacitating dangerous individuals. The incapacitation argument in support of strict liability holds that those who engage in certain forms of conduct, although lacking a culpable mental state, pose a sufficiently high risk of future wrongdoing.[179] Therefore, the government should be able to secure criminal convictions and aggravated sentences against these individuals even in the absence of mens rea. Once again, the logic here is simple; however, the factual information and predictive abilities one would need

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[176] Malani, *supra* note 175, at 21–25 ("It appears that robbers, on average, take less care in jurisdictions with a harsh felony-murder rule."). The study also finds a comparable disparity in crime rates: The felony murder rule appears to decrease the frequency of burglaries, auto thefts, and larcenies, increase the frequency of robberies, and have no effect on the number of rapes committed in a given jurisdiction. *Id.* at 24–25. Viewed collectively, this leads to an overall decrease in the rate at which these five offenses are committed, but, as Malani explains, that "effect is small and can be easily replicated by increasing the penalty for these felonies." *Id.* at 25. In which case, Malani's study of "the best data available for analyzing the effects of the rule" leads to two main conclusions: (1) "the felony murder rule does not substantially improve crime rates" and (2) it "seems to increase the number of felony deaths in a state." *Id.*

[177] As Malani observes, "[d]ata on state crime rates are based on the number of crimes reported to police over the course of a year, as compiled annually by the Federal Bureau of Investigation (FBI) in its Uniform Crime Reports (UCR) and Supplemental Homicide Reports (SHR)." *Id.* at 10. However, the UCR and SHR suffer from severe underreporting and misreporting problems. *See id.* at 26–29.

[178] Nuno Garoupa & Jonathan Klick, *Differential Victimization: Efficiency and Fairness Justifications for the Felony Murder Rule*, 4 REV. L. & ECON. 407, 417 (2008); *see, e.g.*, Shobha L. Mahadev & Steven Drizin, *Felony Murder, Explained*, THE APPEAL (Mar. 4, 2021), https://theappeal.org/the-lab/explainers/felony-murder-explained [https://perma.cc/4JEJ-59CN] ("[T]here is no data or empirical evidence to back this deterrence hypothesis . . . ."); Tomkovicz, *supra* note 28 (questioning the deterrence hypothesis).

[179] *See supra* note 159 and accompanying text.

to confidently conclude that strict liability is an effective means of incapacitation are anything but.

In a very narrow sense, of course, all incapacitation through incarceration is effective: For the duration of time that someone is locked up, they are unable to commit crimes against the *general public*. However, those we incarcerate can commit crimes on the *inside* of correctional institutions—and some do—which decreases the level of safety enjoyed by other prisoners and prison guards.[180] Further complicating matters is the reality that removing adults from their families and underserved communities may, for the period of their absence, lead to increased opportunities for children to become involved in delinquency and crime.[181] As a result, when interrogating incapacitation theory, we need to be mindful of *whose* safety we are concerned with and *which* spaces we are focused on keeping safe. However, the *when* of public safety matters, too. Most people we imprison will someday be released, and prison has a documented criminogenic effect: Some of those we incarcerate are likely to come out of prison with a greater propensity to reoffend than when they went in.[182]

Using criminal punishment to effectively incapacitate therefore entails incredibly complex predictions about human behavior and the impact of incarceration on individuals and communities. This complexity far exceeds the limited abilities of government decisionmakers.[183] Even in our current moment of big data and artificial intelligence, we remain surprisingly bad at forecasting who will commit crimes.[184] For example, available evidence suggests that the

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[180] *See* Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 4 (2017); Ahmed A. White, *The Concept of "Less Eligibility" and the Social Function of Prison Violence in Class Society*, 56 BUFF. L. REV. 737, 757 (2008).

[181] Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 207 (1998); *see, e.g.*, Starr, *supra* note 164, at 108–09 ("The majority of prisoners have minor children . . . . [U]nderstanding the familial effects of incarceration is important even if one seeks merely to estimate incarceration's relationship with crime rates . . . ."); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 145 (1999).

[182] *See, e.g.*, NAT'L RSCH. COUNCIL, *supra* note 157, at 193 (observing the "'criminogenic' effects of imprisonment on individuals—that is, the experience of having been incarcerated appears to increase the probability of engaging in future crime").

[183] For early recognition of this point, see Sanford H. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 289 (1968) (noting that strict liability predictions of future behavior rest upon "a shaky foundation" given the "present imperfect state of our knowledge").

[184] *See* Michael Tonry, *Predictions of Dangerousness in Sentencing: Déjà Vu All Over Again*, 48 CRIME & JUST. 439, 449 (2019) ("[Risk assessment tools] are seldom very accurate."); John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCH. 489, 500 (2016). For criticisms of the COMPAS algorithm

best risk assessment tools are only moderately better than chance at predicting overall recidivism.[185] And in the area of prediction with the greatest stakes, *violent* recidivism, we seem to be wrong far more often than we are right.[186] What is more, our limited predictive abilities are largely rooted in immutable characteristics—things like gender and age—which are at best morally irrelevant, at worst discriminatory, and potentially unconstitutional.[187]

Most problematic of all is the fact that what we are able to predict, risk of recidivism, is one step removed from what matters to the theory of incapacitation, the likelihood that punishment will lower recidivism—or what Sonja Starr has labeled "responsiveness of recidivism risk to incarceration."[188] Think of it this way: The relevant sentencing question incapacitation theory poses to judicial decisionmakers is not how likely it is that Person X will reoffend in the abstract (which is what risk assessment tools yield information on). Instead, the key question is how likely it is that incarcerating Person X for some specific length of time will lower that person's rate of recidivism over the course of a lifetime.[189] Current prediction instruments shed no light on this question.

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in particular, see Ed Yong, *A Popular Algorithm Is No Better at Predicting Crimes Than Random People*, THE ATLANTIC (Jan. 17, 2018), https://www.theatlantic.com/technology/archive/2018/01/equivant-compas-algorithm/550646 [https://perma.cc/VM6P-DKQY] (discussing the limited abilities of algorithms to predict recidivism); Jeff Larson, Surya Mattu, Lauren Kirchner & Julia Angwin, *How We Analyzed the COMPAS Recidivism Algorithm*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm [https://perma.cc/UBR4-2Z2U] (discussing the racially skewed predictions of the COMPAS algorithm).

185 *See* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 806 (2014) ("[W]hen it comes to predicting individual behavior, the [available regression] models offer fairly modest improvements over chance."); Tonry, *supra* note 184.

186 For example, the most influential meta-analysis, analyzing research on the nine most commonly used instruments, concluded that predictions that a given individual will engage in violent behavior are on average correct 42% of the time. *See* Seena Fazel, Jay P. Singh, Helen Doll & Martin Grann, *Use of Risk Assessment Instruments to Predict Violence and Antisocial Behaviour in 73 Samples Involving 24,827 People: Systematic Review and Meta-Analysis*, 345 BMJ 1, 4 (2012) (describing the limitations instruments had to ascertain positive predictive values); Seena Fazel, *The Scientific Validity of Current Approaches to Violence and Criminal Risk Assessment*, *in* PREDICTIVE SENTENCING: NORMATIVE AND EMPIRICAL PERSPECTIVES 197, 197–99 (Jan W. de Keijser, Julian V. Roberts & Jesper Ryberg eds., 2019). Practically speaking, this "means that two of five positive predictions are correct. . . . [S]ubstantially more than half of people predicted to be violent will not be." Tonry, *supra* note 184, at 440, 451.

187 *E.g.*, Starr, *supra* note 185, at 804–05; Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 675 (2015).

188 Starr, *supra* note 185, at 858.

189 *See id.* at 857 (observing that "higher-risk defendants . . . [may] be more *inelastic* to specific deterrence and rehabilitation and . . . more vulnerable to the possible criminogenic effects of incarceration," in which case lengthening their sentences "might be more likely

Now consider a final complicating factor: The kind of predictive tools lawmakers need to conduct a competent incapacitation analysis of strict liability policies is significantly more complicated than what judges require. Whereas sentencing decisions entail prediction at the level of the individual actor, strict liability policies involve group-level predictions based on a single criterion: the actus reus of an offense. In other words, a lawmaker seeking to evaluate whether imposing criminal liability or aggravating punishment on a strict liability basis is an effective incapacitation strategy would need to assess the "responsiveness of recidivism risk to incarceration"[190] of an entire class of actors: those who would non-culpably engage in the particular form of conduct being prohibited. And lawmakers would need to conduct that assessment without the kind of demographic information upon which our limited forecasting ability is based. Legislators therefore lack the data, the studies, or the algorithms necessary to conduct a competent incapacitation analysis of strict liability policies.

There is, then, scant empirical evidence to support the idea that omitting culpable mental state requirements from criminal statutes effectively promotes public safety through general deterrence or incapacitation, as conventionally understood. As explained below, this conclusion also holds when one shifts the focus from strict liability's direct effects on individual offenders to its indirect effects on the administration of criminal statutes. Here, too, we will discover that these administrative expediency arguments in support of strict liability rest upon unsubstantiated claims that lack a firm empirical grounding.

2. Administrative Expediency Arguments

Administrative expediency arguments in support of strict liability, although often underspecified, share a common theme: Omitting culpable mental state requirements from criminal statutes promotes public safety by making prosecutors' jobs easier.[191] One version of the argument sounds in deterrence: Because mens rea is so hard to prove, culpable mental state requirements will "clog the system and lead to lengthy delays in prosecution," in which case "[t]he threat of a sanc-

to increase the risk they pose after they get out, or at least to lower net risk less than would locking up some low-risk offenders").

[190] *Id.* at 858.

[191] *See, e.g.*, WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 5.5(c) (3d ed. 2018) ("The reasons for having statutes imposing criminal liability without fault are those of expediency . . . ."); MODEL PENAL CODE § 2.05 cmt. 1 (AM. L. INST. 1985) ("It has been argued, and the argument undoubtedly will be repeated, that strict liability is necessary for enforcement in a number of the areas where it obtains."); Darryl K. Brown, *Strict Liability in the Shadow of Juries*, 67 SMU L. REV. 525, 535 (2014).

tion, and thus the deterrent force of the law, could diminish."[192] Another version of the argument sounds in incapacitation: Because mens rea is so hard to prove, culpable mental state requirements will make it too difficult for prosecutors to secure convictions or lengthy prison stays for those at a high risk of future offending.[193] Ultimately, these administrative expediency arguments suffer from the same evidentiary problems discussed in the last subsection.

Consider the central flaws in the deterrence through expediency argument. The first, and most basic, problem is that the alleged administrative benefits of strict liability—quicker case processing and fewer delays—only promote effective deterrence if the psychological prerequisites for deterrence are met.[194] But there is no more reason to think that people possess the requisite forms of awareness, rationality, and self-control necessary to make expeditious prosecutorial enforcement of individual criminal laws a deterrent than there is to think that people will be directly deterred by the content of those laws themselves.

Second, if administrative efficiency is the key to deterrence, then it is not clear why the criminal law should be the locus of enforcement in the first place. After all, many low-level and regulatory offenses can be brought in civil actions, where lower evidentiary burdens and the absence of certain constitutional protections make expeditious enforcement that much easier.[195] Given the relative ease of civil enforcement, if we accept the logic of administrative efficiency claims, there is little reason to think that criminal enforcement of strict liability low-level and regulatory crimes would secure any deterrent benefits beyond what civil enforcement can achieve.

And yet, the prospect of holding low-level and regulatory offenders strictly liable through the civil system does not address the

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[192] Tomkovicz, *supra* note 28, at 1452; *see, e.g.*, Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1440 n.41 (2001) (observing that strict liability could "increase the perceived likelihood of conviction").

[193] *See, e.g.*, Yaffe, *supra* note 136, at 399 (noting "the assumption that more prosecutorial burdens result[] in fewer convictions"); Stevenson, *supra* note 155, at 156 ("[O]ur criminal justice system has grown more comfortable with strict liability as a valuable tool in the incapacitation of dangerous individuals.").

[194] *See supra* notes 170–77 and accompanying text.

[195] *See, e.g.*, Peter J. Henning, *Making Sure "The Buck Stops Here": Barring Executives for Corporate Violations*, 2012 U. CHI. LEGAL F. 91, 115–16 (2012) (suggesting that civil enforcement might achieve greater deterrent effects than its criminal counterpart "because liability would not depend on meeting the due process requirement of proof beyond a reasonable doubt otherwise necessary for a criminal conviction"); John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1145 (1999) ("The government enjoys tremendous advantages in . . . strict liability civil forfeiture actions.").

chief concern driving the incapacitation through administrative expediency argument: hampering prosecutors' ability to take the most dangerous offenders off the streets. The idea is that if lawmakers impose difficult-to-prove culpable mental state requirements on serious felony offenses involving violence, sexual exploitation, or other uniquely dangerous forms of conduct, then prosecutors will find it more difficult to effectively incapacitate those who pose the greatest public safety risks.

As a threshold matter, one can question whether the evidentiary demands of mens rea—required for many of the most serious offenses in U.S. criminal codes—really is the hindrance that this species of incapacitation argument presupposes.[196] But even granting that, in at least some contexts, state of mind evidence can be inordinately difficult to produce, there are a number of procedural devices—including evidentiary presumptions, clarifying judicial instructions, and shifting the burden of proof—that would substantially ease the administrative burden confronting prosecutors, while still preserving mens rea in some form.[197]

Arguably, however, the most fundamental problem with this administrative expediency argument is its central premise: that prosecutors *are* effective incapacitators. Think of it this way: In a system where criminal laws are discretionarily enforced, strict liability is a kind of legislative delegation of discretion to prosecutors to engage in their own informal risk assessments. By jettisoning mens rea, lawmakers are in effect trusting prosecutors with the responsibility to forecast the short and long-term benefits of incapacitating a particular group of offenders: those for whom proof of mens rea is either nonexistent or difficult to generate. On this construal of strict liability, however, the logic of prosecutorial incapacitation runs into the same problem discussed in the context of judicial incapacitation: the limited predictive abilities of legal decisionmakers. If, for example, judges operating in the comparatively deliberative and high-information context of sentencing proceedings greatly struggle to identify who will commit fewer crimes over the course of their lifetime by virtue of their being punished now (the issue of "responsiveness of recidivism risk to incarceration"[198]), then there is little reason to think that informal, pre-trial risk assessments conducted by adversarial prosecu-

[196] *See* Yaffe, *supra* note 136, at 399 ("[T]he assumption that more prosecutorial burdens results in fewer convictions is not true a priori; it's an empirical claim [that may be wrong for a number of evidentiary reasons].").

[197] *See* Brown, *supra* note 191, at 537.

[198] Starr, *supra* note 185, at 858; *see supra* notes 188–89 and accompanying text.

tors would be any better (and some reason to think they would be less so given the distorting effects of the prosecutorial vantage point).[199]

As a result, whether the deterrence and incapacitation arguments grounding the Public Safety Assumption are understood in terms of strict liability's direct effects on human behavior or their administrative expediency benefits, these arguments share an important similarity: There is little reason to believe they are true. Each argument rests upon empirical claims for which evidence is lacking, and which often run contrary to what we know about human behavior.

Yet this only captures part of the problem. As explained in the next Section, to fully appreciate the Public Safety Assumption's epistemic shortcomings, one needs to account for the fact that crime control goes well beyond deterrence and incapacitation, and also includes the community's sense of fairness. While public support for mens rea does not incontrovertibly support rejecting strict liability as criminogenic, as some have argued, it does provide even greater reason to question the Public Safety Assumption.

B. Strict Liability and the Broad Sense of Public Safety

However flimsy the evidence in support of strict liability as an effective deterrent or means of incapacitating dangerous actors appears, the utilitarian case for strict liability becomes even weaker once we recognize that public safety goes beyond deterrence and incapacitation. The problem can be appreciated by examining an idea initially developed by W.E.B. Du Bois,[200] first applied to mens rea policy by H.L.A. Hart,[201] and later incorporated into the drafting of the MPC,[202] only to be reaffirmed decades later by scholars across law and the social sciences: There are public safety *costs* that flow from criminal justice rules and practices that conflict with the community's sense of fairness.[203]

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[199] *See generally* Michael Serota, *Stare Decisis and the* Brady *Doctrine*, 5 HARV. L. & POL'Y REV. 415, 419–20 (2011) ("[T]he various institutional pressures and substantial levels of cognitive bias facing prosecutors make the substantial discretion they are afforded highly susceptible to abuse." (citations omitted)).

[200] *See* W.E.B. Du Bois, THE PHILADELPHIA NEGRO 241–42, 249 (Univ. of Pa. Press ed., 1996) (1899); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2068–69 (2017).

[201] *See* Hart, *supra* note 156, at 423 (noting the "shocking damage that is done to social morale by open and official admission that crime can be respectable and criminality a matter of ill chance, rather than blameworthy choice" (citation omitted)).

[202] *See* Wechsler, *supra* note 46, at 1435 (noting that strict liability "would deny all moral force to the proscriptions of criminal law and generate in individuals a sense of gross injustice").

[203] *See, e.g.*, Tracey Meares, *Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111 NW. U. L. REV. 1525, 1531 (2017) ("The

This idea has influenced a variety of criminal justice theories; however, insofar as our discussion of strict liability is concerned, the most important instantiation is Paul Robinson's theory of "empirical desert."[204] The theory of empirical desert holds that distributing criminal liability and punishment in accordance with people's shared intuitions of justice is a critical part of public safety for three main reasons:

1. Public safety depends upon voluntary compliance with the criminal law and voluntary cooperation with those actors and institutions tasked with administering it.
2. Whether people voluntarily comply and cooperate is contingent, at least in part, upon whether they view the criminal law, relevant actors, and institutions as legitimate.
3. Whether people view the criminal law as legitimate depends upon (among other things) whether the imposition of liability and distribution of punishment in their jurisdiction tracks the community's shared intuitions of justice.[205]

The theory of empirical desert is relevant to assessing strict liability's impact on public safety because many of the community's shared intuitions of justice relate to the guilty mind.[206] And, as Robinson has illustrated, many instances of strict liability—from regulatory offenses to felony murder liability—appear to conflict with those intuitions.[207] If true, this presents a fundamental problem for the Public Safety Assumption. When strict liability policies yield legal judgments in conflict with community sentiment, the results may be criminogenic: People may feel more alienated from the law, have less respect for it, and ultimately violate it more often.[208] Where, in contrast, the criminal law is aligned with community sentiment on the guilty mind, the theory of empirical desert predicts important public

centerpiece of [the social psychology of procedural justice] is that people are motivated to comply with the law, cooperate with authorities, and engage with them when they are treated fairly."); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3–4 (Princeton Univ. Press ed. 2006) (developing theory of procedural justice).

[204] *See, e.g.*, PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT (2013) [hereinafter ROBINSON, INTUITIONS OF JUSTICE]; Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1830 (2007); Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19 (1988).

[205] *See, e.g.*, Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940 (2010).

[206] *See* Serota, *supra* note 13 (manuscript at 185–93) (synthesizing empirical work on moral psychology related to blameworthiness).

[207] *See, e.g.*, Paul H. Robinson, *Strict Liability's Criminogenic Effect*, 12 CRIM. L. & PHIL. 411, 421–26 (2018) (describing various situations in which the use of strict liability conflicts with community views).

[208] *See, e.g.*, Robinson, *supra* note 207, at 415.

safety benefits: enhanced legitimacy, greater levels of social trust, more voluntary compliance, and ultimately less crime.[209]

Presented with these findings, it is tempting to assume that the theory of empirical desert offers a decisive public safety-based argument *against* strict liability. But that would be a mistake, because of the difficulty of determining what empirical desert calls for in any particular context. First, there is the measurement problem: Attempts to accurately gauge community sentiment on moral psychological issues—let alone the finer points of mens rea policy—are riddled with complexities.[210] Second, some of the public opinion data that exist—including from Robinson's own work[211]—indicate that community sentiment actually supports strict liability under certain circumstances.[212] Third, and most subtle, is the difficulty of assessing the kinds of actors who actually avoid criminal liability by virtue of mens rea's increased evidentiary burden.

One challenge is the fact that culpable mental state requirements, although fashioned as a legal shield for the morally innocent, simultaneously ensure that some number of morally blameworthy actors will escape liability or punishment.[213] Think of this as mens rea's false negative problem; it is a function of evidentiary hurdles created by culpable mental state requirements. "Save where there is evidence in the form of confessions," as Darryl Brown observes, "evidence of a defendant's mental state must be proven by circumstantial evidence."[214] In the absence of a confession or relevant testimony—or simply faced with ambiguous evidence susceptible to competing interpretations—the government may find it exceedingly difficult to establish mens rea beyond a reasonable doubt. Alternatively, perhaps extremely proba-

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209 *See, e.g.*, ROBINSON, INTUITIONS OF JUSTICE, *supra* note 204, at 152–63.

210 *See, e.g.*, Deborah W. Denno, *The Perils of Public Opinion*, 28 HOFSTRA L. REV. 741, 743–44 (2000).

211 *See* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 88–89 tbl.4.1 (1995) (finding that the vast majority of respondents would impose criminal liability in situations involving accidental damage to property, although the individual acted non-negligently).

212 *See, e.g.*, Carly Giffin & Tania Lombrozo, *Wrong or Merely Prohibited: Special Treatment of Strict Liability in Intuitive Moral Judgment*, 40 LAW & HUM. BEHAV. 707, 717 (2016) (finding that "the legal category of strict liability mirrors a cognitive distinction" and that the intuitive judgments of the study's participants "were surprisingly consistent with the law"); Joseph Sanders, Matthew B. Kugler, Lawrence M. Solan & John M. Darley, *Must Torts Be Wrongs? An Empirical Perspective*, 49 WAKE FOREST L. REV. 1, 1 (2014) (observing study participants' "relative preference for strict liability" under certain circumstances).

213 *See, e.g.*, Tomkovicz, *supra* note 28, at 1452 ("[S]trict liability deprives defendants who cause harm culpably (that is, with negligence or a higher degree of fault) of the opportunity to deceive juries.").

214 Brown, *supra* note 191, at 534.

tive evidence as to mens rea exists, and yet must be excluded by constitutional or other policy considerations. Unless the community filters its sense of justice through the reasonable doubt standard or these other evidentiary considerations, culpable mental state requirements will, at least in some circumstances, produce outcomes that will be perceived as unfair and therefore criminogenic under the theory of empirical desert.

A related challenge in implementing empirical desert is the need to assess the issue of false positives: To what extent do strict liability policies actually ensnare the morally innocent and comparatively less blameworthy?[215] Some take the position, for example, that the injustice of strict liability is illusory because of what strict liability realistically amounts to: a form of negligence per se applicable to unjustifiable conduct that is unlikely to ever be done non-culpably.[216] Felony murder offers a simple illustration. In jurisdictions that limit the doctrine to certain inherently dangerous felonies—for example, robbery, burglary, rape, or arson—some claim that the negligent disregard of a risk of death is likely to exist in most situations in which death occurs during the commission of a qualifying offense.[217] And if most of those convicted of strict liability felony murder have negligently caused someone's death, then (the argument goes) the principal effect of requiring the government to prove mens rea in most situations would be to exonerate those who truly are culpable.[218] As singular justifications for strict liability, however, these arguments

[215] By "comparatively less blameworthy," I mean to reference those who (as in the case of felony murder doctrine) are blameworthy, but, because they lack culpability as to a fact that aggravates punishment (i.e., the commission of a felony would result in death), are less blameworthy than someone who acts culpably as to that fact.

[216] *See, e.g.*, Levenson, *supra* note 4, at 424 ("[I]n strict liability offenses it is presumed that the defendant took an unjustifiable risk in his conduct and was therefore at least negligent. When the defendant's conduct is already morally questionable—'borderline' conduct—concern for punishing an innocent person decreases."); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 628 (1984) ("While the definition of a strict liability offense does not formally contain a culpable state-of-mind element, arguably the true harm or evil the statute is meant to prohibit includes such an element."). *But see* Brown, *supra* note 191, at 535 n.49 ("The arguable paradox is that if culpability is so easy to infer from proof of conduct, then it is hard also to conclude that the state would have trouble proving it.").

[217] *See* Binder, *supra* note 69, at 433 ("By restricting predicate felonies to those that are dangerous or violent, or by restricting killing to violent or foreseeably dangerous acts, legislatures or courts may require negligence by means of a per se rule."); GUYORA BINDER, FELONY MURDER 30 (2012) ("A legislature may conclude that certain conduct poses a significant enough risk of death that its commission implies negligence or recklessness with respect to death.").

[218] For a discussion of other illustrations, including possession of a sawed off shotgun, bookmaking, and discharge of a firearm during a crime of violence, see Brown, *supra* note 191, at 536–37.

prove to be too much. "Most situations" is not the same as "all situations," and there is no shortage of cases illustrating how strict liability punishes morally innocent and comparatively less blameworthy actors who lack culpability as to the legally salient facts.[219]

In the final analysis, however, the core challenge with implementing empirical desert is the level of specificity required. To determine the culpable mental state requirement (if any) empirical desert calls for in any given statutory context demands far more than a general understanding of strict liability's tendency to produce false positives or mens rea's capacity to produce false negatives. Rather, for any given mens rea policy choice, one must be able to competently perform a fine-grained analysis that: (1) assesses how frequently omitting a particular culpable mental state requirement for a specific statute (or individual element within it) will yield false positives; (2) similarly assesses how frequently including a particular culpable mental state requirement for a specific statute (or individual element within it) will yield false negatives; and then (3) weighs the criminogenic impact of both outcomes against one another. And again, this entire analysis presumes that community sentiment weighs against convicting the morally innocent and aggravating punishment for the comparatively less blameworthy in the first instance—a presumption that is not a given based on prior experimental research, which indicates that the public may actually support strict liability outcomes under certain circumstances.[220]

Ultimately, these are empirical issues that are critical to competently implementing empirical desert, yet they are also empirical issues for which there is little available evidence. So, then, where does this leave us? In a state of uncertainty. Strict liability may promote public safety, or it may not, and the answer may very well depend on which particular offense (or offense element) one is talking about. The key takeaway from this Section is that we really do not know. Assessing the deterrent and incapacitative value (if any) of strict liability is complicated; assessing the broader public safety costs and benefits of strict liability by way of empirical desert is doubly so. And the real question raised by the Public Safety Assumption is many times

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219 *See, e.g.*, Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 609–10 (1981) ("Strict liability—that is, conclusively presuming that causing harm is blameworthy—has its costs too. Like all conclusive presumptions, it is inaccurate in particular cases."); Brown, *supra* note 191, at 537 ("[A]cross the broader field of strict liability offenses, [the culpability] assumption does not always hold."). For a discussion of the difference between the "morally innocent" and "comparatively less blameworthy," see *supra* note 215.

220 *See* sources cited *supra* notes 211–12 for indications that the public prefers strict liability under certain circumstances.

more complicated yet: How do all of these utilitarian pathways intersect with one another to impact the prevalence of criminal behavior? At present, we do not possess the data necessary to even begin answering the question, and we also lack the modes of computation, analysis, and prediction to know what to do with the information were we to encounter it.

Strict liability's prevalence in the criminal system thus presents a particularly sharp conflict between policy knowledge and political action: While the findings of law and social science research strewn across many decades have failed to support (and often seem to contradict) the Public Safety Assumption, lawmakers continue to rely on the Public Safety Assumption as the foundation for enacting (or preserving) strict liability policies. The next Section explains why that reliance is morally problematic, and leads to the conclusion that the Public Safety Assumption has no place in government decisionmaking.

C. The Empirics of Strict Liability and the Morality of Government Decisions

The core problem with the Public Safety Assumption is not empirical, but rather political: Lawmakers deploy the idea that strict liability controls crime as the basis for making criminal justice decisions. In some decisional contexts, relying on intuitive, unsupported assumptions about human psychology and the natural world might be an appropriate basis for navigating conditions of uncertainty. However, public policy decisions, and specifically those involving criminal policy, operate under distinct ethical constraints.

To appreciate those constraints, consider a simple analogy drawn from the medical context. Doctors are ethically prohibited from prescribing dangerous medications and performing life-threatening procedures in the absence of a bona fide belief, grounded on reliable evidence, that doing so is in the best interests of their patients. That medical decisions should be informed by the findings of scientific research, and that providers ought to take care to ensure that the risks of treatment are outweighed by the benefits to human well-being, is uncontroversial. It simply reflects the fact that doctors occupy a position of trust. That is, they are fiduciaries who we expect to set aside their self-interest and focus on the best interests of their patients who are vulnerable and have no choice but to trust the decisions their doctors make.

We should think of public policy decisions, and specifically those involving the use of punishment, in much the same way. That is

because lawmakers, like doctors, are a kind of fiduciary.[221] As I've explored in prior work, the public fiduciary status of lawmakers is a function of how they relate to their constituents: The same relational criteria that ground fiduciary relationships in private settings similarly capture the relationship between democratic representatives and the people who elect them.[222] Legislators have been granted a wide berth of authority and discretion by the public to carry out their duties.[223] They possess access to greater information, expertise, and resources.[224] And the combined effect of this grant of discretion and informational asymmetry renders the people vulnerable to predation and abuse.[225] Under these conditions, the public has no choice but to trust that lawmakers will exercise their authority responsibly.[226]

In private law settings, where these indicia are met, fiduciary relationships are governed by critical duties of loyalty and care.[227] For a fiduciary to live up to these obligations, they do not need to make universally correct decisions. But fiduciaries must make these decisions in the right way—deliberatively, conscientiously, and informed by relevant expertise.[228] The precise strictures of these obligations vary across contexts, though their stringency is generally understood to be commensurate with the stakes of a decision.[229] For example, all else being equal, the greater the beneficiary's vulnerability to a fiduciary's decisions, the more the law asks of the fiduciary in making

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221 *See generally* Leib, Ponet & Serota, *Translating Fiduciary Principles into Public Law*, *supra* note 31 (explaining why legislators are public fiduciaries, and exploring the complexity of this relationship); Leib, Ponet & Serota, *A Fiduciary Theory of Judging*, *supra* note 31 (explaining why judges are a kind of public fiduciary).

222 *See* Michael Serota & Ethan J. Leib, *The Political Morality of Voting in Direct Democracy*, 97 MINN. L. REV. 1596, 1599–603 (2013).

223 *See* Leib, Ponet & Serota, *A Fiduciary Theory of Judging*, *supra* note 31, at 712 (explaining how the relationship between citizens and government officials reflects fiduciary principles).

224 *See id.* at 706 (discussing the "expertise" a fiduciary possesses).

225 *Id.* at 708.

226 *See id.* at 706 ("Discretionary power vested in the fiduciary means the beneficiary is always vulnerable to potential abuse through predation or self-dealing.").

227 For general overviews of the role of fiduciary duties in the private law context, see, for example, L.S. Sealy, *Fiduciary Relationships*, 20 CAMBRIDGE L.J. 69 (1962); J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 LAW Q. REV. 51 (1981); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 UNIV. TORONTO L.J. 1 (1975).

228 *See, e.g.*, Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1826 (2016).

229 *See, e.g.*, Kenneth B. Davis, Jr., *Judicial Review of Fiduciary Decisionmaking—Some Theoretical Perspectives*, 80 Nw. U. L. REV. 1, 23–24 (1985); Leib, Ponet & Serota, *A Fiduciary Theory of Judging*, *supra* note 31, at 707 ("[T]he stringency of obligations imposed on fiduciaries shifts as these indicia register at different intensities across the varied landscape of private fiduciary law.").

them.[230] This is intuitive: The investment of time, attention, and resources we expect from a corporate officer or director in making a mundane decision about business operations is materially different than what we expect of a pediatric surgeon carrying out a high-risk, life-threatening procedure. But in all situations, we expect that fiduciary decisions will be "reasonably calculated" to further the beneficiary's interests and objectives.[231]

This logic is particularly apt in the context of criminal policy decisions, which revolve around the intentional use of state-sanctioned violence and have extraordinary consequences for human lives.[232] Many of those consequences are tied to the first-person experience of incarceration: "Imprisonment in its basic structure entails caging or imposed physical constriction, minute control of prisoners' bodies and most intimate experiences, profound depersonalization, and institutional dynamics that tend strongly toward violence."[233] Equally significant, however, are the downstream effects of incarceration on families: "Separation from imprisoned parents has serious psychological consequences for children, including depression, anxiety, feelings of rejection, shame, anger, and guilt, and problems in school."[234] And that is to say nothing of the corrosive consequences of forcibly removing large swaths of people from their communities, including economic devastation, the diminishment of communal bonds, and the erosion of valuable social capital and organization.[235] If the ethics of fiduciary decisionmaking mean anything, it is that lawmakers must refrain from imposing these extraordinary costs on their constituents

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[230] *See, e.g.*, Andrew S. Gold, *The Loyalties of Fiduciary Law*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, at 176, 194 (Andrew S. Gold & Paul B. Miller eds., 2014) (concluding that fiduciary law implicates "different kinds of loyalty for different kinds of relationship[s]" and that "[l]oyalty varies in our social experiences—it also varies in the law").

[231] *See, e.g.*, 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 28 (AM. L. INST. 2000) (requiring a lawyer's representation to "proceed in a manner reasonably calculated to advance a client's lawful objectives").

[232] *See, e.g.*, Serota, *supra* note 105, at 693; Youngjae Lee, *Deontology, Political Morality, and the State*, 8 OHIO ST. J. CRIM. L. 385, 397–98 (2011).

[233] Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1184 (2015); *see also, e.g.*, Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 467 (1997) ("[T]o go to prison in the United States . . . can mean exposure to a debased, mind-numbing environment, including significant possibilities of forcible rape . . . .").

[234] Roberts, *supra* note 116, at 1284; *see also, e.g.*, DONALD BRAMAN, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA (2004).

[235] Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 389 (2005).

unless they have reliable evidence that doing so is indispensable to serving the public good.[236]

In this sense, U.S. strict liability policies represent a failure of criminal justice decisionmaking. A government decision to omit a culpable mental state requirement from a criminal statute—whether on the level of an offense or an individual offense element—is in effect a decision to authorize punishment against a certain segment of a lawmaker's constituency: the morally innocent and comparatively less blameworthy.[237] Throughout history, these decisions have been driven by an unexamined belief that punishing these actors is an effective means of promoting public safety.[238] Under the principles I have just laid out, one should expect this belief to rest on a strong evidentiary foundation; and yet, decades of law and social science research fail to provide any meaningful basis for holding the belief. Indeed, once one carefully considers what we know about human behavior and all of the different factors that contribute to public safety (including the community's sense of fairness), there is reason to think that many strict liability policies are more likely to detract from public safety than promote it.[239] But the important point, from a decision-theoretic perspective, is that lawmakers do not have any basis for confidently reaching a conclusion one way or the other.

Simply put, relying on empirically unsupported beliefs to support the intentional infliction of state-sanctioned violence is a fundamental moral failing on the part of lawmakers. It is inconsistent with their

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[236] That is not to say that government decisions operate solely, or even primarily, under utilitarian constraints. As I have recently argued, "[G]overnment officials and the varied public institutions they populate are constrained by inviolable 'normative limits on the ways in which human beings may be treated,' outside of which state action becomes illegitimate." Serota, *supra* note 13 (manuscript at 206) (quoting NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 146 (1988)). These deontological constraints may, in turn, independently require mens rea, thereby rendering strict liability an "illegitimate exercise of state power." *Id.* (manuscript at 207); *see also* Stephen P. Garvey, *Authority, Ignorance, and the Guilty Mind*, 67 SMU L. REV. 545, 546 ("No state can legitimately punish an actor unless he committed a crime with mens rea."). For purposes of the present discussion, however, I focus on utilitarian constraints.

[237] Counterintuitively, the omission of mens rea, which requires no action by lawmakers, is an inculpatory policy decision to activate the coercive power of the state, whereas the application of a culpable mental state requirement, which actively must be written or read into a statute, is an exculpatory policy decision to maintain the status quo (freedom from criminal liability and punishment).

[238] *See supra* Section I.A.1.

[239] *See supra* notes 200–08 and accompanying text. One way to think of this possibility is as follows: The public safety arguments against strict liability based on empirical desert, notwithstanding the numerous caveats to this theory, *see supra* notes 210–18 and accompanying text, seem to rest on firmer evidentiary ground than the conventional public safety through deterrence and incapacitation arguments, *see supra* notes 170–89 and accompanying text.

fiduciary status and a violation of the kind of decisionmaking lawmakers owe to their constituents. As a result, the Public Safety Assumption deserves just as much space in our policy discourse as strict liability deserves in our criminal codes: none at all.

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This Part explained why the central idea animating more than a century of strict liability is unsupported by available evidence and has no place in criminal lawmaking. What follows? In an idealized politics, perfectly rational lawmakers would of their own volition recognize the problem and abolish strict liability by imposing universal culpable mental state requirements. The politics we have, however, is far from ideal: Legislative pathologies place extraordinary hurdles between the ought and is of criminalization. So strict liability abolition only stands a chance if the criminal justice reform community coalesces behind it. But in an era of mass incarceration, there is little reason to coalesce behind an agenda that—as many appear to have concluded—does not speak to the central problems confronting criminal systems. The question that remains is whether this Mass Incarceration Assumption can withstand scrutiny; the next Part explains why it does not.

III
Deconstructing the Mass Incarceration Assumption

In recent years, many in the criminal justice reform community have neglected strict liability abolition, believing that it would have little impact on prison rates, racial disparities, or the lives of society's most vulnerable populations. The assumption is that, as Ben Levin phrases it, "mens rea reform represents a misdirection of reformist energy that does not speak to the problems faced by the poor, people of color, and other marginalized groups that suffer as a result of mass incarceration."[240]

It is easy to see why someone working on criminal justice reform would subscribe to this position. Confront the horrors of mass incarceration and it becomes clear that "a system as pervasive, harsh, and racially charged as ours requires serious rethinking."[241] Yet the prospect of abolishing strict liability seems like a comparatively modest reform, rather than the kind of wholesale transformation that many reformers believe to be warranted. Moreover, on their face, culpable mental state requirements have little to say about the gravest

[240] Levin, *supra* note 23, at 523.
[241] Alexandra Natapoff, *Underenforcement*, 75 Fordham L. Rev. 1715, 1716 (2006).

problems confronting U.S. criminal systems: racial disparities, police violence, and structural inequality.[242]

But there are also reasons to be skeptical of this position. For one thing, public defenders working the front lines of the fight against mass incarceration have indicated that mens rea reform could benefit their clients: the poor, the underserved, and people of color.[243] For another, the same totalizing logic—that the only worthy reforms are those that would end mass incarceration—can be applied to just about any other reform proposal.[244] In a policy space where even minor legislative changes can have a multi-generational human impact, we should be cautious before dismissing a proposal as insufficiently ambitious to warrant our attention.[245] Accordingly, this Part critically evaluates the Mass Incarceration Assumption.

Section A begins by modeling the legal impact of culpable mental states on the administration of individual criminal statutes. Building upon the first-ever empirical study of mens rea reform, I explain why adding a culpable mental state requirement to a criminal statute can be expected to materially reduce charging and conviction rates without bringing administration to a halt. Thereafter, I synthesize law and social science scholarship on racial disparities in prosecutorial decisionmaking to explain why people of color are likely to meaningfully (and perhaps disproportionately) benefit from the reductions in charging and convictions associated with adding culpable mental state requirements to individual criminal statutes.

Section B brings this statute-level understanding of mens rea's legal impact to bear on the system-level question raised by the Mass Incarceration Assumption: Is abolishing strict liability for *all* criminal statutes an effective means of reducing prison populations or promoting racial justice? Examining the nature and breadth of strict liability in U.S. criminal law, I first explain why the wholesale abolition of strict liability, implemented through the legislative enactment of universal mens rea standards, is likely to have a modest yet discernible impact on the number of convictions and amount of punishment imposed upon all people (and people of color in particular). I thereafter argue that this categorical form of mens rea reform offers a

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242 Levin, *supra* note 23, at 494.

243 *See* Lee Press Release, *supra* note 144 (statement of David Patton).

244 *See infra* notes 371–72 and accompanying text.

245 *See, e.g.*, Lanni, *supra* note 235, at 389 (describing the disruptive effect of incarceration on the offender's family, children, and community); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 765 (2020) ("One can recognize the scourge of carceral ideology even while pursuing practical, even technocratic, harm reduction measures.").

unique combination of codification strengths and political virtues. Contrary to what many have assumed, strict liability abolition offers an important tool in the fight against mass incarceration.

A. The Impact of Culpable Mental States on Criminal Administration: A Case Study of an Individual Statute

Does mens rea impact the enforcement of individual criminal statutes, and if so, how significant is the effect (and for whom)? These are basic questions about a topic that has been at the forefront of over a century of legal thought, and which has been described as criminal law's "central distinguishing characteristic."[246] One might therefore be surprised to learn just how little we know about the impact of culpable mental state requirements on criminal administration. Although there is a vast literature on the philosophical foundations of culpable mental state requirements,[247] and a wide body of scholarship cataloguing the development of mens rea legislation and doctrine,[248] there is effectively no research assessing mens rea's effects on charging, convictions, and incarceration.[249]

This Section begins filling this gap in the literature by modeling the relationship between culpable mental state requirements and criminal administration at the level of an individual statute. Drawing upon a novel empirical analysis of an individual mens rea reform—a legal impact study of the U.S. Supreme Court's recent decision in *Rehaif v. United States*—I first discuss the potential effect of adding a culpable mental state requirement to an offense on charging and conviction rates. Thereafter, I consider the effect that mens rea reform at the level of an individual statute could have on minority incarceration by exploring the literature on racial bias and prosecutorial decision-making. This is an important first step in critically evaluating the Mass Incarceration Assumption.

1. Charging and Conviction Rates

Do culpable mental state requirements lower charging and conviction rates? There are good reasons to think so. We know that culpable mental state requirements narrow the scope of criminal statutes and raise the government's burden of proof. We also know that prosecutors push statutes as far as they will go, pursuing criminal convic-

246 Claire Finkelstein, *The Inefficiency of Mens Rea*, 88 CALIF. L. REV. 895, 896 (2000).

247 *See, e.g.*, *supra* notes 13–17 and accompanying text.

248 *See, e.g.*, *supra* notes 18–26 and accompanying text.

249 For a legal impact study on abolition of the insanity defense, see Lisa A. Callahan, Pamela Clark Robbins, Henry J. Steadman & Joseph P. Morrissey, *The Hidden Effects of Montana's "Abolition" of the Insanity Defense*, 66 PSYCHIATRIC Q. 103 (1995).

tions on the outer boundaries of statutory meaning.[250] Finally, we know that prosecutors frequently complain about culpable mental state requirements and have aggressively lobbied lawmakers to oppose them.[251]

These data points support what commonsense suggests: that culpable mental state requirements limit the frequency that individual charges are brought by prosecutors and the number of convictions the government is able to secure.[252] But even if this intuitive idea were true,[253] there are important issues of scale to be resolved. For example, just how much do charging rates decrease for any given culpable mental state requirement added to a criminal offense? How many fewer convictions for that offense result? And how many fewer people are incarcerated as a result of those reductions in charging and conviction?

These questions animated my collaboration with a team of social scientists at the RAND Corporation to produce "Does Mens Rea Matter?" (Study). This Study assesses the impact of the U.S. Supreme Court's 2019 decision in *Rehaif v. United States*,[254] which read a novel culpable knowledge requirement into one of the most frequently charged statutes in the U.S. Code: 18 U.S.C. § 922(g), or what is colloquially known as the federal felon-in-possession statute.[255] Originally enacted in 1938, the federal felon-in-possession statute prohibits nine groups of individuals—including felons, certain misdemeanants, and

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[250] *See, e.g.*, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453 (2009).

[251] *See, e.g.*, Barkow & Osler, *supra* note 122, at 422–23 (discussing DOJ's lobbying efforts against federal mens rea reform); Apuzo & Lipton, *supra* note 141.

[252] *See* Mizel et al., *supra* note 32 (manuscript at 1529) (offering the following commonsense theory of mens rea reform: "[A]dding a culpable mental state requirement to an individual criminal statute should yield fewer situations in which that statute applies and fewer yet where the government is able to generate evidence sufficient to establish the elements of an offense beyond a reasonable doubt.").

[253] That something is intuitive does not, of course, mean that it is correct. As countless psychological studies have revealed, human intuitions borne of first-person experience frequently offer a poor guide for making accurate predictions about the operation of complex social systems. For helpful book-length discussions of these studies and the ways in which our decision theoretic shortcomings consistently lead us to misdiagnose the world around us, see generally DAN ARIELY, PREDICTABLY IRRATIONAL (rev. and expanded ed. 2009); DANIEL KAHNEMAN, THINKING, FAST & SLOW (2011).

[254] 139 S. Ct. 2191 (2019).

[255] *See generally* Jessica A. Roth, Rehaif v. United States*: Once Again, a Gun Case Makes Surprising Law*, 32 FED. SENT'G REP. 23 (2019) (discussing the *Rehaif* decision and its potential implications for federal criminal law).

those in the U.S. unlawfully—from possessing "any firearm or ammunition" for the duration of their lives.[256]

For the decades preceding the *Rehaif* decision, U.S. courts of appeals had uniformly interpreted the offense's critical legal status element—whether a person possessing a firearm or ammunition falls into one of the nine categories—to be a matter of fact, for which an accused could be held strictly liable.[257] But this reading of the statute also created a problem: It authorized morally innocent actors to be convicted of a serious felony.

For example, someone with a felon status might have been misinformed by the judge presiding over their earlier trial that they would "leave this courtroom not convicted of a felony."[258] Alternatively, someone with an unlawful immigration status might have been brought to the U.S. illegally as a young child but then told otherwise by her parents.[259] In either case, these individuals would have quite reasonably been unaware that they satisfied the status element of 18 U.S.C. § 922(g). While reasonable, however, these legal status mistakes would not have stopped federal prosecutors from securing convictions under the well-established strict liability interpretation of the statute.[260]

Nevertheless, in 2019, that reading was effectively thrown out in *Rehaif v. United States*, where a seven-to-two majority of the Court held that the "[g]overnment must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm."[261] This clear break from prior case law provides the basis for our Study, which focuses on how enforcement of 18 U.S.C.§ 922(g) changed between the two years prior to *Rehaif* (i.e., at the start of the Trump Administration) and the eight months following it (i.e., before the COVID-19 pandemic upended federal criminal practice).[262]

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256 18 U.S.C. § 922(g); *see also* Mizel et al., *supra* note 32 (manuscript at 1520–23) (discussing the scope and ramifications of the federal felon-in-possession statute).

257 *See* Mizel et al., *supra* note 32 (manuscript at 1524); Evan Lee, *Opinion Analysis: Felons-in-Possession Must Know They Are Felons*, SCOTUSBLOG (June 21, 2019, 7:16 PM), https://www.scotusblog.com/2019/06/opinion-analysis-felons-in-possession-must-know-they-are-felons [https://perma.cc/Y49V-7WBP].

258 United States v. Games-Perez, 667 F.3d 1136, 1138 (10th Cir. 2012).

259 Rehaif v. United States, 139 S. Ct. 2191, 2197–98 (2019) (giving this example).

260 *See, e.g.*, *Games-Perez*, 667 F.3d at 1138 (affirming a conviction under § 922(g) even though the sentencing judge told the defendant that he would "leave this courtroom not convicted of a felony").

261 *Rehaif*, 139 S. Ct. at 2200.

262 *See* Mizel et al., *supra* note 32 (manuscript at 1559–60) (noting that the "burgeoning influence" of COVID-19 might have impacted criminal administration even before the federal courts shut down"); *Court Orders and Updates During COVID-19 Pandemic*, U.S.

Working within these parameters, the Study offers five key findings regarding the legal impact of adding a culpable knowledge requirement to the federal felon-in-possession statute. First, there was a 7.79% decline in the likelihood of a defendant being charged with § 922(g) relative to all other federal charges.[263] Second, there was a 19.08% decline in the number of § 922(g) charges brought against individual felon-in-possession defendants.[264] Third, there was a 34.59% decline in the total number of § 922(g) charges filed per circuit per month.[265] Fourth, there was a 16.32% decline in the total number of defendants charged with § 922(g) per circuit per month.[266] Fifth, there was no statistically significant change to the likelihood of a defendant being convicted of § 922(g) once charged.[267]

Reflecting on these findings, the Study offers a few central takeaways. First, the aggregate impact of adding a culpable knowledge requirement to 18 U.S.C. § 922(g) appears to have been sizable. Modeling what the world of federal criminal practice would have looked like in the absence of *Rehaif*, the Study estimates that the decision may have prevented 2,365 felon-in-possession convictions during the eight-month post-*Rehaif* period, and that 8,419 fewer years of prison sentences may have been imposed for § 922(g) violations in this same window of time.[268]

Second, the relative effects of adding a culpable knowledge requirement to the federal felon-in-possession statute seem to have been comparatively modest. For example, the estimated reductions in charging attributable to *Rehaif* constituted a minority of the overall charges, while the felon-in-possession statute remained one of the most frequently used offenses in the federal criminal code during the post-*Rehaif* period.[269]

Third, even if the addition of a culpable knowledge requirement made it more difficult to bring felon-in-possession prosecutions, the Department of Justice seemed to easily navigate this transition. For example, the Study finds that although federal prosecutors charged fewer people with felon-in-possession violations during the post-*Rehaif* period, federal prosecutors were just as likely to secure convic-

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CTS. (July 28, 2022, 4:30 PM), https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic [https://perma.cc/7XH6-2U7N] (documenting the various COVID-19 protocols adopted by the federal courts).

263 Mizel et al., *supra* note 32 (manuscript at 1539).

264 *Id.* (manuscript at 1540).

265 *Id.*

266 *Id.*

267 *Id.* (manuscript at 1556).

268 *Id.* (manuscript at 1551–52).

269 *Id.* (manuscript at 1555).

tions for § 922(g) charges brought after *Rehaif* as they were for those § 922(g) charges brought before it.[270]

All told, adding a culpable knowledge requirement to 18 U.S.C. § 922(g) appears to have materially lowered charging and conviction rates without bringing federal felon-in-possession prosecutions to a halt. If true,[271] the Study provides empirical support for a basic but important proposition: Culpable mental state requirements can yield a modest but meaningful reduction in prosecutorial enforcement of individual statutes by narrowing their scope and raising the government's burden of proof.[272]

That is as far as my co-authors and I were willing to go in terms of generalizing results because it is very likely that the consequences of mens rea reform—i.e., the scale of reductions in charging and convictions—will depend on the specifics of the reform in question. For example, the Study addresses the legal impact of a particular kind of culpable mental state requirement (knowledge) as applied to a particular kind of offense element (the attendant circumstance of one's legal status). Yet there is reason to think that different species of mens rea reform would impact criminal administration differently.

To illustrate, consider that a culpable knowledge requirement such as the one deployed in *Rehaif* is evidentiarily demanding. Insofar as circumstance elements are concerned, knowledge requires proof of full subjective awareness of some fact,[273] and this kind of awareness rests at the top of the hierarchy of culpable mental states.[274] However, mens rea reform may also involve a hierarchically inferior culpable mental state requirement. For example, as previously discussed, central to the MPC's recommended abolition of strict liability is the default application of recklessness, which requires proof that one consciously disregarded a substantial risk that some attendant circumstance exists.[275] And, in certain instances, the Code expressly authorizes criminal liability to be based on negligence, which merely requires proof that one should have been aware of a substantial risk that some attendant circumstance exists.[276] All else being equal, one could expect that reforms involving these less demanding (and therefore easier-to-prove) culpable mental states would lead to smaller

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[270] *Id.* (manuscript at 1556).

[271] For a detailed discussion of the methodological limitations of the study, along with an analysis of generalizability concerns, see *id.* (manuscript at 1559–65).

[272] *See id.* (manuscript at 1565) (offering two possible explanations of why increasing evidentiary burdens might have yielded fewer prosecutions).

[273] *See* MODEL PENAL CODE § 2.02(2)(b) (AM. L. INST. 1985) (defining knowledge).

[274] *See id.* § 2.02(2).

[275] *See id.* § 2.02(2)(c) (defining recklessness); *id.* § 2.02(3).

[276] *Id.* § 2.02(2)(d) (defining negligence); *see also id.* § 2.02(1).

reductions in charges and convictions than those involving a more demanding (and thus harder-to-prove) culpable knowledge requirement, such as the one employed in *Rehaif*.

At the same time, one could also expect that adding culpable mental states to other kinds of offense elements—i.e., distinct from the legal status element at issue in *Rehaif*—could lead to comparatively greater reductions in charges and convictions. This is because the legal status element incorporated into § 922(g) by the *Rehaif* Court is not a fact for which one would expect ignorance or mistakes to be particularly common, nor is it one for which the government should struggle to generate legally-admissible mental state evidence.[277] By contrast, many strict liability elements in U.S. criminal law involve facts that are impersonal (or at least divorced from the accused's individual life history).[278] Illustrative examples include whether the victim of an assault was of a particular age or held a particular occupational status; whether a drug sale involved a particular amount or kind of a controlled substance; and whether a drug sale occurred within particular proximity to a school zone. Because these offense elements all implicate other people, places, or things, as opposed to personal characteristics of the accused, there is reason to think the government would confront greater challenges in proving that a criminal defendant was (for example) aware of them.[279]

All told, the confluence of factors in *Rehaif*—pairing a demanding culpable mental state requirement with a comparatively easy-to-prove legal status element—suggests that the Study's basic findings offer a useful case study for thinking about the relative impact of abolishing strict liability. Some mens rea reforms may yield significantly greater reductions to charging and convictions (even to the point of truly stifling prosecution), whereas others may have no impact at all. But for most individual mens rea reforms, one might expect the consequences to cohere at least generally with what was

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[277] For example, since the issuance of the *Rehaif* decision, federal "courts have recognized" what "commonsense suggests": "individuals who are convicted felons ordinarily *know* that they are convicted felons." Greer v. United States, 141 S. Ct. 2090, 2095 (2021) (emphasis added). This post-*Rehaif* case law furthermore highlights that "a defendant's knowledge of his felon status can often be easily inferred from proof that he has previously spent more than a year in prison or has been convicted of a crime that is unequivocally recognized as a felony offense." Zach Sherwood, Note, *Time to Reload: The Harms of the Federal Felon-in-Possession Ban in a Post-*Heller *World*, 70 DUKE L.J. 1429, 1445 & nn.104–05 (2021) (collecting cases).

[278] *See infra* Section III.B.1 (discussing the sweep of strict liability in United States criminal codes).

[279] Simply put, knowing something about oneself is one thing, whereas knowing something about someone (or something) else is quite another, and generating legally-admissible proof of the latter would appear to be one step further yet.

observed after *Rehaif*: modest reductions in charging and conviction rates without a serious impediment to criminal administration.

2. *Racial Disparities*

Understanding the relationship between culpable mental states and charging and conviction rates is one important aspect of mens rea reform's legal impact; understanding how these decarceral benefits are distributed is another. The latter issue is of significant scholarly interest, and independent moral significance, because of a basic fact discussed in Part I: Racial minorities constitute an inordinately high portion of those incarcerated in the U.S.[280] Because people of color have disproportionately borne the costs of mass incarceration, it stands to reason that criminal justice reforms should meaningfully (if not disproportionately) benefit minority populations. In what follows, I present two reasons to think that, at the level of an individual criminal statute, mens rea reform is consistent with this racial justice principle—what I will respectively refer to as the "General Overcriminalization Thesis" and "Specific Moral Innocence Thesis."

The General Overcriminalization Thesis holds that, all else being equal, the broader a statute, and the greater amount of discretion left to prosecutors, the greater the likelihood that racial bias will infect prosecutorial decisionmaking. This thesis is premised on the idea that statutory overbreadth expands the number of actors to whom a given statute does apply, while at the same time providing prosecutors with less guidance regarding the kinds of actors to whom a statute should apply. Collectively, this increase in prosecutorial discretion creates more opportunities for racially disparate enforcement.[281]

To illustrate, imagine what the world would look like if separate offenses against persons—for example, murder, rape, and assault—did not exist, and in their place was a single overbroad statute generally prohibiting "causing any kind of harm to any person." In this new legal regime, it would be up to prosecutors to decide what "harm" means, and who among every person in a jurisdiction that causes it ought to be prosecuted, with no legal constraints or policy guidance from the legislature. That is an incredibly broad grant of discretion to

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[280] *See supra* notes 116–21 and accompanying text (discussing racially skewed enforcement practices); *see also* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/LQB5-DX7E].

[281] *See, e.g.*, Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 202–03 (2007) (observing that "one of the most significant" factors contributing to the "unwarranted racial disparities that plague the American criminal justice system" is the "exercise of prosecutorial discretion, especially at the charging and plea bargaining stages of the process").

prosecutors, and one that would create many more opportunities for legally irrelevant considerations of race to influence prosecutorial decisions about who, how, and when to charge. By contrast, one could expect that stepping away from this imaginary legal regime—i.e., the single, overbroad harm offense—and embracing the comparatively more cabined offenses against persons we live with today would mitigate the influence of racial bias by narrowing the breadth of discretion afforded to prosecutors.[282]

We can think about the effects of narrowing the scope of strict liability criminal statutes in much the same way. Adding a culpable mental state requirement to an individual statute excludes a particular class of individuals—primarily, those without a guilty mind, but also those for whom proof of a guilty mind is unavailable—from the pool of people to whom a statute applies. And in so doing, it provides prosecutors with more guidance regarding who to charge (i.e., those with a guilty mind). Collectively, mens rea's curtailment of the breadth of unchecked discretion afforded to prosecutors should minimize the influence of racial bias in their enforcement decisions.

Support for this General Overcriminalization Thesis can be found in the empirical literature on racial disparities in prosecutorial decisionmaking. For example, a range of studies finds that prosecutors are more likely to charge,[283] overcharge,[284] and seek both pre-trial detain-

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[282] *See, e.g.*, Ellen S. Podgor, *The Dichotomy Between Overcriminalization and Underregulation*, 70 AM. U. L. REV. 1061, 1065 (2021) ("Discretion can result in disparities, especially to poor and minority members of society."); Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1683 (2021) ("The broad scope of disorderly conduct laws, as with order-maintenance laws more broadly, permits wide discretion in enforcement priorities. This invites discriminatory enforcement . . . ."); *see also* Davis, *supra* note 281, at 210 (observing that the "disparate treatment of similarly situated victims and defendants" in the criminal legal system is the product of "[a]rbitrary, unsystematic decision-making, exacerbated by unconscious race and class predilections"); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 142–43 (2008) (conducting study finding that more carefully graded offense definitions "exercise some meaningful control over the prosecutor's choice of charges").

[283] *See, e.g.*, Cassia Spohn, John Gruhl & Susan Welch, *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175 (1987) (racial disparities in the rate of filing felony charges in Los Angeles County); Charles Crawford, Ted Chiricos & Gary Kleck, *Race, Racial Threat, and Sentencing of Habitual Offenders*, 36 CRIMINOLOGY 481 (1998) (racial disparities in the charging of "habitual offender" statute in Florida); Jeffrey T. Ulmer, Megan C. Kurlychek & John H. Kramer, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RSCH. CRIME & DELINQ. 427 (2007) (racial disparities in imposition of mandatory minimum sentences in Pennsylvania); Jill Farrell, *Mandatory Minimum Firearm Penalties: A Source of Sentencing Disparity?*, 5 JUST. RSCH. & POL'Y 95 (2003) (racial disparities in the charging of mandatory minimum firearm penalty); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2 (2013) (racial disparities in federal criminal cases); Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice*

ment of[285] and harsh sentences for[286] Black defendants than white defendants acting under similar conditions. In addition, controlling for all other factors, an array of studies finds that prosecutors are less likely to recommend pre-trial diversion,[287] sentencing reductions,[288] or other non-carceral options[289] for Black defendants than for white defendants.

Processing, *in* OUR CHILDREN, THEIR CHILDREN 23, 31 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005) (noting that prosecutors are more likely to refer Black youth than white youth to juvenile court than release or send them to a court diversion program); Kris Henning & Lynette Feder, *Criminal Prosecution of Domestic Violence Offenses: An Investigation of Factors Predictive of Court Outcomes*, 32 CRIM. JUST. & BEHAV. 612, 628 (2005) (noting that in domestic violence cases, prosecutors are more likely to dismiss the cases for white defendants than Black defendants).

[284] *See, e.g.*, Terance D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155, 168 (1987) (noting a study of over four thousand felony convictions in Minnesota, and finding that prosecutors were more likely to charge Black offenders more severely across all crimes); Christine Martin, *Influence of Race and Ethnicity on Charge Severity in Chicago Homicide Cases: An Investigation of Prosecutorial Discretion*, 4 RACE & JUST. 152 (2014) (finding that in cases where the defendant was accused of murder in Chicago, Black offenders who killed white victims were charged most severely).

[285] *See, e.g.*, Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOC. PROBLEMS 222 (2004) (finding that Black and Hispanic defendants were more likely to be detained pretrial than similarly situated white defendants).

[286] *See, e.g.*, M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320 (2014) (finding that in federal cases from 2006–2008 Black offenders were subject to sentences 10% longer than comparable white offenders); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285 (2001) (finding racial disparities in federal sentencing); Cyndy Caravelis, Ted Chiricos & William Bales, *Static and Dynamic Indicators of Minority Threat in Sentencing Outcomes: A Multi-Level Analysis*, 27 J. QUANTITATIVE CRIMINOLOGY 405, 416 (2011) (noting a Florida study finding that Black offenders were 22% more likely than eligible white offenders to receive habitual offender sentencing enhancement).

[287] *See, e.g.*, Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts*, 3 RACE & JUST. 210, 223 (2013) (finding that from 1990 through 2006 Black defendants nationally had 44% lower odds of receiving pretrial diversion than similarly situated white offenders).

[288] *See, e.g.*, Keith A. Wilmot & Cassia Spohn, *Prosecutorial Discretion and Real-Offense Sentencing: An Analysis of Relevant Conduct Under the Federal Sentencing Guidelines*, 15 CRIM. JUST. POL'Y REV. 324, 334 (2004) (finding that Black offenders received longer sentences in federal cases, as they were less likely to receive a downward departure from sentencing guidelines, and white defendants were more likely to receive a substantial assistance departure); Brian D. Johnson, *Racial and Ethnic Disparities in Sentencing Departures Across Modes of Conviction*, 41 CRIMINOLOGY 449, 464, 468 (2003) (noting a Pennsylvania study finding Black offenders were 25% less likely than white offenders to receive a beneficial downward departure, but were 21% more likely to receive a punitive upward departure).

[289] *See, e.g.*, Besiki L. Kutateladze, Nancy R. Andiloro, Brian D. Johnson & Cassia C. Spohn, *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution*

This broad collection of empirical work reveals the racially disparate effects of prosecutorial discretion across a range of policy contexts. However, there also exists a small but revealing body of studies documenting particularly striking racial disparities in the enforcement of strict liability felony murder. Most of these studies focus on criminal administration during the 1970s and 1980s, during which two things appear to have been consistently true across jurisdictions. First, Black offenders who killed white victims were disparately targeted by prosecutors with felony murder charges.[290] And second, once charged with felony murder, Black offenders who killed white victims were disproportionately sentenced to death.[291] Reflecting on this body of work, Richard Rosen concludes that the felony murder rule effectively "allow[s] a large, racially skewed group of defendants whose culpability has not been examined individually to be convicted of first degree murder, and thus to be . . . eligible for the death penalty."[292]

A couple of more recent studies reveal comparable disparities in felony murder enforcement. For example, in 2020, Kat Albrecht published the results of her investigation into felony murder charging rates in Cook County, Illinois, based upon the county's 2010 launch of a unique open data portal.[293] "Confirming the findings of previous

and Sentencing, 52 CRIMINOLOGY 514, 538 (2014) (analyzing data from the District Attorney's Office of New York, finding "strong evidence . . . for racial and ethnic disparity in pretrial detention, plea offers, and the use of incarceration"); Henning & Feder, *supra* note 283 (finding that Black defendants were less likely than white defendants to be released on their own recognizance).

290 *See, e.g.*, Steven D. Arkin, Note, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post*-Furman *Murder Cases in Dade County, Florida, 1973–1976*, 33 STAN. L. REV. 75, 88 (1980) (finding that Black defendants in Florida who killed white victims were more likely to be charged with felony murder than any other defendant-victim racial pairing); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post*-Furman *Capital Statutes*, 26 CRIME & DELINQ. 563, 612–14 (1980); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 58 tbl.5, 131–43 (1984).

291 *See, e.g.*, David C. Baldus, Charles A. Pulaski & George Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 194–207 (1986); Frank E. Zimring, Joel Eigen & Sheila O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227, 232–33 (1976); Marvin Wolfgang, Arlene Kelly & Hans Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 301, 306 (1962).

292 Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1120 (1990).

293 That portal contains case-level information about every felony case prosecuted by the State's Attorney. Kat Albrecht, *Data Transparency & the Disparate Impact of the Felony Murder Rule*, DUKE CTR. FOR FIREARMS L. (Aug. 11, 2020), https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felony-murder-rule [https://perma.cc/2AXD-C559].

literature," Albrecht's study finds that Black people "are far more likely to be arrested for felony murder" than white people,[294] and that "enforcement of the felony murder rule is staunchly more affective of [Black people] both in proportion and in raw count."[295] These racial disparities are similarly reflected at the end of the adjudicative process, with Black people comprising 81.3% of those sentenced under the felony murder rule in Cook County.[296] "With effectively a lifetime of freedom on the table," Albrecht concludes that "this [is] a substantial number of harsh punishments for predominantly [B]lack men in Cook County."[297]

Consistent with Albrecht's work, a 2021 study from Greg Egan on Minnesota's felony murder statute reveals comparable enforcement disparities between 2012 and 2018.[298] "Normalized for demographics," Egan finds that "people of color in the Twin Cities are statistically twelve times more likely to be convicted [of] felony-murder."[299] This study also helpfully highlights one particular way that felony murder statutes can yield racially disparate effects. For a strong majority of white offenders convicted of felony murder, Egan finds that the charge served as a plea-down offense from a more serious homicide charge.[300] By contrast, for a strong majority of Black offenders convicted of felony murder, Egan reports that the charge was the most serious homicide offense alleged by the government at any point in the proceeding.[301] These trends seem to indicate that Minnesota prosecutors are deploying felony murder in racially disparate ways—as a shield to protect more culpable white offenders from greater liability, and as a sword to secure more extreme sentences against less culpable Black offenders.[302] Reflecting on this disparity, Egan concludes that "[i]t is the stunningly wide discretion inherent in

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294 *Id.* Specifically, in the Cook County data examined by Albrecht, roughly three-fourths of initiated felony murder cases involve Black defendants, whereas less than one-tenth involve white defendants. *Id.* Albrecht also finds that while a substantial number of felony murder charges are thrown out at the disposition stage, there is no racial disparity in their being dropped. *See id.* ("About the same percentage of felony murder cases (~59%) for both [B]lacks and whites are dropped.").

295 *Id.*

296 *Id.*

297 *Id.*

298 Greg Egan, *George Floyd's Legacy: Reforming, Relating, and Rethinking Through Chauvin's Conviction and Appeal Under a Felony-Murder Doctrine Long-Weaponized Against People of Color*, 39 LAW & INEQ. 543, 545 (2021).

299 *Id.* at 547–48.

300 *Id.* at 548.

301 *Id.*

302 *Id.* ("White defendants plead to reduced felony-murder charges at nearly double the rate of defendants of color.").

Minnesota's felony-murder doctrine . . . that sustains racially inequitable charging practices."[303]

Taken together, this body of work supports the idea that adding culpable mental state requirements to individual statutes could minimize racially disparate enforcement by limiting the scope of unchecked discretion afforded to prosecutors. On this accounting, there is nothing distinctive about mens rea reform as a way of narrowing criminal statutes[304] to curtail racial bias or racially disparate enforcement patterns. Rather, culpable mental state requirements would simply be expected to benefit people of color in ways—and at rates—that roughly mirror the underlying enforcement disparities of the statutes to which they are added. So, for example, if (as publicly available statistics indicate) three-fourths of those convicted of the federal felon-in-possession statute are people of color,[305] then, as the General Overcriminalization Thesis posits, we could expect the group of individuals who benefited from the post-*Rehaif* reductions in convictions to reflect a similar racial make-up.[306]

At the same time, there is also reason to think that mens rea reform could be a particularly effective way of narrowing criminal statutes to promote racial justice. I will refer to this possibility as the "Specific Moral Innocence Thesis." This thesis holds that, all else being equal, the more morally ambiguous the conduct that falls within the purview of an individual criminal statute, the greater the likelihood for racial bias to infect decisionmaking about whether to prosecute people for that conduct. Pursuant to this thesis, culpable mental

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[303] *Id.* at 552.

[304] Instead of limiting the application of an offense to morally blameless individuals—what mens rea reform effectively accomplishes—statutory narrowing could instead carve out otherwise blameworthy offenders from the scope of an offense based on more pragmatic considerations of overcriminalization, overpunishment, and decarceration. Some illustrative examples of the latter form of statutory narrowing would include: (1) raising the value threshold necessary to qualify for particular forms of theft liability; (2) raising the amount of physical harm necessary to qualify for particular forms of assault liability; and (3) abolishing or narrowing the scope of victim-specific or gun enhancements applicable to those who commit crimes of violence. These criminal law reforms may be (indeed, likely are) entirely appropriate; however, the kinds of individuals who avoid prosecution due to their enactment may not be morally blameless in the way that those lacking mens rea would otherwise be.

[305] *See* U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 48 (2020); U.S. SENT'G COMM'N, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 141 (2021); U.S. SENT'G COMM'N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 141 (2022); *see also infra* note 334 and accompanying text.

[306] Unfortunately, limitations in the data prevented us from performing a racial impact analysis of the *Rehaif* decision. *See* Mizel et al., *supra* note 32 (manuscript at 1567 n.181). Nevertheless, the overall racial distribution of federal felon-in-possession convictions appears generally consistent both before and after the *Rehaif* decision. *See supra* note 305.

state requirements might efficaciously minimize racial bias by eliminating prosecutorial discretion to prosecute the most morally ambiguous criminal violations—namely, violations that are perpetrated nonculpably. If true, then people of color could disproportionately benefit from mens rea reform, avoiding charges and convictions at rates higher than those that exist in pre-reform enforcement.

Some support for this thesis can be found in a theory known as the "liberation hypothesis."[307] Initially developed by Harry Kalven and Hans Zeisel in 1966, this theory holds that in borderline cases, legal decisionmakers are "liberate[d] . . . to use greater subjectivity in decision making, thereby increasing the likelihood that extrajudicial factors will influence outcomes."[308] The liberation hypothesis accordingly predicts that, all else being equal, the more morally or evidentiarily ambiguous a legal decision is, the more we should expect that decision to be influenced by factors that have nothing to do with the law.[309]

One important factor, as relevant empirical work reveals, is race. For example, liberation hypothesis studies have found that as crime seriousness decreases (and thus the conduct at issue becomes more morally ambiguous), racial disparities in both the length of a sentence[310] and whether a sentence of incarceration is imposed at all[311] appear to increase. However, these findings are only suggestive. On

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[307] HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 164–66 (1966) (positing a "liberation hypothesis," in which strong evidence leads to less biased decisions by jurors, whereas ambiguous evidence leads to more biased decisions).

[308] Mark Chaffin, Stephanie Chenoweth & Elizabeth J. Letourneau, *Same-Sex and Race-Based Disparities in Statutory Rape Arrests*, 31 J. INTERPERSONAL VIOLENCE 26, 30 (2016). Studies on prosecutorial behavior have found that prosecutors exercise more discretion when the merits of a case are less certain, thereby inviting the influence of extralegal factors in prosecutorial decisionmaking. Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 LAW & SOC'Y REV. 291, 311 (1987).

[309] *See, e.g.*, Dennis J. Devine, Jennifer Buddenbaum, Stephanie Houp, Nathan Studebaker & Dennis P. Stolle, *Strength of Evidence, Extraevidentiary Influence, and the Liberation Hypothesis: Data from the Field*, 33 LAW & HUM. BEHAV. 136 (2009); Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 652–53 (2001).

[310] *See, e.g.*, Rhys Hester & Todd Hartman, *Conditional Race Disparities in Criminal Sentencing: A Test of the Liberation Hypothesis from a Non-Guidelines State*, 33 J. QUANTITATIVE CRIMINOLOGY 77, 96 (2017) (finding that among offenders convicted of less serious crimes, Black defendants received longer sentences than white defendants; however, this effect was not observed for offenders convicted of crimes falling in the most serious offense categories); Cassia Spohn & Jerry Cederblom, *Race and Disparities in Sentencing: A Test of the Liberation Hypothesis*, 8 JUST. Q. 305, 322 (1991).

[311] *See, e.g.*, Hester & Hartman, *supra* note 310, at 91 (finding that Black offenders with no criminal history are more likely to be sent to prison than white offenders, but that this incarceration disparity decreases as criminal history increases); Spohn & Cederblom, *supra* note 310, at 323.

the whole, the results of liberation hypothesis studies "have been extremely mixed,"[312] and it is entirely possible that the influence of stereotypes and other forms of bias could frustrate the posited tendency for racial disparities to be lower in cases involving more culpable conduct.[313]

Whether, in the final analysis, culpable mental state requirements are a particularly effective way of limiting racial bias or curtailing racially disparate enforcement patterns is at best speculative.[314] Nevertheless, as we will see in the next Section, mens rea's utility as a tool for racial justice does not hinge upon whether the Specific Moral Innocence Thesis is true. So long as the decarceral benefits of adding culpable mental states to individual statutes are distributed in a manner that roughly tracks the underlying enforcement patterns (i.e., the General Overcriminalization Thesis), that is enough to reject the Mass Incarceration Assumption.

B. The Impact of Strict Liability Abolition on Mass Incarceration

At this point, two things seem at least generally true of mens rea reform. First, adding culpable mental state requirements to individual statutes can be expected to at least modestly reduce the charging and conviction rates for those statutes. And second, we can expect people of color to meaningfully (if not disproportionately) benefit from those reductions whenever the underlying statutes are enforced in racially disparate ways. Now it is time to bring this statute-specific picture to bear on the system-level question presented by the Mass Incarceration Assumption: Is abolishing strict liability for all criminal offenses an

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312 Hester & Hartman, *supra* note 310, at 80; *see* Spohn & Cederblom, *supra* note 310, at 323 (finding support for the liberation hypothesis for the disposition decision but not for the duration decision).

313 Hester & Hartman, *supra* note 310, at 80 (giving the example of the stereotype of the violent non-white criminal).

314 It is also possible that the answer to this question could hinge upon the culpable mental state requirement applied to a criminal statute. For example, the objective reasonableness evaluation at issue in criminal negligence standards seems like it could be more susceptible to racially-biased constructions than the factually-rooted inquiry into whether an actor possessed the awareness of a risk at issue in culpable knowledge. *Compare* Jody Armour, *Where Bias Lives in the Criminal Law and Its Processes: How Judges and Jurors Socially Construct Black Criminals*, 45 AM. J. CRIM. L. 203, 221 (2018) ("[D]iscretion-laden and open-ended normative standards [such as those implicated by criminal negligence] give maximum elbow room to conscious and unconscious bias.") *with id.* at 224 (noting that the factual inquiry into whether an actor possesses awareness of some fact "leaves little room for the social construction of [B]lack criminals through the racially-biased moral assessments of judges and jurors"). *But see* Francis X. Shen, *Minority Mens Rea: Racial Bias and Criminal Mental States*, 68 HASTINGS L.J. 1007, 1046 (2017) (conducting an experimental study finding that "assessments of minority mens rea are not biased by race").

effective means of reducing prison populations or promoting racial justice?

Answering this question requires addressing two separate issues. The first is mens rea reform's *penal impact*, which focuses on the decarceral effect of abolishing strict liability through the imposition of across-the-board culpable mental state requirements. The penal impact of this comprehensive form of mens rea reform is a product of the breadth of strict liability statutes in U.S. criminal codes and the frequency with which people (and people of color in particular) are convicted of violating them. All else being equal, the more strict liability statutes that exist within a jurisdiction, the greater the number of convictions for those statutes, and the more racially concentrated the distribution of those convictions, the more likely it is that universal culpable mental state requirements would lower incarceration and promote racial justice.

The second issue is mens rea reform's *efficacy*, which focuses on the investment of time, money, and political capital necessary to abolish strict liability. Efficacy matters because the resources available to those fighting mass incarceration are few, while the policies—and interest groups[315]—that sustain it are many. So, the central question posed by the Mass Incarceration Assumption is not whether abolishing strict liability would in any way shrink the prison population or benefit minority communities. Rather, it is whether the decarceral and racial justice benefits of doing so are commensurate with the time, attention, and political capital necessary to secure them. (If not, then the progressive critique that mens rea reform is "a misdirection of reformist energy"[316] would arguably be accurate.)

The Mass Incarceration Assumption thus pairs one complex calculus (determining the decarceral and racial impact of mens rea reform) with another (determining the resources necessary to achieve it). While complex, however, this analysis is no different than what is required by many other criminal justice reforms. From proposals to eliminate mandatory minimums to those that would abolish the death

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315 *See, e.g.*, Katherine Beckett, *The Politics, Promise, and Peril of Criminal Justice Reform in the Context of Mass Incarceration*, 1 ANN. REV. CRIMINOLOGY 235, 240 (2018) ("Researchers emphasizing the challenge of path dependence often identify a range of interest groups that benefit from penal expansion and now endeavor to block penal reform."); RANDALL G. SHELDEN, RESEARCH BRIEF, INTEREST GROUPS AND CRIMINAL JUSTICE POLICY 3 (2011), http://www.cjcj.org/uploads/cjcj/documents/interest_groups_and_criminal_justice_policy.pdf [https://perma.cc/RUL2-PJ2F] ("According to the Lobby Watch project by the Center for Public Integrity, between 1998 and 2004 1,243 different companies engaged in lobbying efforts related to crime, law enforcement, and criminal justice.").

316 Levin, *supra* note 23, at 523.

penalty, life without parole, or drug crimes, reformers must address the same challenging questions about penal impact and efficacy in determining where to target their efforts. They must do so, moreover, in the absence of anything approaching perfect answers or complete information. The best one can do is try to develop a rough sense of a criminal justice reform's utility based upon whatever information is available.[317]

Working within these parameters, this Section analyzes, in a rough and preliminary way, the penal impact and efficacy of abolishing strict liability through the legislative enactment of universal culpable mental state requirements. Examining the breadth and nature of strict liability in U.S. criminal codes, I first explain why enacting universal culpable mental state requirements could meaningfully reduce the number of charges and convictions, both generally and as distributed to racial minorities, within individual jurisdictions. Reflecting upon mens rea reform's distinctive codification strengths and political virtues, I thereafter explain why strict liability abolition could be a particularly efficacious criminal justice reform.

1. Penal Impact: Imprisonment and Racial Justice

Where do strict liability crimes reside within U.S. criminal codes and who is most likely to be prosecuted for violating them? The prevailing sentiment among many reformers is that (with the exception of felony murder) strict liability is really just a problem for the wealthy corporate actors most likely to find themselves on the receiving end of white-collar, financial, or environmental crime prosecutions.[318] The problem with this position, however, is that it is inconsistent with state and federal law.[319] The reality is that strict liability pervades run-of-the-mill drug, gun, and violent offenses for which people of color are disproportionately prosecuted, convicted, and imprisoned on a daily basis.

The law of controlled substances is a case in point, in part because it is where some of the most aggressive tough-on-crime cam-

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[317] Arguably, the most helpful piece of information is the experience of other jurisdictions. With respect to wholesale strict liability abolition set against the backdrop of mass incarceration, however, there is no relevant point of comparison.

[318] *See supra* notes 138–42 and accompanying text; *see also* Levin, *supra* note 23, at 524 (observing the complaint that "mens rea reform is a political project that has nothing to do with mass incarceration and everything to do with deregulation").

[319] *Cf.* Levin, *supra* note 25, at 767 ("[T]he mere characterization of a crime as 'white-collar' or 'regulatory' doesn't mean that the defendants would be white, wealthy, or stationed atop the social and economic hierarchy.").

paigns have been waged against communities of color.[320] Most notorious is the strict liability approach reflected in some U.S. drug possession laws. Under relevant criminal statutes—as Markus Dubber phrases it—"you can be convicted . . . if you don't know that you are 'possessing' a drug of any kind, what drug you are 'possessing,' how much of it you've got, or—in some states—even that you are possessing anything at all, drug or no drug."[321]

Even more consequential is the breadth of strict liability in drug distribution statutes, which focus the length of a sentence on "fairly arbitrary questions about how the drugs involved in a transaction are to be classified or quantified instead of on a defendant's actual culpability."[322] Illustrative examples include severe penalty enhancements triggered by the fact that a drug deal involved substances of a particular weight or type,[323] or occurred within a particular distance from a school.[324] That the accused was reasonably mistaken or understand-

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320 *See, e.g.*, Dubber, *supra* note 2, at 933; DRUG POL'Y ALL., AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE 47 (2017), https://drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf [https://perma.cc/JLR4-89BG] [hereinafter DRUG-INDUCED HOMICIDE LAWS] ("Discriminatory enforcement of drug war policies has produced profound racial and ethnic disparities at all levels of the criminal justice system.").

321 Dubber, *supra* note 2, at 859 (citing State v. Cleppe, 635 P.2d 435 (Wash. 1981) (en banc)). Formally, U.S. drug possession statutes comprise partial strict liability offenses in the sense that most require proof of awareness that one is in fact possessing a controlled substance, yet aggravate liability based on the presence of other characteristics (e.g., weight) without regard to the accused's state of mind. *See, e.g.*, Grant v. State, 788 So. 2d 815, 818 (Miss. Ct. App. 2001) ("[T]hough proof of the quantity of drug is an element of the offense, it is not necessary to demonstrate that the defendant had actual knowledge that the amount of drugs possessed met or exceeded any statutorily-designated quantity."); People v. Scheffer, 224 P.3d 279, 289 (Colo. App. 2009). *Compare* State v. Blake, 481 P.3d 521, 524 (Wash. 2021) (holding that pure strict liability drug possession statute is unconstitutional under the due process clauses of the U.S. and Washington constitutions), *with* Marc B. Hernandez, *Guilt Without Mens Rea: How Florida's Elimination of Mens Rea for Drug Possession Is Constitutional*, 66 FLA. L. REV. 1697, 1698 (2014) (discussing how the Florida legislature has effectively removed "the need to establish a defendant's knowledge of a controlled substance's illicit nature"). Nevertheless, "in practice, drug possession has been said to resemble a [pure] strict liability crime" because the law often presumes awareness of the nature of what happens to be in one's possession. Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1569 (2018); *see also, e.g.*, Dubber, *supra* note 2, at 864–66; N.Y. PENAL LAW § 220.25(1) (McKinney 2022) ("The presence of a controlled substance in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile . . . .").

322 Berman, *supra* note 8, at 251.

323 *See, e.g.*, Weinstein & Bernstein, *supra* note 8, at 121 ("Consideration of mens rea as to type or quantity is not required by the [federal sentencing] guidelines."); N.Y. PENAL LAW § 15.20.4 (McKinney 1965) ("[K]nowledge by the defendant of the aggregate weight of such controlled substance [in a drug distribution offense] is not an element of any such offense . . . .").

324 *See, e.g.*, Brown, *supra* note 9, at 298–302; N.J. STAT. ANN. § 2C:35-7 (West 2010).

ably confused about these circumstances is immaterial; sentences are aggravated—oftentimes exponentially and mandatorily—without regard to an offender's state of mind.[325]

This "in for a penny, in for a pound" approach is similarly reflected in drug-induced homicide statutes, which hold those who sell or share controlled substances strictly liable for their misuse and abuse by friends and customers.[326] Relevant state and federal laws apply murder-like penalties to even the lowest-level drug transactions so long as the government can prove that a death (or, in some cases, injury short of death) occurred.[327] Mens rea plays no role in this analysis; lawmakers have "elected to enhance a defendant's sentence regardless of whether the defendant knew or should have known that death would result."[328]

Who bears the costs of injustice imposed by these strict liability statutes? All too often, the answer appears to be people of color.[329] For example, although Black people comprise only 13% of the U.S. population (and use and sell drugs at rates comparable to white people),[330] they "comprise 29% of those arrested for drug law violations, nearly 35% of those incarcerated in state or federal prison for any drug law violation, and roughly 35% of those incarcerated in state

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325 *See, e.g.*, Weinstein & Bernstein, *supra* note 8, at 121 (discussing the strict liability enhancements applied in United States v. Ekwunoh, 12 F.3d 368 (2d Cir. 1993) and United States v. de Velasquez, 28 F.3d 2 (2d Cir. 1994)); United States v. Sanders, 668 F.3d 1298, 1310 (11th Cir. 2012) (noting that enhanced statutory penalties for federal drug conspiracies under 21 U.S.C. § 841(b) apply on a strict liability basis: "Although the jury must determine the quantity and type of drug involved, nothing in the statute . . . requires the government to prove that the defendant had knowledge of the particular drug type or quantity for which a sentence is enhanced under § 841(b).").

326 *See, e.g.*, Beletsky, *supra* note 109, at 869–71 (providing a history and overview of drug-induced homicide laws); DRUG-INDUCED HOMICIDE LAWS, *supra* note 320.

327 *See, e.g.*, 21 U.S.C. § 841; N.J. STAT. ANN. § 2C:35-9 (West 1987).

328 United States v. Jeffries, 958 F.3d 517, 527 (6th Cir. 2020).

329 *See generally* Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1048 (2010) (noting that, while "[t]hree-fourths of those imprisoned for drug offenses are [B]lack or Latino" and "[i]n seven states, 80% to 90% of imprisoned drug offenders are [B]lack," these disparities "cannot be explained by disproportionate use of drugs by African Americans"); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 185–87 (2012) (arguing that the government has used drug laws to establish a racial caste system that has caused extraordinary harms to people of color).

330 James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 46 (2012); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1046 (2010) ("[A]vailable statistical data suggests that whites, Latin[x], Blacks, and Asian-Americans have roughly similar rates of illicit drug use.").

prison for possession only."[331] Comparable disparities have been observed in the enforcement of strict liability drug-induced homicide statutes, which Black offenders are more likely to be charged with violating—and, once convicted, severely sentenced under—than white offenders.[332] "[T]hese findings suggest that drug-induced homicide charges are being selectively and disproportionately deployed to target people of color."[333]

The law of weapons is similarly rife with strict liability.[334] Consider first the diverse simple possession statutes which authorize convictions for individuals who are reasonably mistaken about the nature of the weapons in their possession.[335] Illustrative examples include strict liability crimes prohibiting the possession of guns capable of "automatically [shooting] more than one shot,"[336] shotguns with "barrels of less than 18 inches in length,"[337] and so-called "gravity knives" that open with a flick of the wrist.[338] Although these subtle characteristics distinguish criminally prohibited weapons from those lawfully possessed, liability can attach even when the accused was completely

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331 DRUG-INDUCED HOMICIDE LAWS, *supra* note 320, at 47; Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 289 (2009) (pointing out that the disproportinately high rates at which Black people are arrested and incarcerated on drug charges relative to white people bear no relationship to rates of offending); *see also* Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2196 (2016) ("[P]art of the power of the drug arrest and conviction statistics is the evidence that suggests that the rates reflect disparate enforcement, rather than disparate criminality.").

332 Beletsky, *supra* note 109, at 874; *see also* Christopher Ingraham, *White People Are More Likely to Deal Drugs, but Black People Are More Likely to Get Arrested for It*, WASH. POST (Sept. 30, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/09/30/white-people-are-more-likely-to-deal-drugs-but-black-people-are-more-likely-to-get-arrested-for-it [https://perma.cc/2T3X-VQ4D].

333 Beletsky, *supra* note 109, at 874.

334 *See generally* Levin, *supra* note 331 (discussing similarities between the War on Drugs and gun enforcement). One important difference between these two areas, as Levin highlights, is that we do not know whether the disproportionate number of people of color convicted of gun (and other weapons) crimes reflects disparate enforcement or disparate violations. *Id.* at 2197 ("Without data about who owns, possesses, or carries guns illegally, we simply do not know whether the same disparate enforcement dynamic is at work, or whether the numbers for arrests and convictions accurately reflect the demographics of illegal gun possession.").

335 *See generally* Dubber, *supra* note 2, at 859–65 (discussing the breadth of strict liability in possession statutes governing guns and other kinds of dangerous objects).

336 *E.g.*, CAL. PENAL CODE §§ 16880, 32625 (West 2021).

337 *E.g.*, N.C. GEN. STAT. § 14-288.8(c) (2022).

338 *E.g.*, W. VA. CODE ANN. §§ 61-7-2-3 (2021); Paul A. Clark, *Criminal Use of Switchblades: Will the Recent Trend Towards Legalization Lead to Bloodshed?*, 13 CONN. PUB. INT. L.J. 219, 228 (2014) (explaining that New York laws only require the State to prove that a defendant knew they had a knife, irrespective of their awareness that it was an illegal antigravity knife).

unaware of and had no reason to know about them.[339] These strict liability weapons laws are subject to racially disparate enforcement. For example, New York's anti-gravity knife strict liability statute was deployed by police "to pick up thousands of people, most of them minorities."[340]

Another common variety of strict liability weapons offense are the many state-level analogues to the federal felon-in-possession statute, 18 U.S.C. § 922(g).[341] Although the *Rehaif* Court read a culpable mental state requirement into the legal status element of the federal offense, the decision is a national outlier.[342] As a result, in state courts across the nation, people who are reasonably mistaken or understandably confused about the disposition of decades-old cases or other legally salient aspects of their past are still subject to felony convictions.[343] And more often than not, those prosecuted for those strict liability felonies are people of color. Indeed, the disparate enforcement of felon-in-possession statutes against racial minorities is a recurring theme in the criminal law literature, "with the percentage of Black defendants . . . in many districts routinely over 80% and 90%."[344]

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339 *See, e.g.*, State v. Watterson, 679 S.E.2d 897, 904 (N.C. App. 2009) (holding that N.C. GEN. STAT. § 14-288.8(c) is a strict liability offense); State v. Jordan, 733 N.E.2d 601, 607 (Ohio 2000) (same as to Ohio Rev. Code § 2923.11); People v. Parrilla, 53 N.E.3d 719, 720 (N.Y. 2016) ("[T]he mens rea prescribed by the legislature for criminal possession of a gravity knife simply requires a defendant's knowing possession of a knife, not knowledge that the knife meets the statutory definition of a gravity knife.").

340 Yaffe, *supra* note 136; *see also* Zamir Ben-Dan, *Law and Order Without Justice: A Case Study of Gravity Knife Legislation in New York City*, 21 CUNY L. REV. 177, 210–11 (2018); *see also* Jesse McKinley, *The 'Gravity Knife' Led to Thousands of Questionable Arrests. Now It's Legal.*, N.Y. TIMES (May 31, 2019), https://www.nytimes.com/2019/05/31/nyregion/ny-gravity-knife-law.html [https://perma.cc/N23B-6YDS] (discussing the racially disparate consequences of New York's gravity knife ban prior to repeal in 2019).

341 *See, e.g.*, Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Centuries-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 143, 160 (2018) ("All states have their own penal law similar to the federal 'felon in possession' statute.").

342 *See, e.g.*, Brief of Amicus Curiae Everytown for Gun Safety, *supra* note 3, at 11 ("[S]tate courts have consistently interpreted state prohibited possessor laws to require a mens rea only for the possession element of the crime."); State v. Rainoldi, 268 P.3d 568, 577 n.1 (Or. 2011) (en banc) (strict liability as to status element is uniform).

343 *See, e.g.*, Campbell v. State, 161 N.E.3d 371, 379 (Ind. App. 2020) (declining to apply the holding in *Rehaif* to Indiana's strict liability felon-in-possession statute); State v. Holmes, 478 P.3d 1256, 1260–61 (Ariz. Ct. App. 2020) (doing the same in Arizona).

344 David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011, 1022 (2020); *see id.* at 1021 ("Racial disparity has been a part of felon-in-possession prosecutions from the start."); *see also, e.g.*, Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 337 (2007) ("Prosecutors in Project Safe Neighborhoods cases know . . . they are effectively targeting

Another consequential form of strict liability weapons law is statutory penalty enhancements triggered by the sheer fact that an individual perpetrated a particular crime in the presence of a firearm or other dangerous weapon. For one illustration, consider Minnesota's first degree burglary offense, which doubles the punishment for a burglary whenever the burglar or an accomplice "possesses, when entering or at any point while in the building . . . a dangerous weapon."[345] That the accused knew or had reason to know that anyone possessed a dangerous weapon is immaterial; merely moving an unopened safe which police later discovered to be holding a firearm (to the accused's complete surprise) is sufficient to aggravate liability.[346]

For another illustration, consider the strict liability approach to punishment reflected in the federal weapons enhancement, 18 U.S.C. § 924(c).[347] This notoriously severe scheme imposes increasingly harsh mandatory minimum sentences for the presence or use of firearms exhibiting distinct characteristics (e.g., being a short-barreled rifle, shotgun, or semi-automatic weapon) during the commission of any "crime of violence or drug trafficking crime."[348] Generally speaking, these aggravated sentences apply without regard to mens rea. For example, the accidental discharge of a gun may lead to the doubling of a minimum sentence (from five years to ten).[349] And an offender's reasonable mistake as to a weapon's precise characteristics may lead to a six-fold increase (from five years to thirty) in mandatory punishment.[350]

Unsurprisingly, again, these strict liability statutory enhancements are most often enforced against people of color. For example, in Fiscal Year 2019, Minnesota sentencing data reveals that 52.6% of those convicted of first degree burglary were Black, 29.8% were

African Americans [through the application of federal felon-in-possession statutes]."). For discussion of how "the prevalence of felon-in-possession statutes and the close relationship between antigun and antidrug initiatives suggests that criminal regulation of gun possession may well reinscribe the inequalities of the drug war," see Levin, *supra* note 331, at 2197.

345 MINN. STAT. § 609.582(b) (2021).

346 State v. Garcia-Gutierrez, 844 N.W.2d 519, 521, 526 (Minn. 2014).

347 18 U.S.C. § 924(c).

348 *Id.*

349 Dean v. United States, 556 U.S. 568, 568–69 (2009).

350 United States v. Harris, 959 F.2d 246, 258 (D.C. Cir. 1992) (finding "congressional intent to apply strict liability to [whether a firearm is a machine gun]"); United States v. Ciszkowski, 492 F.3d 1264, 1268–69 (11th Cir. 2007); United States v. Burwell, 690 F.3d 500, 503 (D.C. Cir. 2012) (noting that while 18 U.S.C. § 924(c) provides for a mandatory consecutive sentence of at least five years for any person who uses or carries a firearm during a "crime of violence," the "mandatory sentence skyrockets to thirty years . . . if the firearm involved was a machinegun").

white, and 17.5% were American Indian, Hispanic, or Asian.[351] That same year, statistics provided by the United States Sentencing Commission reveal that 51% of those convicted under 18 U.S.C. § 924(c) were Black, 23.4% were Hispanic, 22.8% were white, and 2.8% were other races.[352] As a result, people of color comprise nearly three-quarters of those convicted of violating both of these strict liability statutes.

One final illustration of the sweep of strict liability in U.S. criminal codes is provided by the law of violence, which is the predominant source of imprisonment and the central driver of minority incarceration across American penal systems.[353] The most well-known example of a strict liability crime of violence is the felony murder doctrine. Today, the vast majority of jurisdictions in the U.S. treat as murder accidental killings committed in the perpetration of qualifying felonies.[354] This treatment is also usually extended to those who accidentally *aid* a homicide. For example, under most versions of felony murder doctrine, an accomplice's unwitting facilitation of a killing committed by *another* person is enough to bring one within the scope of murder liability.[355]

Felony murder doctrine is not the only way U.S. criminal codes hold offenders strictly liable for harm caused to other people. This point is easy to miss because, unlike the explicit absence of mens rea in felony murder doctrine, most crimes of violence do require proof of some mental state as to the prohibited result (for example, bodily

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[351] MINN. SENT'G GUIDELINES COMM'N, 2019 SENTENCING PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY CASES SENTENCED IN 2019, at 48 (2020), https://mn.gov/sentencing-guidelines/assets/2019MSGCAnnualSummaryStatistics_tcm30-457007.pdf [https://perma.cc/U72M-XXAT].

[352] U.S. SENT'G COMM'N, QUICK FACTS: 18 U.S.C. § 924(c) FIREARMS OFFENSES (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY20.pdf [https://perma.cc/WF7Q-GXWB].

[353] *See* Forman, *supra* note 330, at 24–25 ("[D]rug offenders constitute only a quarter of our nation's prisoners, while violent offenders make up a much larger share: one-half."); PFAFF, *supra* note 114; *see also* WENDY SAWYER & PETER WAGNER, PRISON POL'Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2020 (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/WM5N-Y8UB].

[354] ROBINSON & WILLIAMS, *supra* note 11, at 54 (providing an overview of felony murder legislation across fifty states).

[355] *See id.* at 53–63.

injury or death).[356] Yet upon closer examination, one may discover that the requisite mental state is not actually culpable.[357]

One source of the problem is the troubling tendency of courts to confuse voluntariness with culpability when setting mens rea policy for common law crimes. By way of background, a voluntary act—understood in terms of a consciously willed bodily movement—is a fundamental requirement of criminal liability.[358] While prohibiting convictions in the absence of a voluntary act makes perfectly good moral sense,[359] the mere fact that someone consciously wills a bodily movement that results in harm does not entail that the harm was caused culpably (as any parent who has ever inadvertently kicked a child attempting a surprise leg hug can attest).[360] But courts sometimes miss this distinction. Faced with interpreting the mens rea of vague assault and homicide statutes, judges have deemed proof of a "general intent" to act to be sufficient to support criminal liability.[361] Although this common law standard conceptualizes the voluntary movement behind an accidental injury as a form of culpability, the results it authorizes—criminal convictions for morally innocent actors—are consistent with strict liability.[362]

A second source of de facto strict liability is legislative application of civil negligence standards to crimes of violence. The hallmark of these standards is that they can be satisfied by proof of everyday carelessness and understandable failures to live up to statistically

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356 For example, prototypical assault statutes require proof of purpose, knowledge, or recklessness as to causing bodily injury, *see* MODEL PENAL CODE § 211.1 (AM. L. INST. 1980), whereas murder statutes require proof of purpose, knowledge, or extreme recklessness as to causing death, *see id.* § 210.2.

357 *See* Serota, *supra* note 26 (observing that these de facto strict liability crimes authorize convictions for "those who, absent clear moral fault, accidentally injure or kill another person in the course of daily life").

358 *See* Johnson, *supra* note 5, at 19–20; Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 859 (1994).

359 For example, a person who involuntarily causes harm to another person—for example, by swinging their arms during an epileptic seizure or while sleepwalking—typically lacks a culpable mental state and therefore does not deserve to be blamed. *See* Robinson, *supra* note 358, at 898.

360 *See* Johnson, *supra* note 5, at 19–20 ("A voluntary act, though necessary to justify criminal liability, is not close to being sufficient. A requirement that the defendant 'act purposely' cannot, finally, be the gravamen of second-degree murder or any other serious crime."); Robinson, *supra* note 358, at 864.

361 *See* Theodora Gaïtas & Emily Polachek, State v. Fleck*: The Intentional Infliction of General Intent Upon Minnesota's Assault Statutes*, 39 WM. MITCHELL L. REV. 1480, 1494–95 (2013); Johnson, *supra* note 5, at 19–20.

362 *See* Buchanan v. United States, 32 A.3d 990, 1002 (D.C. 2011) (Ruiz, J., concurring) (noting that the "intent to act" interpretation of simple assault under D.C. law allows for "the prosecution of individuals . . . for actions taken with a complete lack of culpability").

average standards of conduct.[363] Deployment of these tort-like standards flies in the face of a basic principle of criminal responsibility: Punishing people for conduct that is attributable to circumstances beyond their control (e.g., their height, vision, or intelligence) is unjust.[364] The MPC's widely adopted criminal negligence standard respects this basic insight by requiring proof of a "gross deviation" of a reasonable standard of care viewed in light of the actor's "situation" (i.e., the actor's capacities and surroundings).[365] However, for violent crimes ranging from vehicular homicide to child endangerment, the "overwhelming majority of jurisdictions"[366] eschew this kind of individualized approach in favor of wholly objective surface-level inquiries into whether physical harm resulted from "a failure to exercise ordinary care."[367] Once again, this de facto form of strict liability authorizes morally innocent actors to be convicted of and punished for serious felony crimes.

Reflecting upon the varieties of strict liability discussed in this subsection reveals three important commonalities. First, these varieties of strict liability involve offenses that are frequently prosecuted and support a large volume of criminal convictions. Second, they involve offenses for which people of color bear the brunt of enforcement. And third, these forms of strict liability would effectively be wiped out by legislatively enacting something like the MPC's mens rea reform scheme.

As discussed in Part I, that scheme involves the adoption of a strong recklessness default and impermeable negligence floor governing all facts necessary to support criminal liability or aggravate punishment.[368] By imposing across-the-board culpable mental state

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363 *See* Leslie Yalof Garfield, *A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature*, 65 TENN. L. REV. 875, 890–91 (1998); Lee Perla, Note, *Mens Rea in Alaska: From Bad Thoughts to No Thoughts?*, 23 ALASKA L. REV. 139, 141 (2006) (describing how the Alaska Supreme Court applied a civil negligence standard to a criminal case involving an oil tanker spill).

364 *See* Douglas Husak, *Negligence, Belief, Blame and Criminal Liability: The Special Case of Forgetting*, 5 CRIM. L. & PHIL. 199, 205–06 (2011); *cf.* Westen, *supra* note 5, at 151 (observing that "blame is a negative judgment of the person's motivating values"—not their characteristics).

365 MODEL PENAL CODE § 2.02(2)(d) (AM. L. INST. 1985). By assessing reasonableness in light of an actor's capacities and surroundings, this partially subjective standard focuses liability on those who "act[] out of insensitivity to the interests of other people, and not merely out of an intellectual failure to grasp them." *Id.* cmt. d, at 243.

366 State v. Hazelwood, 946 P.2d 875, 884 n.17 (Alaska 1997).

367 Butts v. United States, 822 A.2d 407, 416 (D.C. 2003).

368 MPC § 2.02(1) establishes a minimum, (largely) inviolable general mens rea requirement: proof of a culpable mental state as to every element of an offense. MODEL PENAL CODE § 2.02(1) (AM. L. INST. 1985). Thereafter, MPC § 2.02(3) establishes that, in the absence of express statutory specification, recklessness supplies the threshold standard.

requirements, this scheme could in one fell swoop raise the government's burden of proof for drug, weapons, and violence offenses that are both frequently utilized and disparately enforced against people of color.[369]

Given the decarceral effects of culpable mental states discussed in Section A, one might therefore surmise that universal mens rea reform could yield a meaningful penal impact. Although no individual instance of adding a culpable mental state to a statute is likely to materially impact incarceration, the cumulative effect of abolishing all forms of strict liability within a single jurisdiction seems like it could. But just how great should we expect this impact to be? Putting a precise number on the expected decarceral benefits of strict liability abolition entails complex, jurisdiction-specific calculations that are beyond the scope of this Article. However, under even the most optimistic calculations, it seems unlikely that universal mens rea reform would do more than modestly reduce charging and convictions for the totality of strict criminal liability in any given jurisdiction. As a result, it seems clear that the wholesale abolition of strict liability across U.S. jurisdictions would not bring an end to mass incarceration—or even substantially diminish it.

This may all be true, and yet it would not preclude one from finding the penal impact of strict liability abolition to be sufficiently significant to merit serious consideration. There are two reasons for this. First, as the *Rehaif* Study illustrates, even modest changes to the

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Id. § 2.02(3). More than just prescribing an answer to situations of interpretive uncertainty, the Code's recklessness default embraces "conscious risk creation" as the appropriate basis for criminal sanctions. *See id.* § 2.02(2)(c); § 2.02 cmt. 3 ("As the Code uses the term, recklessness involves conscious risk creation."). Under the Code's overarching approach, legislators remain free to apply the more demanding subjective mens rea standards of purpose and knowledge, as well as the less demanding objective mens rea standard of criminal negligence. However, unless the legislature has clearly expressed an intent to the contrary, the government must prove that the accused was at least aware of a substantial risk that her conduct would cause a given result or that a prohibited circumstance existed.

[369] Any strict liability abolition effort should similarly entail excising expansive complicity doctrines, such as the natural and probable consequences doctrine and *Pinkerton*, which extend the same equivocation in mens rea discussed in the context of felony murder—between unwitting accomplices and intentional perpetrators—to all other crimes. *See* Michael Serota, *Second Looks & Criminal Legislation*, 17 OHIO STATE J. CRIM. L. 495, 509 n.77 (2020) ("[I]n many jurisdictions, a person who purposely assists with, or conspires in, the commission of one crime may be held fully responsible for any other reasonably foreseeable crimes . . . under the natural-and-probable-consequences doctrine (for accomplices) and *Pinkerton* doctrine (for co-conspirators)." (citation omitted)); *see also* Kimberly Kessler Ferzan, *Conspiracy, Complicity, and the Scope of Contemplated Crime*, 53 ARIZ. STATE L.J. 453 (2021). In jurisdictions where these doctrines have been codified, they should expressly be repealed; where courts have adopted them, the legislature should make clear its intent to excise them from the jurisdiction's criminal law.

enforcement of a single statute can avert thousands of years of incarceration for that statute.[370] Combine enough modest changes to individual statutes and you end up with numbers—and corresponding human consequences—that are substantial, even if comparatively small when viewed in the broader context of U.S. aggregate imprisonment.

Second, the likelihood of ending mass incarceration should not be the measure of a meritorious criminal justice reform when no other proposal on the table can live up to it. From eliminating mandatory minimums to abolishing the death penalty, life without parole, or drug crimes, the decarceral effects of many of the most ambitious policy reforms are ultimately just a drop in an ocean of incarceration.[371] That one is committed to completely overhauling our brutal and inhumane criminal systems should not preclude the pursuit of more cabined reforms that promise meaningful benefits.[372]

And thus, when evaluating whether the Mass Incarceration Assumption is true, the question is not whether universal culpable mental state requirements would end or even substantially diminish mass incarceration. Instead, it is whether the marginal reductions offered by strict liability abolition are a good investment for those committed to the fight against mass incarceration. As I explain in the final subsection of this Article, there are compelling reasons to think that universal culpable mental state requirements are a particularly efficacious criminal justice reform.

2. Efficacy: Resources and Politics

The reformist case in support of strict liability abolition rests less on its overall penal impact and more on its strategic efficacy. In a world of limited resources, the value of any reform idea is in part a function of how much time and effort it would take to operationalize (i.e., develop into legislation and generate support for), and in part a function of how likely it is that the idea would end up being realized under current political conditions. From this pragmatic perspective,

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370 *See supra* Section III.A.1.

371 *See generally* PFAFF, *supra* note 114; John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173 (2015) (arguing that drug reform is insufficient to reduce incarceration to pre-War on Drugs rates).

372 *See* PFAFF, *supra* note 114, at 185 ("Assume that in 2013 we released half of all people convicted of property and public-order crimes, one-hundred percent of those in for drug possession, and seventy-five percent of those in for drug trafficking. Our prison population would have dropped from 1.3 million to 950,000."); Bell, *supra* note 245, at 765 ("One can recognize the scourge of carceral ideology even while pursuing practical, even technocratic, harm reduction measures.").

strict liability abolition has much to offer as a pathway for criminal justice reform.

At the level of policy development, universal culpable mental state requirements are a highly efficient means of combatting overcriminalization.[373] "While [overcriminalization] takes various forms," as Alexandra Natapoff explains, "the key insight is that the criminal code is too broad to perform the defining and constraining work necessary to ground legitimate convictions."[374] By nigh-near making everything criminal and everyone a potential target of law enforcement, "the substantive criminal law has ceded its power over outcomes to police and prosecutorial discretion."[375] This "overcriminalization phenomenon"[376] corrodes criminal systems in diverse and complex ways.[377] However, one of the most pernicious aspects of the problem is how difficult it is to combat.

Addressing overcriminalization is challenging—and thus time and resource intensive—because of the large quantity of statutes contained in U.S. criminal codes. Given the sheer volume of potentially relevant legislation, it is surprisingly challenging to even identify all of a jurisdiction's criminal offenses, let alone determine which need to be narrowed or repealed. Once identified, moreover, statutory narrowing is arduous work; it generally requires making surgical revisions to individual statutes informed by pre-existing case law and judicial

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373 For a few of the canonical contributions to the overcriminalization literature, see Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 158 (1967) ("American criminal law . . . has extended the criminal sanction well beyond . . . fundamental offenses to include very different kinds of behavior, kinds which threaten far less serious harms, or else highly intangible ones about which there is no genuine consensus, or even no harms at all."); DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3 (2008) (understanding overcriminalization in terms of "the explosive growth in the size and scope of the criminal law," and arguing that the "most pressing problem with the criminal law today is that we have too much of it"); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 712–13 (2005) (arguing that "overcriminalization is not merely a problem of too many crimes akin to an opera having 'too many notes,'" but rather that "it encompasses a broad array of issues, including: what should be denominated as a crime and when it should be enforced; who falls within the law's strictures or, conversely, avoids liability altogether; and what should be the boundaries of punishment and the proper sentence in specific cases"); *cf.* Levin, *supra* note 125, at 290–318 (2018) (discussing the different ways that "overcriminalization" can be construed, and why these differences matter).

374 Natapoff, *supra* note 115, at 1358.

375 *Id.* at 1354.

376 Luna, *supra* note 373, at 718.

377 *E.g.*, Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012).

interpretations.[378] Doing this comprehensively can take years (and entire teams of attorneys) to accomplish, yet undertaking anything less risks undermining the goals that typically animate code reform efforts.[379] For example, the rule-of-law and decarceral benefits of narrowing criminal codes piecemeal are easily obviated by the "hydraulic discretion" afforded by any overbroad criminal statutes left behind.[380]

Universal culpable mental state requirements are a rare exception to these criminal law reform dynamics. As a matter of legislative drafting, strict liability can be excised from a criminal code with one clear, definitive statement of the default and minimum mens rea standards governing all criminal offenses. Because "[i]t is axiomatic and undisputable that a newly passed statute trumps a conflicting preexisting statute,"[381] and that later-in-time general provisions overrule specific indications to the contrary,[382] an entire body of strict criminal liability can thus be erased with a brief stroke of the pen.

To be sure, abolishing strict liability through the legislative enactment of piecemeal general mens rea provisions would not be cost-free, and likely would present some significant administrative challenges. For example, superimposing culpable mental state requirements upon

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[378] For an illustrative example, see the final recommendations of the D.C. Criminal Code Reform Commission, which were the product of nearly a decade of work and the product of many thousands of pages of legal analysis. D.C. CRIM. CODE REFORM COMM'N, RECOMMENDATIONS FOR THE COUNCIL AND MAYOR: REVISED CRIMINAL CODE COMPILATION (2021), https://ccrc.dc.gov/node/1531361 [https://perma.cc/2S6J-MF4H]; D.C. CRIM. CODE REFORM COMM'N, RECOMMENDATIONS FOR THE COUNCIL AND MAYOR, COMMENTARY: SUBTITLE I (2021), https://ccrc.dc.gov/node/1531366 [https://perma.cc/H6ZS-XLAD] (commentary on general provisions); D.C. CRIM. CODE REFORM COMM'N, RECOMMENDATIONS FOR THE COUNCIL AND MAYOR, COMMENTARY: SUBTITLE II (2021), https://ccrc.dc.gov/node/1531371 [https://perma.cc/5VHW-PYNK] (commentary on specific offenses); D.C. CRIM. CODE REFORM COMM'N, RECOMMENDATIONS FOR THE COUNCIL AND MAYOR, COMMENTARY: SUBTITLES III–V, OUTSIDE TITLE 22, & STATUTES RECOMMENDED FOR REPEAL (2021), https://ccrc.dc.gov/node/1531376 [https://perma.cc/XF8W-GHDL] (commentary on statutes recommended for repeal).

[379] *See* Paul H. Robinson, *The Rise and Fall and Resurrection of American Criminal Codes*, 53 UNIV. LOUISVILLE L. REV. 173, 177–80 (2015) (describing how criminal codes degrade as legislatures layer rules and crimes on top of each other, without integrating them).

[380] *See generally* Miethe, *supra* note 284, at 155–56 (positing that the reduction or elimination of discretion in one area of the criminal legal system will resurface through discretion that exists in another area).

[381] Carlos E. González, *The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms*, 80 OR. L. REV. 447, 453 (2001).

[382] *See, e.g.*, State v. Pribble, 145 N.E.3d 259, 265 (Ohio 2019) ("[W]hen a specific and a general provision are in irreconcilable conflict, the general provision prevails if it was enacted later in time . . . ."); Sharps v. United States, 246 A.3d 1141, 1152 (D.C. 2021) (analyzing a criminal statute under the same principle); *see also* People v. Carrillo, 297 P.3d 1028, 1033 (Colo. Ct. App. 2013) (noting that "later enacted statutes prevail only when the two statutes at issue are irreconcilable," and the statutes at issue were not irreconcilable).

a diverse corpus of criminal offenses risks creating a complex web of interpretive issues. However, with a little sensitivity to jurisdiction-specific drafting norms and a great deal of focus on minimizing any room for interpretive discretion, the post-enactment "retooling costs" of piecemeal mens rea reform could be kept to a minimum. In which case, strict liability abolition offers a uniquely efficient way of narrowing criminal liability and prosecutorial discretion across offenses.

While efficient, however, strict liability abolition's greatest strength may be political. In a period where increased public awareness of the need for criminal justice reform has greatly overshadowed the volume and scope of concrete policy changes,[383] universal mens rea standards may be the most significant curtailment of criminal liability and prosecutorial discretion that stands a chance of enactment.

To appreciate the point, consider that the vast majority of the criminal law reforms enacted by state and federal legislatures over the past decade share a couple of characteristics.[384] First, they focus on the so-called "non, non, nons": non-violent, non-serious, and non-sex offender criminals.[385] Second, they offer backend relief in the form of shortening sentences or affording probation opportunities after the fact.[386] While laudable, these reforms starkly contrast with the empirics of mass incarceration: Most of the people (and people of color) imprisoned in the U.S. are there for violent (and other serious) crimes, while "the real heart of prison growth" is new prison admissions, not length of stay.[387] These statistical realities call for curtailing discretion to prosecute serious crimes on the front end—yet these are precisely the kinds of reforms least likely to succeed before legislatures. Indeed, when it comes to extending any kind of relief to "violent offenders"—an amorphous category which can sweep beyond

383 *See* Barkow, *supra* note 126, at 2626 (outlining some reasons to feel "glass-is-half-empty"—or even "eleven-twelfths empty"—about criminal justice reform, in spite of improvements); Serota, *supra* note 105, at 703.

384 For scholarship reviewing these criminal law reforms, see, for example, TONRY, *supra* note 126, at 9 (reviewing criminal justice policy changes between 2010 and 2016 compiled in a National Conference of State Legislatures database); PFAFF, *supra* note 114, at 108–09 (reviewing changes in the 2013 report from the Sentencing Project); ZIMRING, *supra* note 126, at 99 ("[B]usiness as usual in the United States incorporates all of the practices, attitudes, and expectations of the fivefold expansion in rates of imprisonment since 1970.").

385 *See* PFAFF, *supra* note 114, at 108–09.

386 *See id.*

387 *Id.* at 110.

common sense[388]—the pathological politics of criminal law remain alive and well.[389]

Could strict liability abolition transcend the pathologies that have frustrated so many other criminal justice reform efforts? It is hard to say. Certainly, any policy proposal that could be characterized as making it more difficult to "lock up violent offenders" faces steep political headwinds. But if any significant front end statutory reform can overcome them, it may very well be across-the-board culpable mental state requirements.

For one thing, universal mens rea reform has key public choice strengths.[390] Given the breadth of strict liability in U.S. criminal codes, its wholesale abolition would benefit constituencies of central importance to both political parties.[391] And because of the diverse values mens rea reform promotes—for example, decarceration, racial justice, deregulation, and constraining prosecutorial discretion—strict liability abolition offers a legislative victory that would register in both conservative and liberal frames for criminal justice reform.[392]

Politically, mens rea reform is also strengthened by the fact that respect for the guilty mind is deeply intuitive. As Justice Holmes famously put it, "even a dog distinguishes between being stumbled over and being kicked."[393] Of course, humans do too. A wide body of research indicates that people's basic sense of fairness is keenly sensi-

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[388] *See* Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011) (discussing the overly broad and flawed conceptions of violence deployed in the criminal law); Russell Patterson, Note, *Punishing Violent Crime*, 95 N.Y.U. L. REV. 1521, 1532 (2020) (explaining how the violent crime category is based upon "incomplete empirical and normative notions of who commits violent crimes and of the need for more punitive sentencing enhancements to provide retribution and ensure deterrence and incapacitation").

[389] *See* Levin, *supra* note 23, at 555; Serota, *supra* note 105, at 703; Roxanna Asgarian, *The Controversy Over New York's Bail Reform Law, Explained*, VOX (Jan. 17, 2020, 8:30 AM), https://www.vox.com/identities/2020/1/17/21068807/new-york-bail-reform-law-explained [https://perma.cc/9RYX-XPTS].

[390] For discussion of the relationship between public law and public choice, see, for example, Jerry Mashaw, *Public Law and Public Choice: Critique and Rapprochement*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE & PUBLIC LAW 19 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010); DENNIS C. MUELLER, PUBLIC CHOICE III (3d ed. 2003).

[391] That is, mens rea reform would simultaneously narrow the scope of criminal liability for the poor, the underserved, people of color, as well as the corporate actors prosecuted for regulatory and white-collar crimes. *See supra* Section I.B (discussing the failed federal mens rea reform effort).

[392] *See generally* Levin, *supra* note 125 (discussing liberal and conservative frames generally); Levin, *supra* note 25, at 752–60, 761 (proposing liberal frames for mens rea reform, which "do not require us to accept the logic that conduct accompanied by a higher mens rea should be criminalized and that defendants acting with a higher mens rea should be punished").

[393] O.W. HOLMES, JR., THE COMMON LAW 3 (Boston, Little, Brown, and Company 1881).

tive to what is happening in the minds of wrongdoers.[394] This does not mean that public opinion would support all aspects of strict liability abolition. But because universal mens rea reform is general and abstract, there may be room for a certain amount of "acoustic separation" in public debate.[395] That is, one might make the general case for universal culpable mental state requirements unencumbered by discussion of the most controversial forms of conduct to which they apply.

Notwithstanding mens rea's political virtues, it is unclear whether any legislature could be persuaded to categorically eliminate strict liability, at least in the short term.[396] However, it is important to note that, even in failure, a concerted effort by advocates to generate political and public support for universal mens rea reform could have salutary effects. For example, a strict liability abolition campaign could be a useful way of highlighting the stark injustices produced by criminal systems. And it might also provide an effective vehicle for challenging the core assumption that drives so many of those injustices—namely, that more punishment necessarily yields greater public safety.[397]

More than just laying an educational foundation for future reform efforts, however, a concerted campaign to abolish strict liability might help strengthen the advocacy world itself. In a time of "criminal law skepticism,"[398] advocates who increasingly reject penal solutions to social problems find it difficult to resist the use of punishment to deal with wrongdoing that infringes upon personally or politically salient values. Given the broad reach of this kind of "carceral

394 *See generally* Serota, *supra* note 13 (manuscript at 185–93) (synthesizing empirical work on moral psychology related to blameworthiness).

395 *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (defining the notion of "acoustic separation"—the distance between "conduct rules" addressed to the general public to guide their conduct and "decision rules" which are directed at the officials who apply those conduct rules—and describing its use in criminal law discourse).

396 For a recent example of resurgent concerns about crime, see Jamiles Lartey, Weihua Li & Liset Cruz, *Ahead of Midterms, Most Americans Say Crime Is Up. What Does the Data Say?*, THE MARSHALL PROJECT (Nov. 5, 2022, 12:00 PM), https://www.themarshallproject.org/2022/11/05/ahead-of-midterms-most-americans-say-crime-is-up-what-does-the-data-say [https://perma.cc/UV8Q-8978]. And for discussion of the media's role in perpetuating misconceptions about crime trends, see, for example, Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 854 (1998); Carissa Byrne Hessick (@CBHessick), TWITTER (July 4, 2021, 9:11 AM), https://twitter.com/CBHessick/status/1411674081716584449 [https://perma.cc/3XXK-RRB5].

397 *See supra* Section II.A.

398 *See* Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 NEW CRIM. L. REV. 27, 27 (2020) (describing "criminal law skepticism" as "present[ing] reasons to doubt that the criminal law as presently constituted should continue to exist at all").

exceptionalism," in which different factions of those opposed to mass incarceration have fought for the expansion of rape, gun, environmental, and economic crimes (among other areas of the criminal law),[399] rallying around strict liability abolition could be an act of mutual disarmament. Advocating for reforms that would make it more difficult for prosecutors to secure convictions on topics of personal or political significance is never easy, even when the evidence supports it.[400] But it is precisely these difficult acts upon which "a truly transformative criminal justice reform movement"[401] depends. Perhaps mens rea reform has a role to play in that.

Conclusion

Mens rea has long been at the center of criminal law scholarship, and for good reason: Guilty minds frustrate, repel, and enrage as they imbue physical movements with moral significance.[402] Reflecting on that significance leads to a clearer understanding of the criminal law—both why we have it and why it looks the way that it does. But mens rea is more than just a source of fascination or useful pedagogical tool; it is also a policy choice that has practical consequences for human lives and criminal systems. For far too long, those choices have been made without a clear understanding of their consequences. This Article has tried to shine an empirical light on those consequences.

Existing studies which address criminal law's impact on human behavior provide little reason to think that strict liability is an effective means of improving public safety. And the first-ever empirical analysis of mens rea's impact on criminal administration, along with the literature on race and prosecutorial decisionmaking, provides reason to think that abolishing strict liability would be an effective means of lowering imprisonment rates and promoting racial justice. These findings conflict with the two central assumptions that have fueled strict liability's historic rise and its current deprioritization by criminal justice reformers.

Redressing the policy effects of misguided assumptions is often quite complex, particularly in the context of criminal systems as

399 *See* Levin, *supra* note 23, at 548–57 (discussing the challenges to mens rea reform presented by carceral exceptionalism which is the belief that certain crimes or defendants are "exceptional and therefore deserving of the full force of the carceral state").

400 *See id.* at 551–55.

401 *Id.* at 557.

402 *See* Stephen J. Morse, *Inevitable Mens Rea*, 27 Harv. J.L. & Pub. Pol'y 51, 62 (2003) ("[N]otice that . . . only people create meaning and care about meaning and that these are further mental phenomena that are motivated and motivating."); Stephen J. Morse, *Criminal Law and Common Sense: An Essay on the Perils and Promise of Neuroscience*, 99 Marq. L. Rev. 39, 52 (2015).

expansive as ours. Fortunately, the solution to the problem of strict criminal liability is simple: abolish it. Persuading lawmakers to embrace that solution—and thus, to enact universal mens rea standards—would be more difficult, given the political challenges of narrowing the breadth of violent, serious, or dangerous crimes. But for those concerned with mass incarceration, one thing does seem clear: The success of criminal justice reform depends upon overcoming those challenges, and strict liability abolition is a good place to start.