

RETHINKING THE PRESUMPTION OF MENS REA

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INTRODUCTION

Substantive background principles play a critical role in the courts' interpretation of criminal statutes, particularly where the subject of mens rea is concerned.¹ As Professor Dan Kahan has said, "criminal statutes typically emerge from the legislature only half-formed."² The effect of these "incompletely specified criminal statutes" is a tacit delegation of lawmaking authority from the legislature to the courts.³ A delegation of this sort occurs, for example, in connection with the question of causation. By enacting statutes that require causation but leave the required causal relationship undefined, legislatures effectively have "left to judicial development"⁴ the meaning of the statutory causation requirement.⁵

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1. Eric A. Johnson, *Does Criminal Law Matter? Thoughts on Dean v. United States and Flores-Figueroa v. United States*, 8 OHIO ST. J. CRIM. L. 123, 135–36 (2010); *see also* *United States v. Figueroa*, 165 F.3d 111, 119 (2d Cir. 1998) ("The principles of construction underlying the criminal law serve as much better signposts to congressional intent in these kinds of circumstances than a statute's sparse and inconsistent legislative history."); MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 4–5 (1993) ("[The criminal law] needs some general doctrines—doctrines applying to all types of action prohibited by a criminal code—in order to avoid an ungodly redundancy and a woeful incompleteness."); Andrew C. Spiropoulos, *Making Laws Moral: A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915, 935–42 (2001) (using the mens rea problem to illustrate the essential role of substantive canons of statutory construction in criminal law).

2. Dan M. Kahan, *Ignorance of Law Is an Excuse—but Only for the Virtuous*, 96 MICH. L. REV. 127, 153 (1997).

3. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 372 (1994); *see also* Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 470 (1996) [hereinafter Kahan, *Chevron*] (arguing that judicial "inventiveness" in the interpretation of federal criminal statutes "is a response to the deliberate incompleteness of the criminal statutes").

4. 1 MODEL PENAL CODE AND COMMENTARIES § 2.03 cmt. 5, at 264 (1985) (describing the effect of the causation provision included in the draft federal criminal code).

5. *See State v. David*, 141 P.3d 646, 649–52 (Wash. Ct. App. 2006) (recognizing that the Washington State Legislature "has historically left to the judiciary the task of defining some criminal elements," among them causation).

A similar, though more complex, delegation occurs in connection with mens rea. Legislatures routinely fail to identify the culpable mental states associated with particular objective elements of crimes.⁶ And so the task of deciding what mental states, if any, to assign these elements falls to the courts. To guide their exercise of this delegated power, courts have developed a rich—if somewhat untidy—body of substantive background principles.⁷

The most important of these substantive background principles is the presumption of mens rea—or the “mens rea principle,” as it sometimes is known.⁸ The origins of this principle are usually traced to *Morissette v. United States*,⁹ where the Supreme Court famously said:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.¹⁰

In service of this universal notion, the Court read a requirement of intent into the federal conversion statute under which *Morissette* had been prosecuted.¹¹ More broadly, the Court recognized a general presumption that every criminal statute requires proof of “some mental element.”¹² This presumption, the Court said, could be overcome only by a “clear expression” of legislative intent to impose liability without fault.¹³

Nowadays, the mens rea question is more complicated than whether a crime requires proof of just “some mental element.” Though “[t]he common law and older codes often defined an offense

6. See *People v. Rathert*, 6 P.3d 700, 711 (Cal. 2000) (“[T]he Legislature is often silent as to the mental element of a crime.”); Kahan, *Chevron*, *supra* note 3, at 477 (“Congress is notoriously careless about defining the mental state element of criminal offenses.”).

7. Johnson, *supra* note 1, at 125.

8. See, e.g., *United States v. Muzii*, 676 F.2d 919, 920 (2d Cir. 1982); *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 495–96 (E.D.N.Y. 1993).

9. 342 U.S. 246 (1952); see also *United States v. Côté*, 504 F.3d 682, 685 (7th Cir. 2007) (tracing the presumption against strict liability to *Morissette*); *United States v. Semenza*, 835 F.2d 223, 224 (9th Cir. 1987) (noting the Court in *Morissette* held that without a clear indication of legislative intent, mens rea should be inferred); Lisa Rachlin, *The Mens Rea Dilemma for Aiding and Abetting a Felon in Possession*, 76 U. CHI. L. REV. 1287, 1292 (2009) (tracing the presumption of a mens rea requirement to *Morissette* and referring to this presumption as “*Morissette* presumption”).

10. *Morissette*, 342 U.S. at 250.

11. *Id.* at 273.

12. *Id.* at 250–52.

13. *Id.* at 255 n.14.

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to require only a single mental state,”¹⁴ the publication of the Model Penal Code in 1962 led to “a general rethinking of traditional *mens-rea* analysis.”¹⁵ Among the components of this rethinking was a recognition that the question of mens rea must “be faced separately with respect to each material element of the crime.”¹⁶ In other words, the Model Penal Code showed that the question whether to require proof of “some mental element” must be addressed not in relation to the crime as a whole but rather in relation to each individual objective element of the crime. And so it also showed that the mens rea principle must operate, somehow, at the level of individual material elements.

Unfortunately, nobody seems to know *which* material elements are subject to the mens rea presumption. Students in the traditional first-year Criminal Law course learn two very different versions of the presumption. The first is the Model Penal Code version, which requires proof of some mental state—purposely, knowingly, recklessly, or negligently—with respect to every material element of the offense,¹⁷ unless the offense is a mere “violation.”¹⁸ The second is the judge-made version, which requires proof of some mental state only with respect to those “statutory elements that criminalize otherwise innocent conduct.”¹⁹ Justice (then Judge) Sotomayor precisely, if somewhat awkwardly, summarized this judge-made version of the presumption in her very first opinion as a judge of the Second Circuit.²⁰ “Absent clear congressional intent to the contrary,” she said, “statutes defining federal crimes are . . . normally read to contain a mens rea requirement that attaches to enough elements of the crime that together would be sufficient to constitute an act in violation of the law.”²¹

Neither the Model Penal Code’s nor the courts’ version of the mens rea presumption is entirely right. In Part I, I will argue that the Code’s drafters were wrong in assuming that elements designed to measure the *harm* from an offense invariably require the assignment of a mental state. In Part II, I will argue—drawing on a recent dissenting opinion by Justice Stevens—that the courts are wrong in assuming that elements designed to do something *other than* measure the harm often do *not* require mental states. In Part

14. Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 683 (1983).

15. *United States v. Bailey*, 444 U.S. 394, 403 (1980).

16. *Id.* at 406 (citation omitted).

17. MODEL PENAL CODE § 2.02(1) (1985).

18. *Id.* § 2.05. A “violation” is defined as an offense for which “no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction.” *Id.* § 1.04(5).

19. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994).

20. *See United States v. Figueroa*, 165 F.3d 111 (2d Cir. 1998).

21. *Id.* at 116.

III, I will use these two criticisms—of the Model Penal Code and of the courts—as the basis for constructing an alternative version of the mens rea presumption, in which the mens rea presumption is reconceptualized as a kind of actus reus presumption. Finally, in Part IV, I will show that this alternative version of the mens rea presumption is consistent with what the courts say about the confusing topic of general and specific intent.

I. THE SHORTCOMINGS OF THE MODEL PENAL CODE APPROACH

The Model Penal Code's version of the mens rea requirement appears in section 2.02, which provides that "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense."²² This rule would require the courts to assign some mental state to every objective element of every offense—even elements whose function is to distinguish between more and less serious versions of the same offense. As applied to the crime of aggravated theft, for example, this rule would require the courts to assign some mental state—"recklessly," perhaps—even to the value of the stolen property.²³ Thus, a defendant charged with aggravated theft could defend the case by asserting that he had not realized that the stolen property's value might exceed the statutory threshold.²⁴

This expansive version of the mens rea presumption undoubtedly is based in part on the uncontroversial proposition that culpability is a matter of degree.²⁵ There is a difference, of course, between a thief who hopes or expects to obtain property valued at a million dollars and a thief who hopes or expects to obtain property valued at five dollars. And one reason for differentiating aggravated from simple theft is to take this difference into account. But the expansive version of the mens rea presumption also appears to be based on two more controversial assumptions, neither of which has won a broad following among courts.

The first of these two assumptions is that harm has no independent bearing on a crime's gravity and, accordingly, that the harm elements in criminal statutes really function only as markers—to tell the jurors in relation to what harm they are to measure the unjustifiability of risk and the culpability of the actor's

22. MODEL PENAL CODE § 2.02(1) (1985). An element counts as "material" unless it relates exclusively to the statute of limitations, jurisdiction, venue, or other like questions. *Id.* § 1.13(10).

23. MODEL PENAL CODE AND COMMENTARIES, *supra* note 4, § 223.1 cmt. 3(c), at 144.

24. *Id.*

25. See Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 128 (2009) ("Mens rea has traditionally served to prevent disproportional punishment as well as punishment of blameless conduct . . .").

conduct. From this assumption that harm elements are present in criminal statutes only as markers, it appears to follow that harm elements can fulfill their statutory function only if they are assigned mental states. The commentaries to the Model Penal Code make roughly this point in connection with the aggravated-theft example: “The amount involved in a theft has criminological significance only if it corresponds with what the thief expected or hoped to get. To punish on the basis of actual harm rather than on the basis of foreseen or desired harm is to measure the extent of criminality by fortuity.”²⁶

This first apparent assumption—that harm has no bearing on the crime’s gravity except as a marker—is belied even by the Model Penal Code’s own special part. Under the Code, a person who “recklessly engages in conduct which places or may place another person in danger of death” is guilty only of a misdemeanor—reckless endangerment—if the risk of death is not realized.²⁷ On the other hand, if the risk of death *is* realized, the defendant is guilty of reckless manslaughter, a felony punishable by up to ten years in prison.²⁸ The risk required by these two crimes is exactly the same, as is the degree of culpability. What distinguishes the two crimes is just the harm. In this setting, then, the Code obviously assigns independent significance to the degree of harm inflicted by the crime.²⁹

State legislatures, too, have assigned independent significance to harm in a wide array of criminal statutes. Consider, for example, two Iowa statutes on the subject of drag racing. The first, section 321.278 of the Iowa Code, defines “drag racing” as a “motor vehicle speed contest . . . on any street or highway” and classifies it as a simple misdemeanor.³⁰ The second, section 707.6A of the Iowa Code, provides that “[a] person commits a class ‘D’ felony when the person unintentionally causes the death of another while drag racing, in violation of section 321.278.”³¹ The second of these statutes appears to require nothing by way of risk or culpability that is not required by the first. It says nothing about any requirement of recklessness or negligence with respect to the death, for

26. 2 MODEL PENAL CODE AND COMMENTARIES, § 223.1 cmt. 1, at 146 (1980).

27. MODEL PENAL CODE § 211.2 (1985).

28. *Id.* § 210.3 (defining manslaughter and classifying it as a second-degree felony); *id.* § 6.06(2) (providing that a person convicted of a felony of the second degree may be imprisoned “for a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum of which shall be ten years”).

29. For an account of the reason why harm matters in criminal law, and of the debate among scholars about whether it *ought to* matter, see Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 IOWA L. REV. 59, 118–24 (2005).

30. IOWA CODE § 321.278 (2009).

31. *Id.* § 707.6A.

example.³² And so it appears simply to require intentional or knowing participation in a drag race, as does the misdemeanor statute.³³ The relationship between these two statutes is the same, then, as the relationship between reckless endangerment and reckless manslaughter. What distinguishes the two drag-racing crimes is just the harm caused by the defendant. In this and other like statutes, harm matters.

There is more behind the Model Penal Code's expansive version of the mens rea requirement, though, than the drafters' apparent assumption that harm lacks any independent bearing on a crime's gravity. There also is a second, distinct assumption, namely, that only by assigning a mental state to the social harm that is the statute's target can the statute adequately answer the two normative questions on which criminal liability ought to hinge: (1) whether the risk posed by the defendant's conduct was unjustifiable; and (2) whether the defendant's disregard of the risk, or his failure to perceive the risk, "justifies condemnation."³⁴ The Code's drafters assumed, in effect, that every criminal statute must operate on the same model as the Code's reckless-manslaughter provision, which—by assigning a mental state of "recklessly" to the "death of another" element³⁵—requires the jury to decide for itself whether the conduct posed an "unjustifiable" risk of death and whether the defendant was culpable in relation to this risk.³⁶

This second of the drafters' assumptions is, like the first, belied by statutes like Iowa's drag-racing homicide statute, which measure the unjustifiability and culpability of the risk-taking *without* assigning a mental state to the social-harm element. As Professor Mark Kelman has said, offenses like drag-racing homicide are

32. *Id.*

33. *See State v. Buchanan*, 549 N.W.2d 291, 294 (Iowa 1996) (explaining that Iowa courts ordinarily presume that criminal statutes require only general intent, rather than specific intent, and that general intent consists simply of "deliberate or knowing action, as opposed to causing the prohibited result through accident, mistake, carelessness, or absent-mindedness").

34. MODEL PENAL CODE AND COMMENTARIES, *supra* note 4, § 2.02 cmt. 3, at 238 (explaining that a jury must first evaluate the risk posed by the defendant's conduct and whether such risk is justifiable, and then decide whether the defendant's disregard of the risk or failure to perceive the risk justifies moral condemnation).

35. MODEL PENAL CODE § 210.3(1)(a) (1985) (providing that criminal homicide constitutes manslaughter when it is committed "recklessly"); *id.* § 210.1 (providing that the "death of another human being" is the result element of all forms of criminal homicide).

36. The drafters' assumption that every criminal statute must operate on the same model as the manslaughter statute is nowhere clearer than in their explanation for rejecting the felony-murder rule. The trouble with felony murder, they said, was that it imposes liability for homicide "based on the culpability required for the underlying felony without separate proof of any culpability with regard to the death." MODEL PENAL CODE AND COMMENTARIES, *supra* note 4, § 210.2 cmt. 6, at 31.

related to reckless and criminally negligent homicide in much the same way that tort negligence per se is related to ordinary tort negligence.³⁷ Statutes defining offenses like drag-racing homicide embody antecedent legislative judgments of unjustifiability and culpability per se.³⁸ These antecedent legislative judgments—though made in relation to the social harm that is the statute’s target—are based on the statute’s *other* elements and on the mental states associated with those other elements.³⁹ In the crime of drag-racing homicide, for example, the antecedent legislative judgment hinges on proof that the actor knowingly or intentionally participated in a motor vehicle “speed contest” on a public “highway.” It would be redundant, then, to assign a mental state to the harm; it would be redundant, that is, to put to the jury directly the questions whether the conduct posed an unjustifiable risk of death and whether the actor was culpable in relation to this risk. In effect, the legislature already has answered these questions on the basis of the statute’s circumstance and conduct elements and their accompanying mental states.

Statutes that embody these sorts of antecedent determinations of unjustifiability and culpability per se are commonplace. For example, most state criminal codes have drunk-driving-homicide statutes, in which the driver’s liability hinges exclusively on his or her intoxication at the time of the fatal accident.⁴⁰ These statutes do not require the jury to make a determination that the defendant was reckless or negligent with respect to the result element—that is, the death of a person.⁴¹ Instead, the statutes’ only mental states

37. Mark Kelman, *Strict Liability: An Unorthodox View*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1512, 1516 (Sanford H. Kadish ed., 1983) (“[T]he key to seeing strict liability as less deviant in the criminal justice system is . . . to see the real policy fight as a rather balanced one over the relative merits and demerits of precise rules (conclusive presumptions) and vague, ad hoc standards (case-by-case determinations of negligence).”). Kelman’s operative definition of “strict liability,” like the Model Penal Code’s definition of “absolute liability,” is broad enough to encompass offenses like drag-racing homicide. *Id.*

38. *Id.* at 1517 (raising the possibility that the legislature “might *predefine* what constitutes ‘reasonable care’”); see also Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 744 (1960) (characterizing antecedent legislative judgments underlying statutes like these as “similar to a jury determination that conduct in a particular case was unreasonable”).

39. For general accounts of the operation of statutes like these, see Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 425 (2011); Eric A. Johnson, *Mens Rea for Sexual Abuse: The Case for Defining the Acceptable Risk*, 99 J. CRIM. L. & CRIMINOLOGY 1, 11–20 (2009).

40. See, e.g., FLA. STAT. § 316.193(4) (2006); IDAHO CODE ANN. § 18-8006 (2012); MICH. COMP. LAWS § 257.625(4) (2010); NEB. REV. STAT. § 28-306(1), (3)(b) (2008); N.Y. PENAL LAW § 125.12(2) (McKinney 2009); WYO. STAT. ANN. § 6-2-106(b)(i) (2011).

41. See, e.g., *People v. Garner*, 781 P.2d 87, 89 (Colo. 1989) (en banc); *State v. Hubbard*, 751 So. 2d 552, 563 (Fla. 1999); *State v. Creamer*, 996 P.2d 339,

pertain to the conduct and attendant-circumstance elements.⁴² They usually require, first, that the defendant act purposely with respect to the conduct element—namely, driving a motor vehicle—and, second, that the defendant act knowingly with respect to an attendant circumstance element—namely, the fact that the defendant had consumed an intoxicant.⁴³

Likewise, a substantial minority of states have specific “drug-induced homicide” statutes.⁴⁴ These statutes generally require, first, that the defendant deliver one of several specified controlled substances—for example, heroin, methamphetamine, or cocaine—and, second, that another person die as the result of ingesting the controlled substance.⁴⁵ The statutes do not require the government to prove that the defendant was reckless or criminally negligent with respect to the social harm that is the target of the statute.⁴⁶ Instead, by way of *mens rea*, they typically require the government to prove only that the defendant knew that he or she was delivering the controlled substance.⁴⁷

There is room for disagreement about whether statutes like these are desirable⁴⁸—about whether society is better served by

343 (Kan. Ct. App. 2000); *Reidweg v. State*, 981 S.W.2d 399, 406–07 (Tex. App. 1998); *Allen v. State*, 43 P.3d 551, 569 (Wyo. 2002).

42. See *Armijo v. State*, 678 P.2d 864, 868 (Wyo. 1984).

43. See *People v. Derror*, 715 N.W.2d 822, 832 (Mich. 2006) (holding that the Michigan statute defining the offense of operation of a vehicle under the influence of a controlled substance causing death does not require the Government to prove that the defendant knew that he might be intoxicated, but implying that Government is required to prove that defendant knew “that he or she had consumed an intoxicating agent”); *Armijo*, 678 P.2d at 868 (remarking that the offense of aggravated homicide by vehicle requires proof that the defendant became “intoxicated voluntarily to the point that he is not able to safely drive”); see also *State v. Simpson*, 53 P.3d 165, 167 (Alaska Ct. App. 2002) (explaining that the offense of driving while intoxicated usually requires proof that the defendant “knowingly ingested intoxicants”).

44. See, e.g., ALASKA STAT. § 11.41.120(a)(3) (2010); COLO. REV. STAT. § 18-3-102(e) (2011); FLA. STAT. § 782.04(1)(a)(3) (2007); 720 ILL. COMP. STAT. 5/9-3.3 (2002); LA. REV. STAT. ANN. § 14:30.1(3) (2007); MICH. COMP. LAWS § 750.317a (2003); MINN. STAT. § 609.195(b) (2010); N.J. STAT. ANN. § 2C:35-9 (West 2005); 18 PA. CONS. STAT. § 2506(a) (1998); R.I. GEN. LAWS § 11-23-6 (2002); TENN. CODE ANN. § 39-13-210(a)(2) (2010); VT. STAT. ANN. tit. 18, § 4250(a) (2002); WASH. REV. CODE § 69.50.415 (2007); WIS. STAT. § 940.02(2)(a) (2005); WYO. STAT. ANN. § 6-2-108 (2011).

45. See *People v. Faircloth*, 599 N.E.2d 1356, 1360 (Ill. App. Ct. 1992).

46. See ALASKA STAT. § 11.41.120(a)(3) (providing explicitly that “the death is a result that does not require a culpable mental state”); *Faircloth*, 599 N.E.2d at 1360 (interpreting Illinois’s statute not to require a culpable mental state with respect to the result: “The defendant just needs to make a knowing delivery of a controlled substance, and if any person then dies as a result of taking that substance, the defendant is responsible for that person’s death.”).

47. See *Faircloth*, 599 N.E.2d at 1360.

48. See, e.g., R.A. Duff, *Criminalizing Endangerment*, 65 LA. L. REV. 941, 960–61 (2005) (describing the relative advantages and disadvantages of *per se*

rules embodying antecedent legislative judgments of unjustifiability and culpability per se,⁴⁹ or instead is better served by statutes that delegate to the finder of fact the responsibility for making ad hoc, case-specific judgments of unjustifiability and culpability.⁵⁰ What is not subject to disagreement, though—and what is critical to the argument here—is just that legislatures traditionally have made extensive use of both kinds of criminal statutes.⁵¹ From the fact that legislatures traditionally have made extensive use of both kinds of criminal statutes, it follows that the courts ought not to adopt a version of the mens rea presumption that wishes away statutes embodying antecedent legislative judgments of unjustifiability and culpability per se. In exercising their delegated power to develop substantive criminal-law background principles,⁵² after all, the courts are merely “partners in the enterprise of lawmaking.”⁵³ They do not dictate to the legislature.

II. THE SHORTCOMINGS OF THE SUPREME COURT’S APPROACH

This criticism of the expansive Model Penal Code version of the mens rea presumption seems to point toward a particular limitation

rules, on the one hand, and vaguer, ad hoc standards, on the other); Kelman, *supra* note 37, at 1517 (describing the individual challenges that arise from vague terms, such as inconsistency and bias in jury verdicts, as well as from predefined terms, such as imprecise application to defendants of differing circumstances).

49. *See* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (arguing that one of the vices of vague criminal laws is that they “impermissibly delegate[] basic policy matters to . . . juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application”); *People v. Pinckney*, 328 N.Y.S.2d 550, 553–54 (N.Y. App. Div. 1972) (upholding the dismissal of a reckless-manslaughter charge against the supplier of a fatal dose of heroin on the ground that drug-induced homicides are better addressed by the adoption of specific legislation: “In our opinion, if the Legislature had intended to include homicide by the selling of dangerous drugs, it would have amended the sections of the Penal Law relating to homicide.”); OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 120–26 (Little, Brown and Co. 1984) (1881) (“[I]t is very desirable to know as nearly as we can the standard by which we shall be judged at a given moment . . .”).

50. *See* Douglas N. Husak, *Reasonable Risk Creation and Overinclusive Legislation*, 1 *BUFF. CRIM. L. REV.* 599, 620–21 (1998) (arguing that offenses like drunk driving should either (1) be redefined to require proof of culpability—that is, recklessness—with respect to the ultimate social harm that is the target of the offense or (2) be replaced by “a more general offense of risk creation”); Cynthia Lee, *“Murder and the Reasonable Man” Revisited: A Response to Victoria Nourse*, 3 *OHIO ST. J. CRIM. L.* 301, 305–06 (2005) (“[T]he jury is a better institutional actor than the legislature when it comes to deciding questions of culpability . . .”); William J. Stuntz, *Unequal Justice*, 121 *HARV. L. REV.* 1969, 1974, 2036–39 (2008) (arguing that justice and racial equality can best be served by “defin[ing] criminal prohibitions more vaguely”).

51. *See* HOLMES, *supra* note 49, at 58–59.

52. Johnson, *supra* note 1, at 125.

53. Spiropoulos, *supra* note 1, at 919.

on the presumption. One of the defining features of crimes like drunk-driving homicide is the fact that the result element does not define the boundary between lawful and unlawful conduct. The underlying conduct in drunk-driving homicide—driving while drunk—is criminal even when it does not cause death, injury, or property damage. And the same is true of drag racing and drug trafficking and of the felonies that provide the bases for felony-murder prosecutions. This feature of the homicide statutes suggests a possible shorthand formula for identifying elements that do not require the assignment of a mental state. We could say an element does not require the assignment of a mental state if—like the element of death in drunk-driving homicide—it merely aggravates conduct that already is criminal.

This, as it happens, is the formula that the courts usually have used to define the scope of the mens rea presumption. State and federal courts, when they have recognized that the question of mens rea must “be faced separately with respect to each material element of the crime,”⁵⁴ usually have held that the presumption of mens rea does not apply to elements that make a crime more serious; it only applies to elements that “make[] the conduct criminal.”⁵⁵ In *Staples v. United States*,⁵⁶ for example, the Supreme Court said that the presumption requires the government to prove some mental state with respect to all “the facts that make [the] conduct illegal.”⁵⁷ The Supreme Court spoke even more clearly in *Carter v. United States*,⁵⁸ where it said that “[t]he presumption in favor of scienter . . . requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”⁵⁹

The Court’s most recent application of this limiting principle came in *Dean v. United States*.⁶⁰ The statute at issue in *Dean* was 18 U.S.C. § 924(c)(1)(A)(iii), which, in effect, defines an aggravated version of the offense of carrying a firearm during a crime of

54. *United States v. Bailey*, 444 U.S. 394, 403, 406 (1980) (explaining that the Model Penal Code brought about “a general rethinking of traditional *mens-re* analysis” and identifying as one facet of this general rethinking the recognition that the question of culpability must be faced separately with respect to each material element).

55. *United States v. Taylor*, 239 F.3d 994, 997 (9th Cir. 2001); *see also, e.g.*, *United States v. Figueroa*, 165 F.3d 111, 115–16 (2d Cir. 1998); *Noblit v. State*, 808 P.2d 280, 285 (Alaska Ct. App. 1991); *People v. Busch*, 113 Cal. Rptr. 3d 683, 688–89 (Cal. Ct. App. 2010).

56. 511 U.S. 600 (1994).

57. *Id.* at 619.

58. 530 U.S. 255 (2000).

59. *Id.* at 256–57 (quoting *United States v. X-Citement Video*, 513 U.S. 64, 72 (1994)).

60. 556 U.S. 568 (2009).

violence.⁶¹ Under this section, a person who uses or possesses a firearm during a crime of violence or a drug-trafficking crime will be subject to an enhanced minimum sentence of ten years “if the firearm is discharged.”⁶² In *Dean*, both sides agreed that the defendant, Dean, had carried a firearm during a crime of violence—the robbery of a bank.⁶³ And both sides agreed that the firearm had gone off.⁶⁴ But the discharge appeared to have been accidental (since Dean cursed after the gun went off).⁶⁵ So the question arose whether the government was required to prove some mental state with respect to the discharge.⁶⁶ Dean argued that the government was required to prove that he had discharged the gun intentionally or knowingly.⁶⁷ The Supreme Court concluded, though, that Congress had meant, by its omission of a mental state, not to require a mental state with respect to the discharge.⁶⁸

In reaching this result, the Supreme Court said that Dean’s reliance on the presumption of mens rea was misplaced.⁶⁹ The Court explained that the presumption did not apply to the discharge element, since the defendant’s conduct in cases prosecuted under 18

61. Technically, this section defines a “sentencing enhancement,” rather than a separate offense. See *Harris v. United States*, 536 U.S. 545, 553 (2002); see also Brief for the Petitioner at 4, *Dean v. United States*, 556 U.S. 568 (2009) (No. 08-5274) (acknowledging that the district court judge, rather than the jury, was responsible for deciding whether the discharge element in 18 U.S.C. § 924(c)(1)(A)(iii)(2006) had been proved). This distinction has important procedural consequences. See *Harris*, 536 U.S. at 553 (noting that the brandishing and discharge of a firearm can be a factor in sentencing). From a substantive perspective, though, the sentencing enhancement in § 924(c)(1)(A)(iii) does exactly what many offense elements do: trigger harsher penalties for more serious criminal conduct. See *Dean*, 556 U.S. at 575 (comparing the discharge provision to the felony-murder rule, in which proof that the defendant caused the victim’s death results in the imposition of increased punishment). The Court in *Dean*, accordingly, appears to have assigned no substantive significance to the fact that the discharge provision defines a sentencing enhancement, rather than a separate offense. See *id.* at 576–77 (explaining why the presumption of scienter does not require the assignment of a mental state to the discharge provision, and so tacitly rejecting the government’s argument, see Brief for United States at 10, *Dean*, 556 U.S. 568 (No. 08-5274), that the presumption of scienter does not apply at all to sentencing enhancements).

62. *Dean*, 556 U.S. at 571 (quoting 18 U.S.C. § 924(c)(1)(A)(iii)).

63. See *id.* at 570 (“At trial, Dean admitted that he had committed the robbery . . .”).

64. See Brief for United States, *supra* note 61, at 4 (“Petitioner testified that when he was removing money from the teller station, he ‘pulled the trigger’ on the pistol he was carrying while trying to transfer the gun from one hand to the other.”).

65. *Id.*

66. *Dean*, 556 U.S. at 570.

67. *Id.* at 571.

68. *Id.* at 576–77.

69. *Id.* at 574–77.

U.S.C. § 924(c)(1)(A)(iii) is unlawful even apart from the discharge of the firearm. “It is unusual to impose criminal punishment for the consequences of purely accidental conduct,” the Court said.⁷⁰ “But it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts.”⁷¹ In effect the Court applied in *Dean* the same limiting principle it had applied in cases like *Staples* and *Carter*, namely, that the presumption of mens rea applies only to “the facts that make [the] conduct criminal.”⁷²

The academic commentary has been broadly critical of this limitation on the mens rea presumption.⁷³ What interests me, however, is the somewhat more focused criticism offered by Justice Stevens in his dissenting opinion in *Dean*.⁷⁴ In arguing that the discharge element in 18 U.S.C. § 924(c)(1)(A)(iii) required a mental state, Justice Stevens relied in part on the mens rea presumption.⁷⁵ To the *Dean* majority’s reliance on the distinction between aggravating elements and elements that make conduct criminal, Justice Stevens responded by proposing a refinement of the distinction. He said, in substance, that the “aggravating-element”

70. *Id.* at 575.

71. *Id.*

72. *Staples v. United States*, 511 U.S. 600, 619 (1994). One commentator has argued that the *Staples* rule was “rejected” in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), which was decided just a week after *Dean*. See *The Supreme Court, 2008 Term — Leading Cases*, 123 HARV. L. REV. 153, 321 (2009) [hereinafter *Leading Cases*]. This is wishful thinking. In *Flores-Figueroa*, the Supreme Court did not advert to the mens rea principle at all, much less “reject” the longstanding *Staples* limitation. The Court’s decision in *Flores-Figueroa* was based almost exclusively on what the Court identified as a rule of “ordinary English grammar,” namely, that “where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action . . .” *Flores-Figueroa*, 556 U.S. at 650. Thus, the claim that *Flores-Figueroa* overruled *Staples* not only misreads *Flores-Figueroa*; it overlooks a fundamental distinction between two kinds of interpretive rules: substantive canons and language canons. See *In re Estate of Tanner*, 295 S.W.3d 610, 628 n.15 (Tenn. 2009) (“Substantive canons provide presumptions for interpreting ambiguous statutes that explicitly consider the substance of the law being interpreted. These canons stand in contrast with language canons—like the last antecedent rule—which only provide presumptions for interpreting words and syntax.”).

73. See Smith, *supra* note 25 (criticizing the *Staples* rule for “equat[ing] ‘innocence’ with ‘moral blamelessness’” and urging the adoption of a “proportionality-based approach to mens rea selection”); *Leading Cases*, *supra* note 72 (arguing that the *Staples* limitation—which the authors bizarrely treat as attributable to a misreading of Supreme Court precedent—fails properly to “align punishment with culpability”). But see John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1024 (1999) (praising the *Staples* rule, which the author identifies as the “rule of mandatory culpability”).

74. *Dean*, 556 U.S. at 578–83 (Stevens, J., dissenting).

75. *Id.* at 581–82.

limitation on the mens rea principle really only applies to aggravating elements that measure the degree of harm inflicted by the defendant:

The Court cites the felony-murder rule . . . and Sentencing Guidelines provisions that permit increased punishment based on the seriousness of the harm caused by the predicate act These examples have in common the provision of enhanced penalties for the infliction of some additional harm. By contrast, § 924(c)(1)(A)(iii) punishes discharges whether or not any harm is realized. . . . For [this and other] reasons, § 924(c)(1)(A)(iii) is readily distinguishable from the provisions the majority cites.⁷⁶

These four sentences are brief to a fault. But the twofold gist of the sentences can be summarized as follows. First, elements that are designed to measure the degree of harm inflicted by the defendant—that, in Justice Stevens’s words, go to “the seriousness of the harm caused by the predicate act”—sometimes can justify increased punishment quite apart from whether the government is required to prove any mental state with respect to the harm. Second, elements designed to do something other than measure the harm—like the discharge of a firearm under § 924(c)(1)(A)(iii)—usually cannot justify increased punishment unless the government is required to prove some mental state with respect to them.⁷⁷

This second point is the controversial one. Why did Justice Stevens suppose that elements that are designed to measure something other than the harm usually cannot justify increased punishment absent proof of an accompanying mental state? The only explanation appears in Justice Stevens’s enigmatic statement that 18 U.S.C. § 924(c)(1)(A)(iii) was intended “to serve a different purpose [than provisions that impose increased punishment on the basis of the seriousness of the harm]—namely, to punish the more culpable act of intentional discharge.”⁷⁸ The implication of this remark is that factors other than harm are significant only to the degree that they signal enhanced culpability.

This explanation seems wrong, though. It is at least arguable that, as the majority said in *Dean*,⁷⁹ the discharge element in § 924(c)(1)(A)(iii) was designed to do something other than measure

76. *Id.* at 582.

77. The majority in *Dean* acknowledged that the discharge element was designed to measure the degree of risk posed by the actor’s conduct: “The sentencing enhancement in subsection (iii) accounts for the risk of harm resulting from the manner in which the crime is carried out.” *Id.* at 576 (majority opinion). “A gunshot in such circumstances,” the majority explained, “increases the risk that others will be injured, that people will panic, or that violence (with its own danger to those nearby) will be used in response.” *Id.*

78. *Id.* at 583 (Stevens, J., dissenting) (emphasis added).

79. *Id.* at 576 (majority opinion).

the degree of the defendant's culpability. The majority thought the discharge element mattered not because it signified enhanced culpability but because it signified enhanced risk. The discharge of a firearm during a bank robbery, the Court said, "increases the risk that others will be injured, that people will panic, or that violence (with its own danger to those nearby) will be used in response."⁸⁰ According to the majority, then, the discharge element might have been designed not to measure the defendant's culpability—not, that is, to measure the defendant's subjective perception of risk—but rather to measure the degree of objective risk posed by his conduct.

The *Dean* majority appears to have been correct in thinking that the degree of risk posed by an actor's conduct sometimes has significance that is independent of the actor's perception of the risk. The Model Penal Code's definition of reckless endangerment, for example, requires proof not only of culpability but of actual risk; it is satisfied only when the actor's conduct "places or may place another person in danger of death or serious bodily injury."⁸¹ A person who believes without any basis that he is driving ninety miles per hour is not guilty of reckless endangerment if he really is driving within the speed limit.⁸² The same is true of criminally negligent homicide, reckless manslaughter, and even depraved-indifference homicide. In all these offenses, the actor's liability depends not only on the actor's culpability but also on the degree of objective risk posed by his conduct.⁸³ There is no reason in principle, then, why increased risk should *never* be significant in its own right. And indeed some criminal codes assign—or purport to assign—significance to the risks created by a defendant's conduct without requiring proof of enhanced culpability.⁸⁴

80. *Id.*

81. MODEL PENAL CODE § 211.2 (1985).

82. See Eric A. Johnson, *Knowledge, Risk, and Wrongdoing: The Model Penal Code's Forgotten Answer to the Riddle of Objective Probability*, 59 BUFF. L. REV. 507, 560–64 (2011) (discussing the speedometer example).

83. See, e.g., *State v. Kristenmacher*, 436 N.W.2d 168, 171 (Neb. 1989) (holding that the fact-finder's assessment of risk in a manslaughter prosecution is "purely objective"); *State v. Ebinger*, 603 A.2d 924, 925 (N.H. 1992) (holding in a prosecution for negligent homicide that the existence of a "substantial and unjustifiable risk" is determined by an objective test, not by reference to the defendant's subjective perception"); *State v. Robinson*, 63 P.3d 105, 108 (Utah Ct. App. 2003) (holding in a prosecution for manslaughter that "the magnitude of the risk itself . . . is an objective matter"); *State v. Brooks*, 658 A.2d 22, 27 (Vt. 1995) (holding that the involuntary manslaughter statute requires "the jury to objectively assess the risk").

84. For example, the sentencing provisions of Alaska's criminal code say that an offense may be considered aggravated where "the defendant's conduct created a risk of imminent physical injury to three or more persons, other than accomplices." ALASKA STAT. § 12.55.155(c)(6) (2010). *But cf.* MODEL PENAL CODE § 210.6 (1985) (making it an aggravating factor in a homicide case that "the defendant *knowingly* caused a great risk of death to many persons") (emphasis added).

The *Dean* majority's reliance on the objective risk posed by Dean's conduct—as a basis for the enhanced punishment imposed under § 924(c)(1)(A)(iii)—suggests a powerful alternative basis for Justice Stevens's implied criticism of the traditional judge-made version of the mens rea presumption, however. The magnitude of even an "objective" risk, and indeed the very *existence* of the risk, is always tied to the defendant's perspective—to what the defendant knew about his conduct and about the surrounding facts and circumstances. Strictly speaking, purely *objective* probabilities don't exist outside the world of indeterministic microphysics.⁸⁵ At the macroscopic level, probabilities are just a reflection of the incompleteness of our knowledge of the world.⁸⁶ If we knew everything there was to know about the objective facts—"all the forces by which nature is animated and the respective situation of the beings who compose it"⁸⁷—probability would give way to certainty.⁸⁸ The very notion of probability, then, presupposes "a perspective that is defined by possession of certain information but not other information."⁸⁹

Dean illustrates this. It is possible now, after the fact, to reconstruct the objective facts surrounding the discharge of Dean's gun—the position and orientation of the gun, the trajectory of the bullet, the location of the bank's employees and customers, and so on. And so it is possible now to say that, when the gun discharged, the purely "objective" probability that the bullet would injure one of the bank's employee or customers was zero.⁹⁰ The bullet was bound

85. Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333, 358 (2002) ("Indeterministic microphysics to the side, there is no such thing as an objective risk; there are only risks to be perceived from certain epistemic vantage points."); see also BRIAN GREENE, THE ELEGANT UNIVERSE 93, 116 (2003) (explaining why most indeterminacy is confined to the quantum realm: "The smallness of [Planck's constant] confines most of these radical departures from life-as-usual to the microscopic realm . . .").

86. GREENE, *supra* note 85, at 105 ("We are accustomed to probability showing up in horse races, in coin tosses, and at the roulette table, but in those cases it merely reflects our *incomplete* knowledge.")

87. PIERRE SIMON, MARQUIS DE LAPLACE, A PHILOSOPHICAL ESSAY ON PROBABILITIES 4 (F.W. Truscott & F.L. Emory trans., 1902) (1814).

88. *Id.*

89. LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 28 (2009) ("Risk is always relative to someone's perspective, a perspective that is defined by possession of certain information but not other information . . ."); see also *Long v. State*, 931 S.W.2d 285, 289 (Tex. Crim. App. 1996) (concluding that a stalking statute's use of the phrase "reasonably likely" was ambiguous because the statute did not specify the perspective from which this probability determination was to be made).

90. See HOLMES, *supra* note 49, at 69–70 ("[Where a bullet misses its aim] the act has produced the whole effect possible to it in the course of nature. It is just as impossible that that bullet under those circumstances should hit that man, as to pick an empty pocket."); Lawrence Crocker, *Justice in Criminal*

to travel through the partition separating the two bank tellers, ricochet off a computer, and come to rest harmlessly on the teller counter.⁹¹ Thus, when the majority in *Dean* says that the discharge of Dean's firearm "increase[d] the risk that others [would] be injured,"⁹² it cannot mean the agent-independent risk. It must, rather, mean the risk or probability as calculated from some "perspective that is defined by possession of certain information but not other information."⁹³

In criminal law, objective probabilities are calculated from the defendant's perspective. More precisely, the probabilities of interest to the criminal law are calculated on the basis of a factual setup defined by what the defendant *knows* of the background facts and circumstances.⁹⁴ (In the words of the Model Penal Code's definitions of recklessness and negligence, the probabilities are measured on the basis of "the circumstances known to [the actor].")⁹⁵ This is true where the finder of fact bears the responsibility for making a case-specific assessment of the nature and degree of risk, as he does in, say, a prosecution for reckless homicide.⁹⁶ But it is true as well where the legislature uses specific, factual elements—such as the discharge of a firearm—to mark the existence of a risk that is unjustifiable per se.⁹⁷ After all, the probabilities that are the subject of the antecedent legislative judgment of unjustifiability per se are the same probabilities that are the subject of a fact-finder's case-

Liability: Decriminalizing Harmless Attempts, 53 OHIO ST. L.J. 1057, 1098 (1992) ("A good current guess might be that the world is not deterministic, but that for macro-level phenomena there is little or no room for physically possible events that do not occur. Thus the probability in the fundamental physical sense of the close miss bullet's hitting may be zero, on fundamental physical probabilities, even if determinism is false.").

91. Brief for the Petitioner, *supra* note 61, at 2 ("The bullet went through a partition, ricocheted off a computer, and landed on the teller counter.").

92. *Dean v. United States*, 556 U.S. 568, 576 (2009).

93. ALEXANDER & FERZAN, *supra* note 89, at 28.

94. See Eric A. Johnson, *Is the Idea of Objective Probability Incoherent?*, 29 L. & PHIL. 419, 429–30 (2010); Johnson, note 82, at 561–64 (describing the different ways that one *knows* things, such as knowledge of truth and knowledge by acquaintance).

95. MODEL PENAL CODE § 2.02(2)(c)–(d) (1985); see also *Commonwealth v. Pierce*, 138 Mass. 165, 178 (1884) (explaining that the criminal law measures risk on the basis of "the degree of danger which common experience shows to attend the act under the circumstances known to the actor").

96. MODEL PENAL CODE § 2.02(2)(c).

97. See HOLMES, *supra* note 49, at 58–59 ("[T]he lawmaker may consistently treat acts which, *under the known circumstances*, are felonious . . . as having a sufficiently dangerous tendency to be put under a special ban.") (emphasis added); Johnson, *supra* note 39, at 16 ("In statutes that define offenses like drunk-driving homicide and drug-induced homicide, the legislature takes a foolproof approach to identifying just those cases where the defendant knew of the circumstances that made his or her conduct unjustifiably risky: namely, it requires the Government to prove that knowledge.").

specific judgment. And so, for example, in a prosecution for drunk driving, the antecedent legislative determination of unjustifiability per se hinges on proof that the defendant knew he was driving and knew that he had consumed an intoxicant.⁹⁸ And in a prosecution for drag-racing homicide, the antecedent legislative judgment of unjustifiability per se hinges on proof that the defendant knew he was participating in a speed contest on a public highway.

This account of objective risk, though curious sounding, is utterly uncontroversial. Consider a typical Fourth Amendment case, for example. The lawfulness of a warrantless search or seizure usually depends on whether the evidence available to the officer satisfied one of two probability thresholds: the probable cause standard or the reasonable suspicion standard. In applying these two probability thresholds, the courts insist that the probabilities at work are “objective,” rather than “subjective.”⁹⁹ Still, the courts measure these objective probabilities just as the Model Penal Code requires the fact finder to do in criminal cases: on the basis of “the facts and circumstances known to the officer.”¹⁰⁰ Here and elsewhere, then, courts measure even objective probabilities according to what the actor himself knew of the background facts and circumstances.

This is to say, the real trouble with the traditional judge-made version of the mens rea presumption is not, as Justice Stevens supposed, that the moral significance of risk depends on the defendant’s mental state. The real trouble is that the very *existence* of risk depends on the defendant’s mental state. Offense elements like the discharge of a firearm—elements that are designed to measure the objective risk posed by the actor’s conduct, rather than the harm inflicted by his conduct—can perform their assigned function only if they are tied somehow to what the actor knew about the underlying facts. Therefore, elements designed to measure the risk ordinarily require the assignment either of a “knowingly” mental state or of a mental state like negligence or recklessness,

98. See *People v. Derror*, 715 N.W.2d 822, 832 (Mich. 2006); cf. *State v. Simpson*, 53 P.3d 165, 167 (Alaska Ct. App. 2002) (explaining that the offense of driving while intoxicated usually requires proof that the defendant “knowingly ingested intoxicants”).

99. See *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (explaining that probable cause is an “objective standard[] of conduct,” which does not “depend on the subjective state of mind of the officer”); *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968) (identifying the reasonable suspicion standard as an “objective standard”).

100. *Henry v. United States*, 361 U.S. 98, 102 (1959) (“Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.”); see also *Devenpeck*, 543 U.S. at 153 (“Our cases make clear that an arresting officer’s state of mind (except for the facts he knows) is irrelevant to the existence of probable cause.”).

whose existence turns on an assessment of the underlying “circumstances known to [the actor].”¹⁰¹

III. THE MENS REA PRESUMPTION AS AN ACTUS REUS PRESUMPTION

From these criticisms—of the Model Penal Code version of the mens rea presumption, on the one hand, and of the judge-made version, on the other—it is possible to construct a new version of the presumption. This new version of the presumption would not apply to elements whose exclusive function is to measure the degree of harm inflicted by the crime. Instead it would apply to every other kind of element: to elements that define risk-enhancing attendant circumstances, like the intoxication of the actor in drunk-driving homicide; to elements that define the nature of the required conduct, like the “driving” element in drag-racing homicide; and to elements that define risk-manifesting intermediate results, like the discharge of the firearm in 18 U.S.C. § 924. Moreover, the presumption would apply even to harm elements when the statute’s remaining elements—the circumstances, the conduct, and the intermediate results—do not clearly embody an antecedent legislative judgment of unjustifiability and culpability per se.

This might sound, at first hearing, like a relatively modest change in the mens rea presumption. But it really works a fundamental change in the presumption’s underpinnings. The new version is grounded not on concerns about fine-tuned assessments of subjective moral blameworthiness but rather on concerns about whether the defendant’s conduct even was *wrong*. It is grounded, in

101. MODEL PENAL CODE § 2.02(2)(c)–(d). This is not to say that these elements *invariably* require the assignment of a mental state. In a few nonstandard criminal statutes, the existence of objective risk is inferred from how things turned out. Take, for example, statutes that impose strict criminal liability on defendants who engage in sexual relations with children under a certain critical age. In these statutes, the only required mental state is the defendant’s knowledge that he was engaged in sexual relations with another person. See Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 385–91 (2003) (summarizing the law in all fifty states). Of course, the defendant’s mere knowledge that he was engaged in sexual relations with another person cannot, by itself, provide a basis for inferring that there was an unacceptable probability that his partner was underage. The only basis for this inference is the fact that his partner turned out, after the fact, to be underage. In other words, from the fact that the defendant’s partner turned out to be underage, the legislature infers that the defendant could not have remained unaware of facts in which there inhered a substantial risk that the partner was underage. See H.R. REP. NO. 99-594, at 6195–96 (1986) (justifying the imposition of strict liability for sexual abuse on the ground that “no credible error of perception would be sufficient to recharacterize a child [who is under twelve years old] as an appropriate object of sexual gratification”) (quoting 2 MODEL PENAL CODE § 213.6 cmt. 2, at 414 (1980)).

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other words, on concerns about the existence of the crime's actus reus, not on concerns about culpability.

To explain, criminal liability is usually thought to hinge on the answers to two different questions. The first is the question of "legality" or "wrongdoing," which in effect asks whether the actor's conduct violated an external, objective rule of conduct.¹⁰² The second is the question of "culpability," which in effect asks whether the actor, despite having violated a rule of conduct, nevertheless lacks "the minimum blameworthiness required to be held criminally liable for the violation."¹⁰³ Courts and scholars both have assumed that the mens rea presumption really speaks to the second of these questions, and not without justification. After all, the Supreme Court in *Morissette* identified the presumption of mens rea not with the requirement of "an evil-doing hand" but rather with the apparently distinct requirement of "an evil-meaning mind."¹⁰⁴

Still, it is the requirement of wrongdoing—of "an evil-doing hand"—on which the so-called mens rea presumption mostly bears. This was one of Holmes's central insights in *The Common Law*. Holmes was concerned with establishing, in criminal law as elsewhere, "tests of liability [that] are external, and independent of the degree of evil in a particular person's motives or intentions."¹⁰⁵ But he recognized that the objective risk posed by an actor's conduct could not be measured except according to "the circumstances known to him."¹⁰⁶ And so he recognized that "[s]o far . . . as criminal liability is founded upon *wrong-doing* in any sense, . . . [it] must be confined to cases where circumstances making the conduct dangerous were known [to the actor]."¹⁰⁷ He dismissed, moreover, the possibility that the requirement of mens rea is meant to accomplish more than this: "[T]he *mens rea*, or actual wickedness of the party, is wholly unnecessary, and all reference to the state of his consciousness is misleading if it means anything more than that the circumstances in connection with which the tendency of his act is judged are the circumstances known to him."¹⁰⁸

102. See George P. Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 427–30 (1971) (explaining the distinction "between the legality of conduct and the culpability of the individual who engages in the conduct" and attributing to the Model Penal Code "an appreciation for [this] distinction").

103. Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 878 (1994); Herbert Wechsler & Jerome Michael, *A Rationale for the Law of Homicide: II*, 37 COLUM. L. REV. 1261, 1275 (1937) (explaining the culpability component of criminal negligence).

104. *Morissette v. United States*, 342 U.S. 246, 251 (1952).

105. HOLMES, *supra* note 49, at 50.

106. *Id.* at 75.

107. *Id.* at 55 (emphasis added).

108. *Id.* at 75.

If Holmes was wrong in expressing doubt about whether “the actual degree of personal guilt involved in any particular transgression . . . is an element at all,”¹⁰⁹ he was right in thinking that the most important function of mental-state requirements is to tell us what the actor knew of the surrounding circumstances and thereby to tell us what the objective risk posed by the actor’s conduct was. It is this critical function that the mens rea presumption, as reconfigured by Justice Stevens in *Dean*, really is designed to serve. The mens rea presumption serves this critical function by requiring that mental states be assigned to elements whose purpose is, at least in part, to measure the risk associated with the actor’s conduct. Paradoxically, then, the mens rea presumption really is an actus reus presumption; it requires the courts to presume that the legislature meant to require proof of an indispensable mental component of the actus reus—knowledge of the “circumstances making the conduct dangerous.”¹¹⁰

Finally, there is nothing conceptually problematic in the recognition that the actus reus has an indispensable mental component. Courts long have recognized that the actus reus includes a requirement of a voluntary act and that this voluntary-act requirement has a mental component. The Washington Court of Appeals explained this point nicely in *State v. Utter*¹¹¹:

There are two components of every crime. One is objective—the actus reus; the other subjective—the mens rea. The actus reus is the culpable act itself, the mens rea is the criminal intent with which one performs the criminal act. However, the mens rea does not encompass the entire mental process of one accused of a crime. There is a certain minimal mental element required in order to establish the actus reus itself. This is the element of volition.¹¹²

The effect of Justice Stevens’s reconceptualization of the mens rea presumption is just to show that another facet of the actus reus—the objective risk—has a mental component as well.¹¹³

109. *Id.* at 49.

110. *Id.* at 55.

111. 479 P.2d 946 (Wash. Ct. App. 1971).

112. *Id.* at 948.

113. This treatment of the actus reus is not unprecedented. J.W.C. Turner argued in *The Mental Element in Crimes at Common Law*, 6 CAMBRIDGE L.J. 31, 47–48 (1936), that the offender’s knowledge sometimes counts as an ingredient of the actus reus, rather than the mens rea. In discussing the offense of statutory rape, Turner argued that the addition of a requirement of knowledge of the victim’s age to the offense definition “would not affect the *mens rea* of the accused person, but it would merely add another necessary fact to the *actus reus*.” *Id.* *Contra* H.L.A. HART, *Negligence, Mens Rea and Criminal Responsibility*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 136, 144–45 (1968) (referring to Turner’s view as a “great incoherence”).

IV. THE ACTUS REUS PRESUMPTION AS A PRESUMPTION OF
GENERAL INTENT

What I have said so far would provide, at best, a thin basis for urging a state or federal court to adopt the proposed limitation on the scope of the mens rea presumption. Thankfully, though, the proposed limitation is grounded in more than Justice Stevens's remark in his dissent in *Dean* and on more than my own theoretical excursus into the nature of objective probability. The proposed limitation also has a strong grounding in what the courts say about the difficult subject of general and specific intent.

Federal and state courts often have said that what the presumption of mens rea *really* presumes is that the legislature meant to require "general criminal intent," as opposed to "specific intent." This version of the mens rea requirement appears to have originated in *United States v. Lewis*,¹¹⁴ where the Fourth Circuit observed that courts applying the mens rea requirement usually wound up concluding—of the statute being interpreted—that "only general intent is needed."¹¹⁵ In the intervening years, the Fourth Circuit's observation has become a kind of formula. The Supreme Court invoked this formula in *Carter v. United States*,¹¹⁶ where it said that "the presumption in favor of scienter demands only that we read [18 U.S.C. § 2113(a), which defines the federal bank-robbery offense] as requiring proof of general intent."¹¹⁷ Federal courts of appeals, too, now frequently say of the mens rea requirement that "absent any express reference to intent, [courts] . . . generally presume that proof only of 'general' rather than of 'specific' intent is required."¹¹⁸

At first glance, this proposition—that the presumption of mens rea requires only general intent, not specific intent—appears to have little bearing on the question addressed in this Article. After all, the proposition appears to speak only to the *kind* of mental state required by the presumption of mens rea, rather than to the question of *which elements* require mental states. But this first glance is deceiving. When the courts say that the presumption of mens rea requires only general intent, not specific intent, they are not just saying something about what kind of mental state is

114. 780 F.2d 1140 (4th Cir. 1986).

115. *Id.* at 1142–43 ("In the absence of an explicit statement that a crime requires specific intent, courts often hold that only general intent is needed.").

116. 530 U.S. 255 (2000).

117. *Id.* at 268 (emphasis omitted).

118. *United States v. Francis*, 164 F.3d 120, 121 (2d Cir. 1999); *see also United States v. Campa*, 529 F.3d 980, 1006 (11th Cir. 2008); *United States v. Jackson*, 248 F.3d 1028, 1030–31 (10th Cir. 2001); *United States v. Myers*, 104 F.3d 76, 81 (5th Cir. 1997), *cert. denied*, 520 U.S. 1218 (1997); *United States v. Martinez*, 49 F.3d 1398, 1401 (9th Cir. 1995); *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992); *State v. Dolsby*, 145 P.3d 917, 919–20 (Idaho Ct. App. 2006); *State v. Warner*, 564 N.E.2d 18, 48 (Ohio 1990).

required.¹¹⁹ They are also saying something about which objective elements the mental state attaches to. And what they are saying, as it turns out, revolves around exactly the same distinction that formed the basis for Justice Stevens's argument in *Dean*, namely, the distinction between elements that measure harm and elements that measure risk.

To explain, the terms "general intent" and "specific intent" do not describe mental states, or at least they do not describe mental states in the way that terms like intentionally, purposely, knowingly, recklessly, negligently, willfully, and maliciously do. When a legislature defines the mental state for an element, it uses terms like purposely, knowingly, recklessly, and so on. It never uses the terms general intent and specific intent. Nor, in most places, do judges use the terms general intent and specific intent in instructing juries. Rather, they use terms like purposely, knowingly, recklessly, and so on.¹²⁰

If general and specific intent are not the names of mental states, though, what are they? The answer is that whether a particular mental state counts as a general intent or a specific intent will depend not just on the nature of the mental state itself but also on the kind of objective element to which it is attached. The mental state of "intentionally," for example, sometimes will count as a general intent and sometimes will count as a specific intent, depending on what objective element the mental state attaches to. When the mental state of intentionally attaches to an element that is designed to measure the *harm* from the offense—say, the element of serious bodily injury in the crime of aggravated assault—the mental state of intentionally will usually be classified as a specific intent.¹²¹ When the mental state of intentionally attaches instead to

119. Admittedly, courts sometimes make the mistake of thinking that the difference between general intent and specific intent is reducible to the difference between two mental states—for example, intentionally and knowingly, or knowingly and recklessly. *See, e.g.*, *United States v. Bailey*, 444 U.S. 394, 405 (1980) ("In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent."); MODEL PENAL CODE § 2.02 explanatory note, at 228 (1985) (positing "rough correspondence between . . . the common law requirement of 'general intent'" and the Model Penal Code's use of recklessness as a default mental state).

120. *See Reilly v. State*, 55 P.3d 1259, 1262–63 (Wyo. 2002) (explaining that a jury should not be given instructions on general and specific intent, "due to their 'vagueness and general failure to enlighten juries'").

121. *See, e.g.*, *State v. Sivak*, 852 A.2d 812, 815–16 (Conn. App. Ct. 2004) ("Assault in the first degree is a specific intent crime. It requires that the criminal actor possess the specific intent to cause serious physical injury to another person."); *T.S. v. State*, 965 So.2d 1288, 1290 (Fla. Dist. Ct. App. 2007) (holding that aggravated battery is a specific intent crime because it requires that the defendant intentionally or knowingly cause great bodily harm); *State v. Fuller*, 414 So. 2d 306, 309–10 (La. 1982) (holding that second-degree assault is

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an element that is designed to measure the *risk* posed by an offense—say, the element of discharge of a firearm—it will be classified as a general intent.

Granted, this isn't what the courts actually *say* when they articulate the distinction between general and specific intent. What the courts typically say is that a crime is a general-intent offense if it requires the government to prove only that "the defendant intended to do the proscribed act,"¹²² and that, by contrast, a crime is a specific-intent offense if it requires the government to prove that the defendant also intended to "achieve some additional consequence."¹²³ But the only way to make sense of this distinction between an "additional consequence" and "the proscribed conduct" is to differentiate the (1) the social harm that is the statute's ultimate target from (2) earlier events in the causal sequence leading up to the social harm, whose significance lies in their contribution to the risk.

To illustrate, imagine a case where the defendant uses a firearm to kill another person. The event can be broken down into several steps: first, the shooter squeezes the trigger of the firearm; second, the firearm goes off, sending a bullet in the direction of the victim; third, the bullet strikes the victim's body; and fourth, the damage inflicted by the bullet causes the victim's death. The act of squeezing the trigger clearly seems to be part of the "act," rather than an "additional consequence."¹²⁴ And the last event in the causal sequence—the death of the victim—is clearly an "additional consequence." (Courts uniformly classify intent-to-kill homicide as a specific intent crime.)¹²⁵ But what of the two events that mediate the causal connection between the squeezing of the trigger and the death of the victim? Are they "additional consequences" or just part of "the proscribed act"?

At first glance, the discharge of the firearm might appear to be an "additional consequence." In causal terms, the discharge of the

a specific-intent offense because it requires that the defendant intentionally bring about serious bodily injury).

122. *People v. Hood*, 462 P.2d 370, 378 (Cal. 1969).

123. *Id.*

124. *But see* DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING: A LETTER FROM A GENTLEMAN TO HIS FRIEND IN EDINBURGH 42–45 (Steinberg ed. 1977). Hume would no doubt have said that even the squeezing of the trigger is a "consequence" of another event. Hume pointed out that when a person "wills" a bodily movement, the willed bodily movement sometimes occurs and sometimes doesn't. *Id.* at 43. "A man, suddenly struck with palsy in the leg or arm, or who had newly lost these members, frequently endeavors, at first, to move them and employ them in their usual offices." *Id.* From the fact that a bodily movement sometimes follows an exercise of the will and sometimes does not, it can be inferred that the bodily movement is really a causal consequence of the earlier mental event. The events are not indivisible.

125. *See, e.g., People v. Whitfield*, 868 P.2d 272, 278 (Cal. 1994) (noting that the court had "recently reaffirmed that murder is a specific intent crime").

firearm is a consequence of squeezing the trigger. What is more, it appears to be a truly separate or “additional” event. After all, sometimes pulling the trigger of a gun causes a gun to discharge, and sometimes it does not.¹²⁶

But courts have said that the discharge of a firearm does not qualify as an “additional consequence.” Consider, for example, California decisions interpreting a state statute that prohibits “discharg[ing] a firearm in a grossly negligent manner.”¹²⁷ The California courts have held that this statute requires proof that the defendant actually intended that the firearm go off; it is not enough that he intended to squeeze the trigger.¹²⁸ Nevertheless, the courts have said that this statute defines a “general intent crime, because . . . its mental state consists of an intent to do the act that causes the harm.”¹²⁹ Thus, the discharge of the firearm cannot be an “additional consequence” for purposes of the definition of specific intent.

Nor, in our original illustration, is the bullet’s initial contact with the victim’s body “an additional consequence.” Granted, in purely causal terms, the bullet’s contact with the victim’s body plainly is a consequence both of the squeezing of the trigger and the firearm’s discharge. What is more, this initial contact appears to be a truly separate event; the discharge of a firearm sometimes causes a bullet to strike another person’s body, and it sometimes does not. Nevertheless, courts uniformly have held—in interpreting statutes that define the crime of battery—that an intent to bring about physical contact with another person’s body is a form of general intent, not specific intent.¹³⁰ This means that the bullet’s initial contact with the other person’s body cannot be considered an

126. Cf. DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* 61 (2d ed. 2001) (arguing that after the movement of your finger on the trigger, “there are no further actions, only further descriptions”).

127. CAL. PENAL CODE § 246.3 (Deering 2008).

128. *People v. Robertson*, 95 P.3d 872, 879 (Cal. 2004) (holding that a defendant who believed that the firearm was unloaded would not be guilty of violating statute). The California courts also have held that CAL. PENAL CODE § 246, which prohibits discharging a firearm “at an inhabited dwelling house, occupied building, [or] occupied motor vehicle,” likewise “is a general intent crime . . . , which does not require proof of a specific intent to accomplish an objective, such as to injure, kill, or frighten.” *In re Jerry R.*, 35 Cal. Rptr. 2d 155, 160 (Cal. Ct. App. 1994). This holding reinforces the view that an intent to bring about any consequence short of the social harm is a general intent.

129. *People v. Overman*, 24 Cal. Rptr. 3d 798, 806 (Cal. Dist. Ct. App. 2005).

130. See *People v. Colantuono*, 865 P.2d 704, 709 (Cal. 1994) (concluding that the criminal intent for assault with a deadly weapon is a form of general intent); *State v. Campbell*, 39 P.3d 97, 100 (Kan. Ct. App. 2002) (explaining that intent to “caus[e] physical contact with another person” is a form of general intent); *Commonwealth v. Ford*, 677 N.E.2d 1149, 1151–52 (Mass. 1997) (holding that assault and battery by means of a dangerous weapon are general-intent crimes).

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“additional consequence” for purposes of our definition of specific intent.

So what’s going on here? All three of the events that followed the squeezing of the trigger—the discharge of the firearm, the bullet’s initial contact with the victim’s body, and the death of the victim—appear to be consequences of the conduct. Why is only one of these events—the death of the victim—treated as an “additional consequence” for purposes of the definition of specific intent? The answer, as I have said, lies in the distinction between (1) the ultimate harm at which the statute is targeted and (2) the intermediate events that contribute to the risk of that harm occurring. In our hypothetical shooting, only the death of the victim is the kind of harm at which criminal statutes are targeted. Statutes that proscribe, say, the intentional discharge of a firearm are not ultimately targeted at the discharge of firearms. These statutes proscribe the discharge of firearms not because the discharge of a firearm is harmful in itself but because the discharge of a firearm creates or enhances a risk of death or physical injury.

There are other facets to the complex distinction between general and specific intent.¹³¹ But this facet defines the real content of the distinction. When courts say that an offense will qualify as a specific-intent offense if it requires proof that the defendant intended to “achieve some additional consequence” beyond “the proscribed act,” what they really mean (usually) is that an offense will qualify as a specific-intent offense if it requires proof that the defendant intended to bring about the social harm at which the statute is targeted. And when the courts say that an offense will qualify as general-intent offense if it requires only proof that the defendant intended to do “the prohibited act,” what they really mean is that an offense will qualify as a general-intent offense if it requires only proof that the defendant intended to do something, or

131. The term “specific-intent crime” also encompasses crimes like burglary, which require proof that the defendant intended “to do some further act” when he engaged in the proscribed conduct. *People v. Hood*, 462 P.2d 370, 378 (Cal. 1969). Some scholars have argued that the term “specific intent” should be used exclusively to refer to crimes of this sort. See GEORGE E. DIX & M. MICHAEL SHARLOT, *CRIMINAL LAW CASES AND MATERIALS* 315 (6th ed. 2008) (arguing that specific intent “may usefully be regarded as meaning a mental state that has as its object a matter which is not an element of the crime”). This argument, though, fails to account for the fact that courts routinely classify intent-to-kill murder as a specific-intent offense. It also fails to account for decisions like *People v. Hesslink*, 213 Cal. Rptr. 465, 470 (Cal. Ct. App. 1985), where the court applied Justice Traynor’s definition of specific intent—“intent to do some further act or achieve some future consequence”—to California’s extortion statute. The court said that the required intent to obtain the property of another qualified as a specific intent to achieve “a future consequence,” even though the statute required that the defendant succeed in “obtaining . . . property from another” as part of the proscribed conduct. *Id.* at 470–71.

to cause something to exist or occur, that creates a risk or increases the magnitude of the risk.¹³²

What all this means, finally, is that the limiting principle grounded in the distinction between general and specific intent often will operate very much like the limiting principle suggested by Justice Stevens in his dissent in *Dean*. It will favor the assignment of mental states to those elements that are designed to measure the risk associated with the conduct (that are part of “the proscribed act,” in other words) but not to those elements that are designed instead to measure the social harm from the offense (that qualify as “additional consequences,” in other words).

CONCLUSION

Stuart Taylor said in 1990 that “[t]he careful case-by-case distinctions of [Justice] Stevens do not lend themselves to pigeonholing and do not attract much attention.”¹³³ Justice Stevens’s dissenting opinion in *Dean v. United States* provides further evidence both of Justice Stevens’s tendency to articulate “careful case-by-case distinctions” and of the unfortunate fact that these distinctions only rarely “attract much attention.”¹³⁴ In *Dean*, Justice Stevens recognized that what underlies the courts’ intuitions about the limits of the mens rea presumption is not a distinction between aggravating elements and elements that “criminalize otherwise innocent conduct,” but rather a distinction between elements that measure harm and elements that measure risk.¹³⁵ Despite the novelty and force of this insight, though, no member of

132. This refinement of the standard definition also has the benefit of giving the distinction between general and specific intent some real intuitive content. There is a very basic, morally intuitive distinction between (1) somebody who really wants to bring about harm and (2) somebody who merely accepts the possibility of bringing about harm by, say, intentionally discharging a firearm under dangerous circumstances. There is a moral difference, as philosopher Antony Duff has said, “between being guided by wrong reasons and not being guided by right reasons.” See Duff, *supra* note 48, at 945–46. Duff explains:

If I wrongfully attack you, the harm that I intend figures in my reasons for acting as I do: I act thus because I believe that by doing so I will harm you—though that is not a reason by which I should be guided. If I culpably endanger you, by contrast, my reasons for acting as I do may be perfectly legitimate; what goes wrong is that I am not guided by the reason against acting thus . . . that the risk of harm to you provides.

Id.

133. Stuart Taylor Jr., *The Last Moderate*, AM. LAWYER, June 1990, available at <http://stuarttaylorjr.com/content/last-moderate>.

134. *Dean v. United States*, 556 U.S. 568, 578–83 (2009) (Stevens, J., dissenting).

135. Taylor, *supra* note 133.

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the Court joined Justice Stevens's dissent, and no commentator has paid this insight any attention.¹³⁶

Justice Stevens's insight deserves attention, and not just because it happens to be right. Legislatures routinely fail to specify the mental states associated with objective elements, and so courts frequently face the question whether a particular element requires a mental state. Justice Stevens's proposed refinement of the mens rea principle would make itself felt in a substantial number of these cases. It would have made itself felt in *Dean* itself, of course, if the majority had heeded it. It would have suggested that the discharge element in 18 U.S.C. § 924(c)(1)(A)(iii) required a mental state—if not “knowingly” or “intentionally,” as Dean's attorneys hoped,¹³⁷ then perhaps “with criminal negligence” or “recklessly.”¹³⁸ But the import of this distinction is not remotely limited to *Dean*.

Take, for example, the question addressed by the Second Circuit in *United States v. Falu*.¹³⁹ Falu was convicted of aiding and abetting the distribution of heroin within 1000 feet of a school and accordingly was subject to the sentence enhancement imposed by 21 U.S.C. § 860(a).¹⁴⁰ Section 860(a), like many state statutes,¹⁴¹ enhances the penalties for drug dealers whose offenses occur near schools.¹⁴² But § 860(a) is silent on the question of whether this proximity element has an associated mental state.¹⁴³ On appeal, Falu argued that § 860(a) “does not apply unless a defendant had specific knowledge of the proximity of a school.”¹⁴⁴ But the Second Circuit rejected this claim, relying primarily on the traditional version of the mens rea presumption:

136. Justice Stevens's dissent in *Dean* is mentioned, but only in passing, in a couple of law review articles focusing generally on the Court as a whole. Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 233 (2010); Madhavi M. McCall et al., *Criminal Justice and the U.S. Supreme Court's 2008–2009 Term*, 29 MISS. C. L. REV. 1, 26 (2010).

137. See Brief for the Petitioner, *supra* note 61, at 26 (arguing that a mental state of “knowingly” was required).

138. See *United States v. Brown*, 449 F.3d 154, 158–59 (D.C. Cir. 2006) (applying the mental state of “recklessly” to the discharge element in § 924(c)(1)(A)(iii)).

139. 776 F.2d 46 (2d Cir. 1985).

140. *Id.* at 48. When Falu was convicted, this sentence enhancement was codified in 21 U.S.C. § 845(a). It later was moved, without substantial alteration, to 21 U.S.C. § 860(a).

141. See L. Buckner Inness, *A Moving Violation? Hypercriminalized Spaces and Fortuitous Presence in Drug Free School Zones*, 8 TEX. F. ON C.L. & C.R. 51, 52 (2003) (“Over the last thirty years, both the federal government and a majority of states have enacted statutes that prohibit certain types of conduct involving illicit drugs in or near schools, school buses, or other youth or family-related facilities and locales.”).

142. *Falu*, 776 F.2d at 48.

143. 21 U.S.C. § 860(a).

144. *Falu*, 776 F.2d at 49.

[The proximity element in] section [860(a)] does not criminalize otherwise innocent activity, since the statute incorporates section 841(a)(1), which already contains a *mens rea* requirement—one must ‘*knowingly* or *intentionally* . . . distribute . . . a controlled substance.’ . . . Anyone who violates section [860(a)] knows that distribution of narcotics is illegal, although the violator may not know that the distribution occurred within 1,000 feet of a school.¹⁴⁵

Application of Justice Stevens’s more refined version of the *mens rea* principle might have led to a different result in *Falu*. The proximity element in 21 U.S.C. § 860(a) is designed to measure not the harm associated with the defendant’s drug dealing but the risk. In other words, the sentence enhancement triggered by the proximity element is based not on the assumption that narcotics sales in the vicinity of an elementary or secondary school somehow *harm* the students, but rather on the assumption “that narcotics sales in the vicinity of an elementary or secondary school *endanger* the students” by increasing the risk that the drugs will fall into the students’ hands.¹⁴⁶ Because the proximity element in § 860(a) is designed to measure risk, rather than harm, and because the existence even of objective risk depends on the background facts and circumstances known to the actor, the court ought at least to have *presumed* that the proximity element required the assignment of a mental state—if not “knowingly,” as *Falu*’s attorneys hoped,¹⁴⁷ then perhaps the mental state of “recklessly” or the mental state of “with criminal negligence,” both of which judge the risk of an attendant circumstance’s existence on the basis of “the [underlying] circumstances known to [the actor].”¹⁴⁸

Finally, if Justice Stevens’s approach to this issue lacks the ideological purity of the Model Penal Code’s approach,¹⁴⁹ it also has the potential to succeed where the Code’s approach failed: in actually getting itself accepted by the courts.¹⁵⁰ In recent years,

145. *Id.* at 50; *see also* United States v. Pitts, 908 F.2d 458, 461 (9th Cir. 1990) (adopting *Falu*’s reasoning with regard to *mens rea* and the proximity element of § 860(a)—then § 841(a)).

146. United States v. Nieves, 608 F. Supp. 1147, 1149 (S.D.N.Y. 1985) (emphasis added).

147. *Falu*, 776 F.2d at 49.

148. MODEL PENAL CODE § 2.02(2)(c)–(d) (1985).

149. *See* Taylor, *supra* note 133 (“On a Court more polarized than ever between liberal and conservative blocs, Stevens plays a unique and valuable role: He stands alone in the moderate, common law, self-consciously apolitical tradition of justices like Benjamin Cardozo, John Marshall Harlan, Potter Stewart, and Lewis Powell, Jr. It is a tradition skeptical of absolutes and fixed rules, open to experience and facts, sensitive to competing values.”).

150. Even in states whose criminal codes were heavily influenced by the Model Penal Code, the courts have been reluctant to enforce the Code’s demand that every element be assigned a mental state. *See, e.g.*, People v. Mitchell, 571 N.E.2d 701, 704 (N.Y. 1991) (refusing to assign a mental state to an

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courts increasingly have framed the mens rea as a presumption of general intent and so have taken pains to distinguish general from specific intent.¹⁵¹ The distinction between general and specific intent—between mental states attached to the “prohibited act” and mental states attached to “additional consequences”—closely parallels the distinction made by Justice Stevens between elements that measure risk and elements that measure harm. The courts, then, already are stumbling toward the very rule proposed by Justice Stevens.

aggravating element in theft statute); *State v. Rutley*, 171 P.3d 361, 364–65 (Or. 2007) (refusing to assign mental state to the proximity element in a statute proscribing the sale of drugs within 1000 feet of a school).

151. *See supra* notes 111–115 and accompanying text.