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COMMENTS

*PEOPLE V. RYAN*¹: A TRAP FOR THE UNWARY

INTRODUCTION

Consider two scenarios. In the first, a woman is waiting for a federal express package. Her sometime boyfriend, a drug dealer, has told her that the package contains a small amount of heroin. The woman, who has little knowledge of her boyfriend's business, reluctantly agrees to keep the package for him. When the woman accepts delivery of the package, she is arrested by undercover police. The package actually contains over a kilogram of heroin. In the second scenario, a different woman is awaiting a federal express package from a friend. Her friend has told the truth: the package contains a kilogram of heroin, which he will later distribute on the street. The woman readily agrees to this, as she has to similar transactions in the past. When she is later arrested with the package, she is fully aware of the quantity of heroin.²

The protagonists of these two scenarios have each committed the same act. The harm caused to society is the same in each case. Moreover, both women are culpable: each knowingly consented to engage in the criminal act of possessing heroin.

¹ 82 N.Y.2d 497, 626 N.E.2d 51, 605 N.Y.S.2d 235 (1993).

² These scenarios are a composite of fact patterns taken from cases discussed in this comment, relating to the *Ryan* decision and federal enhanced-penalty provisions. See *infra* notes 88-125 and accompanying text. A mens rea requirement for quantity offers particular protection from unjust punishment for women; women of limited knowledge and culpability often become peripherally involved in narcotics crime through coercion and threats of violence. See *New York State Defenders Association, Inc., Memorandum Concerning S.6912*, June 7, 1994.

But these situations are not identical. The woman in the first scenario mistakenly believed she possessed only a small quantity of heroin. The woman in the second scenario knew exactly how much heroin she possessed.

The question raised by these two scenarios is whether the punishment imposed on each of these women should reflect the difference in their knowledge. Depending on the answer, there could be a dramatic difference in their respective fates. In most jurisdictions, quantity plays a pivotal role in determining severity of sentence. Under certain federal statutes, differences in quantity can double the mandatory minimum sentences.³ Under New York law, quantity can determine whether a person spends a lifetime in prison or only a year.⁴

Federal courts currently apply enhanced penalties linked to aggravating factors such as quantity without regard to a defendant's knowledge of this factor. A defendant will be sentenced according to the actual quantity possessed, even though because of accident, mistake or treachery, she believed that she possessed a much smaller amount.⁵ This legal determination implicitly contains an ethical assessment and a policy decision about a defendant's guilt: the personal culpability evinced by a knowing participation in any narcotics offense is by itself so great that further culpability distinctions based on aggravating factors are unwarranted. Thus, if the two women were both prosecuted in federal court, their respective levels of knowledge would not be factors in sentencing. In the eyes of the law, they would be equally guilty.⁶

In *People v. Ryan*,⁷ New York's highest court reached a holding diametrically opposed to federal law. Under *Ryan*, whenever quantity is an element of a narcotics crime, prosecutors must establish a "knowing" mens rea with regard to that quantity.⁸ This holding surprised and alarmed commentators,

³ 21 U.S.C. § 841(b) (1994).

⁴ N.Y. PENAL LAW § 220.18 (McKinney 1989).

⁵ *United States v. de Velasquez*, 28 F.3d 2, 5 (2d Cir.), cert. denied, 115 S. Ct. 679 (1994).

⁶ See *id.* and *infra* note 87 and accompanying text.

⁷ 82 N.Y.2d 497, 626 N.E.2d 51, 605 N.Y.S.2d 235 (1993).

⁸ *Id.* at 501, 626 N.E.2d at 54, 605 N.Y.S.2d at 238. *Black's Law Dictionary* defines "mens rea" as "a guilty mind; a guilty or wrongful purpose; a criminal intent." BLACK'S LAW DICTIONARY 985 (6th ed. 1990).

legislators and, most particularly, prosecutors.⁹ Yet the court reached its holding through a straightforward application of statutory construction rules.¹⁰ The mens rea requirement for quantity, the court held, had been in the statute all along—in keeping with the goals of “fairness and proportionality” underlying New York’s Penal Code.¹¹

Nevertheless, the New York State Legislature quickly responded to political pressure from prosecutors to overrule *Ryan*. Just eighteen months after the court’s decision, the legislature rewrote the statute so that defendants would be strictly liable for the full quantity of narcotics possessed.¹² Prosecutors were troubled by the *Ryan* holding because they claim that proving a defendant’s knowledge of quantity involves insuperable evidentiary difficulties. Indeed, the case inspired numerous appeals from defendants seeking to reduce sentences and charges because prosecutors failed to prove mens rea.¹³ Accordingly, much of the discussion surrounding *Ryan* centered on the practical matter of what kind of evidence is sufficient to establish a defendant’s knowledge of quantity.¹⁴

Ryan raises a more fundamental question, however, which survives the legislative overruling of the holding. This concerns the fairness of mandating a mens rea for quantity, when a mens rea is already established for the other elements of a crime. The question has two components: the fairness to a defendant and the fairness to society.¹⁵ Consider again the woman with the mistaken belief about quantity. Arguably, it

⁹ See Matt Gryta, *Dillon Urges Quick Response to Counter Drug Ruling*, BUFF. NEWS, Feb. 22, 1994, at B4; Gary Spencer, *Assembly Compromises on Ryan Bill*, N.Y.L.J., June 29, 1994, at 1; Gary Spencer & Cerisse Anderson, *Drug Ruling Targeted for Reform*, N.Y.L.J., Feb. 15, 1994, at 1.

¹⁰ *Ryan*, 82 N.Y.2d at 501-02, 626 N.E.2d at 54-55, 605 N.Y.S.2d at 237-38.

¹¹ *Id.* at 501, 626 N.E.2d at 54, 605 N.Y.S.2d at 238.

¹² N.Y. PENAL L. § 220.06 (Consol. 1995); see also Gary Spencer, *Evidence for Ryan’s Weight Proof Described*, N.Y.L.J., June 8, 1995, at 1.

¹³ See Cerisse Anderson, *Appellate Bench Gridlock on Ryan Issue*, N.Y.L.J., Sept. 28, 1994, at 1; Cerisse Anderson, *Appellate Courts Split on Interpreting Ryan*, N.Y.L.J., Oct. 14, 1994, at 1; Steven W. Fisher, *Ryan: A View from the Bench*, N.Y.L.J., Feb. 22, 1994, at 1.

¹⁴ See Spencer, *supra* note 12; Fisher, *supra* note 13; *Grand Jury Can Infer Knowledge of Drug Weight from Packaging*, N.Y.L.J., Aug. 25, 1995, at 1.

¹⁵ See Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 68 (1933) and *infra* note 20 and accompanying text.

would be unfair to subject her to as severe a penalty as the woman who was aware of the quantity. She did not know—and perhaps could not be expected to know—how much heroin she possessed.

On the other hand, one could argue that it is unfair to society not to punish the woman according to the actual quantity possessed. Because a defendant's mental state can be difficult to prove, a mens rea requirement places significant administrative and labor burdens on prosecutors and the judicial system. This in turn creates an opportunity for culpable defendants to escape liability by feigning a lack of awareness. Moreover, the woman in this scenario is guilty of a crime: although she had a mistaken belief as to quantity, she still knowingly possessed heroin. In short, it can be argued that to place the burden of an additional mens rea requirement for quantity on society accomplishes little more than protecting criminals.

This Comment will analyze *Ryan* principally by evaluating the fairness of imposing a mens rea requirement for quantity. Part I presents a brief overview of the historical and philosophical underpinnings of mens rea and strict liability. It examines the traditional strict liability offense—the social-welfare crime. It then looks at the strict liability enforcement of enhanced penalty provisions in narcotics offenses in the federal court. Part II provides an overview of the *Ryan* decision. Part III analyzes *Ryan*. It argues that the court's holding is correct because the enforcement of strict liability for narcotics offenses would be an unwarranted departure from the traditional strict liability offense. This Part further argues that the strict liability enforcement of enhanced penalties is not justified by proving a threshold mens rea for the other elements of the crime. Finally, Part III argues that although the court's holding was the product of statutory interpretation, there exist constitutional due process grounds for the holding.

I. MENS REA AND STRICT LIABILITY

A. *Mens Rea*

The link between criminal punishment and proof of mental culpability is an enduring tenet of Anglo-American jurisprudence. Through much of Anglo-American history, courts and

lawmakers have abided by the principle that a person who intentionally commits a bad act deserves to be punished more than a person who commits the same act inadvertently.¹⁶ Even when an individual's act leads to gravely harmful consequences, the law will not permit severe punishment without some proof of mental culpability.¹⁷ Only then is the full force of the state's power to punish brought to bear on an individual. In this sense, the mens rea requirement is at the heart of the criminal law; it is what justifies the punishment of one who commits a socially harmful act.

A prime reason for the enduring relevance of the mens rea concept is that it is simple and intuitive. The distinction between an intentional and unintentional act is instinctive. As Oliver Wendell Holmes famously observed, even a dog knows the difference between being kicked and accidentally stepped on.¹⁸ Equally instinctive is the urge to blame and punish for an intentionally offensive act. Vengeance itself—perhaps the most deeply intuitive response to a bad act—is fueled by an appreciation of culpability. It is the deliberate and calculated offense that sparks the desire for vengeance and retribution, and serves as its justification.¹⁹ By contrast, blaming someone for an act done inadvertently is widely understood to be unfair.²⁰

¹⁶ *Morissette v. United States*, 342 U.S. 246, 250 (1952) ("[T]he ancient requirement of a culpable state of mind . . . 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."). See generally Emilio S. Binavince, *The Ethical Foundation of Criminal Liability*, 33 FORDHAM L. REV. 1 (1964); Francis B. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 993 (1932) ("By the second half of the seventeenth century, it was universally accepted law that an evil intent was as necessary for felony as the act itself").

¹⁷ *Staples v. United States*, 114 S. Ct. 1793, 1803 (1994) ("[I]mposing severe punishments for offenses that require no mens rea would seem incongruous."). See also *Morissette* 342 U.S. at 251 n.5 (stating that punishment must fit the offender and that "such ends would seem illusory if there were no mental element in crime").

¹⁸ OLIVER WENDELL HOLMES, *THE COMMON LAW* 6 (Mark DeWolfe Howe ed., 1963).

¹⁹ Sayre, *supra* note 16, at 975 ("Vengeance seeks a blameworthy victim; and blameworthiness rests upon fault or evil design.").

²⁰ Sayre, *supra* note 15, at 56 ("To inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake, or pure accident, would so outrage the feelings of the community as to nullify its own enforcement.").

This intuitive understanding is most strikingly reflected in retributive theories of justice.²¹ Retribution is fueled by the moral concept that guilt and punishment are preeminently personal. An individual must merit the punishment he receives.²² In this sense, retribution depends upon *mens rea* for its meaning: without evidence of personal guilt, punishment becomes a gratuitous act.²³ Conversely, because each individual has the power of moral choice, to punish those who choose badly is an act of respect for individuals' existence as autonomous beings.²⁴

The longstanding social consensus on the importance of personal culpability underlies contemporary decisions on conviction and punishment. Proof of personal culpability is a mainstay requirement for all crimes which provoke public outrage and a need for retribution—rape, robbery, murder.²⁵ On the other hand, the crimes which do not require culpability—largely the so-called social-welfare offenses—spark far less social opprobrium and generally carry moderate penalties.²⁶

Yet despite this underlying clarity of principle, history

²¹ While most obviously linked to retributive theories, *mens rea* is a prerequisite for meaningful punishment under many theories. GLANVILLE WILLIAMS, CRIMINAL LAW 30 (2d ed. 1961) ("The deterrent theory is workable only if the culprit has knowledge of the legal sanction. . . . The retributive theory presupposes moral guilt; incapacitation supposes social danger; and the reformative aim is out of place if the offender's sense of values is not warped.")

²² H.L.A. HART, PUNISHMENT AND RESPONSIBILITY, 158-73 (1968). The pure idea of a criminal embracing his punishment has come to seem archaic; since the late nineteenth century, the utilitarian notion that punishment should be forward looking—i.e., should promote the future good of society—has gained prominence. But as Hart notes, at two critical stages, punishment looks back to the criminal's act, not forward: "At the conviction stage, if punishment is to be justified at all, the criminal's act must be that of a responsible agent: that is, it must be the act of one who *could have* kept the law which he has broken. And at the sentence stage, the punishment must bear some sort of relationship to the act: it must in some sense 'fit' it or be 'proportionate' to it." *Id.* at 160.

²³ *United States v. Dotterweich*, 320 U.S. 286, 287 (1943) (Murphy, J., dissenting) ("it is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal").

²⁴ Culpability requirements are also well-suited to peculiarly American concepts of individualism and freedom of choice. *Morissette v. United States*, 342 U.S. 246, 252 (1952).

²⁵ *Id.* at 260 (stating that the crimes which require *mens rea* are those "which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high, and . . . the infamy is that of a felony.")

²⁶ *Id.* at 254-55 n.14.

shows that the concept of mens rea can be complex and malleable.²⁷ While proof of some form of mental state has long been a requirement of punishment, the level of guilt, the method of proving it and its relative importance in the criminal process, have all varied through time.²⁸ In approaching mens rea, lawmakers are influenced by the kinds of crimes prevalent in society and the requirements of regulation and enforcement. In this way the instinctive urge to blame and punish is tailored to the demands of the social moment.²⁹

Thus, mens rea has taken different shapes through history.³⁰ In its most rudimentary form, it exists as a kind of generalized moral blameworthiness. In the eleventh and twelfth centuries, when trials were often conducted through battle or ordeal, evidence of the defendant's general moral character could determine whether he would need to face trial at all.³¹ In the fifteenth century, mens rea began to be shaped by the widespread influence of Christian conceptions of morality. Within the church, wrongdoing took on an almost exclusively mental character. Under this influence, a defendant's malicious motive in committing an act became the central determinant of his guilt.³² This was malice in the interior sense of vicious

²⁷ *Powell v. Texas*, 392 U.S. 514, 536 (1968) ("The doctrines of . . . mens rea . . . [and] mistake . . . have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical and medical views of the nature of man.").

²⁸ See generally *supra* note 16; Binavince, *supra* note 16.

²⁹ There is an enduring tension between the demands of society's collective well-being, and values that protect individual liberty and justice. This is reflected in the criminal law through the relative prominence accorded the mens rea requirement, as against strict liability crimes. Though these interests are shifting, the concept of personal culpability has always endured. See Sayre, *supra* note 15, at 68.

³⁰ Prior to the twelfth century, mental intent was not a prerequisite for conviction. Yet the concept still hovered over the law. For one thing, the most prevalent crimes of the period—waylaying, robbery and rape—carried implicit proof of intent in the *actus reus*. Additionally, although lack of intent could not preclude conviction for killing, this did factor into punishment. Even in pre-Norman times, the laws of Alfred imposed the penalty of death only on those who intentionally killed. By the eleventh century, the king routinely granted pardons to those who had killed in self-defense. See Sayre, *supra* note 16, at 980-82.

³¹ Sayre, *supra* note 16, at 976. A person who had led a blameworthy life was thought more likely to be culpable—and also more expendable—than an upstanding citizen. *Id.*

³² Sins were born in the mind; the extent of an individual's guilt, and there-

and evil desire. Modern conceptions of knowledge and intent were not relevant to these religious concerns.³³

A variant of these doctrines persisted into modern times with the "moral-doctrine" and "lesser-legal-wrong" theories of culpability.³⁴ According to these theories, the central requirement of culpability is satisfied when the defendant knowingly engages in some form of immoral or illegal activity. His lack of knowledge and intent as to the specific elements of the crime then become irrelevant. For example, courts often justify the enforcement of strict liability for statutory rape under a moral-doctrine theory: because the defendant intentionally engaged in the presumed moral wrong of sexual activity, his lack of knowledge of his partner's age is irrelevant.³⁵ Similarly, under a lesser-legal-wrong theory, a defendant may be convicted of coercing a minor into prostitution, even though he mistakenly believed the young woman to be an adult.³⁶ Because the defendant knowingly committed the lesser-legal-wrong of coercing an adult into prostitution, he is fully culpable of the greater offense of inducing a minor into prostitution.

For the most part, the modern form of the mens rea requirement tends to de-emphasize the strictly moral quality of the defendant's mental state, except by implication. Instead, modern penal laws generally split culpability into levels of

fore the penance he owed before God, were essentially internal phenomena. Because the canonists were a dominating influence on rulers of the period and often direct participants in judicial proceedings, the religious conception of guilt became prevalent in the criminal law. See Binavince, *supra* note 16, at 14-17 and Sayre, *supra* note 16, at 984-89.

The ultimate extension of this concept is to eliminate *actus reus* altogether and make criminal guilt purely dependent on a culpable state of mind. While this obviously extreme position has never become part of the criminal law, it is echoed in the Model Penal Code's subjectivist approach to crime. Under the Modern Penal Code, a person is guilty of an attempted crime when his conduct would have constituted a crime if the facts were as he mistakenly supposed them to be. MODEL PENAL CODE § 5.01(1)(2) (Official Draft 1962).

³³ For example, by the late fifteenth century, there were two broad categories of murder—with and without malice. The former was punished by death, the latter by branding on the thumb. Sayre, *supra* note 16 at 996-97.

³⁴ See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 5.1, at 581-84 (1986).

³⁵ See discussion in *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 497-98 (E.D.N.Y. 1993).

³⁶ *United States v. Hamilton*, 456 F.2d 171 (3d Cir. 1972), *cert. denied*, 406 U.S. 947 (1972).

awareness including intent, knowledge, recklessness and negligence.³⁷ Rather than grades of immorality per se, these levels evince different degrees of consciousness of wrongdoing. An inference about the defendant's moral state may—but need not—be drawn from the conclusions reached about his level of awareness. Additionally, modern penal laws require mens rea to be particularized not only for the crime as a whole, but for each separate element of the crime.³⁸

B. *Pure Strict Liability*

The enduring link between mental culpability and punishment has not gone unchallenged. The direct alternative to requiring proof of mental intent is strict liability. Strict liability requires that a determination of guilt and punishment be based on the defendant's actions. The mental state with which he undertook those actions is irrelevant.³⁹

Advocates of a strict liability criminal regime attack the mens rea requirement as unsound, both pragmatically and philosophically. The practical arguments speak to the evidentiary burdens mens rea requirements place on prosecutors.⁴⁰ Depending on the crime, proving an individual's mental awareness can be a difficult, inherently problematic task.⁴¹ Faking

³⁷ MODEL PENAL CODE § 1.13 (Official Draft 1962); N.Y. PENAL LAW §§ 15.00, 15.05 (McKinney 1989).

³⁸ The practice whereby culpability levels are particularized to the specific elements of a crime is sometimes designated mens rea in the special sense. This is distinct from the general doctrine of mens rea which is the broad principle that wrongdoing should not be punished without evidence of a guilty mind. See Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571, 1577 (1978). The initial emergence of a particularized mens rea paralleled the declining influence of the canonists at the dawn of the Enlightenment. This served the practical purpose of facilitating criminal prosecutions. The previous emphasis on pure moral guilt had required proof of a willful and malicious intent for conviction, precluding prosecution of many culpable individuals. By the seventeenth century, mens rea meant not so much moral guilt but "reference to a precise intent at a given time." See Sayre, *supra* note 16, at 994-1004.

³⁹ See Saltzman, *supra* note 38, at 1575-79.

⁴⁰ *Morissette v. United States*, 342 U.S. 246, 263 (1952) ("The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction. . . .").

⁴¹ See Fisher, *supra* note 13, at 1. The difficulties and administrative demands of proving mental state were among the early justifications for criminal strict liability. In the 1852 case, *Regina v. Woodrow*, which upheld a strict liability con-

a lack of awareness is correspondingly easy, which thereby provides guilty people an opportunity to escape punishment, at great detriment to society. This has been cited as support for the allegedly greater deterrent power of strict liability.⁴² Depriving cunning defendants of the opportunity to escape punishment by feigning a lack of culpability would tend to discourage would-be offenders from crime. Moreover, the general increase in the efficiency of punishment and conviction under a strict liability regime, would act as a significant disincentive to would-be criminals.⁴³

The arguments run that, given the complexity of modern society, the criminal law should first strive to protect the efficiency and effectiveness of the social organization.⁴⁴ Concerns about an individual's personal awareness and responsibility may be luxuries of the past.⁴⁵ In an advanced post-industrial society, notions of individual responsibility may come to seem increasingly irrelevant. Social science questions whether personal responsibility for wrongdoing can ever be more than an idealized, largely chimerical concept.⁴⁶

The Constitution does not require proof of culpability as a prerequisite for criminal conviction and punishment.⁴⁷ The Supreme Court has also established that enforcing certain criminal statutes on a strict liability basis does not violate due

viction for the sale of adulterated tobacco, the court noted that "the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge." See *Binavince*, *supra* note 16, at 30 (citing *Woodrow*).

⁴² See generally Saltzman, *supra* note 38, at 1585-88.

⁴³ Saltzman, *supra* note 38, at 1585-88.

⁴⁴ In *United States v. Balint*, 258 U.S. 250 (1922), one of the earliest Supreme Court cases dealing with strict criminal liability, the Court engaged in this balancing act. The defendant, a pharmacist, was convicted of mislabeling drugs, although there was no proof of his mental state. The Court noted that "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." *Id.* at 254.

⁴⁵ But see Saltzman, *supra* note 38, at 1579 ("The 'better view' opposes strict liability. It is frequently asserted that strict criminal liability is unjust, that legislatures ought to refrain from imposing it, and that courts at least ought to presume that legislatures did not intend to impose it unless that intention is explicitly stated.").

⁴⁶ See *Binavince*, *supra* note 16, at 27-32.

⁴⁷ This may be because historically in America "intent was so inherent in the idea of the offense that it required no statutory affirmation." *Morissette v. United States*, 342 U.S. 246, 252 (1952).

process or equal protection per se.⁴⁸ However, the Court has yet to establish whether and in what way due process might limit the kinds of crimes that may be punished on a strict liability basis.⁴⁹

Currently, strict liability has a well-established, but limited foothold in the criminal law. It appears in essentially two forms. The first form is pure strict liability, where an offense is prosecuted without any reference to a defendant's mental state. Generally, these crimes are the so-called social-welfare or regulatory offenses.⁵⁰

The second form is partial strict liability. These offenses require proof of what may be characterized as a "threshold mens rea," whereby prosecutors establish the defendant's mental state for some, but not all, of the elements of a crime. Elements or factors linked to enhanced penalties are applied on a strict liability basis at either the conviction phase of a trial or the penalty phase. Federal enhanced penalty provisions and statutes are applied according to a threshold mens rea theory, representing a significant new incursion of strict liability into the criminal laws.⁵¹

The social-welfare offense is the primary application of pure strict liability in the criminal law.⁵² This entirely statutory offense is designed not to punish, but to promote the social good through regulation of those businesses and other activities that pose a particular risk to society.⁵³ A person who unwittingly violates a social-welfare statute is subject to the identical penalties as one who acts with calculation and cunning.

A social-welfare offense therefore is more akin to a breach of a civil regulation than a crime. It creates a kind of collective

⁴⁸ Beginning with *Balint* in 1922, the Supreme Court has enforced a series of criminal statutes on a strict liability basis. For a general history, see Saltzman, *supra* note 38.

⁴⁹ See discussion in *United States v. Cordoba-Hincapié*, 825 F.Supp. 485, 515-17 (E.D.N.Y. 1993) ("The outer limits of what is permissible have not been drawn, but such limits certainly exist").

⁵⁰ See *infra* notes 52-70 and accompanying text.

⁵¹ See *infra* notes 71-126 and accompanying text.

⁵² See generally Sayre, *supra* note 15.

⁵³ The emphasis is on "social betterment rather than the punishment of the crimes as in cases of mala in se." *United States v. Balint*, 253 U.S. 250, 252 (1922).

civil right of action for the social good.⁵⁴ In an industrial, urban society the improper or hazardous operation of otherwise legitimate businesses, for example, pose real risks to the health, safety and welfare of the populace. Because of the potential scope and seriousness of these risks, lawmakers choose to criminalize regulatory matters; while the established criminal law machinery is the most effective means of ensuring enforcement, the violations in themselves do not constitute an intrinsic wrong.⁵⁵ Thus, the origins of the social-welfare offense are, in the first instance, practical and political rather than ethical and religious.

For these reasons, the social-welfare offense is perhaps the most representative type of *malum prohibitum* crime. *Malum prohibitum* crimes are purely statutory creations, with no clear antecedents in the common law. This is in contrast to the other main category of crime, *mala in se*, which constitutes the traditional common law crimes.⁵⁶ Besides their different origin, these two categories of crimes are different in nature. The common law crimes are intrinsically evil, and widely perceived to be so. Society intuitively understands the moral wrong and social danger of rape, robbery and murder.⁵⁷ Certain *malum prohibitum* crimes may come to seem obviously criminal as well: for instance, a landlord's failure to install window guards in apartments with children⁵⁸ or a pharmacist mislabeling drugs.⁵⁹ Yet this perception comes only after public and political debate has determined that the danger posed by a particular activity warrants a criminal statute. Potential dangers of

⁵⁴ *Tenement House v. McDevitt*, 215 N.Y. 160, 169 (1915) ("This statute . . . must be viewed as defining, not a crime in the strict sense, but a civil right of action for the benefit of the public.").

⁵⁵ The Congressional intent in creating social-welfare offenses statutes is to make regulations "more effective" by providing for criminal conviction of violations. *Morissette v. United States* 342 U.S. 242, 254-55 (1952).

⁵⁶ *Tenement House*, 215 N.Y. at 168 ("The element of conscious wrongdoing, the guilty mind accompanying the guilty act, is associated with the concept of crimes that are punished as infamous.").

⁵⁷ See *Morissette*, 342 U.S. at 245-55 (stating that the *malum prohibitum* crimes are those "which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high . . . and the infamy is that of a felony").

⁵⁸ *People v. Nemadi*, 140 Misc.2d 712, 531 N.Y.S.2d 693 (N.Y.C. Crim. Ct. N.Y. County 1988).

⁵⁹ *United States v. Balint*, 258 U.S. 250, 252 (1922).

all sorts lie hidden in a complex, industrial society; in creating *malum prohibitum* crimes, legislatures seek to identify and protect against these dangers.⁶⁰

The decision to enforce these statutes on a strict liability basis is often made by the courts. Although legislatures are free to dispense with *mens rea* requirements expressly, statutes are often silent or ambiguous as to their culpability requirements. When faced with such a statute, courts must construe the appropriate *mens rea* requirement. The courts' ostensible goal is to discern what culpability requirements best comport with legislative intent. In making this determination, however, courts have usually examined the underlying fairness of dispensing with the *mens rea* requirement in a given situation.

A frequently stated justification for applying strict liability to social-welfare offense statutes is that doing so increases the statute's effectiveness in promoting social betterment.⁶¹ This outweighs the injustice of permitting the conviction of an unwitting offender.⁶² Arguably, this reasoning could be applied to diverse crimes as a broad justification for strict liability.⁶³ However there are three characteristics of the social-welfare offense that mitigate the harshness of strict liability. First, they usually carry only moderate penalties. Second, because the statutes regulate obviously hazardous activities, potential offenders are "on notice" of their exposure to liability. Third,

⁶⁰ The social-welfare offense emerged in Britain and America in the mid-nineteenth century, with the development of the modern industrial age. The hazards created by new industries and wide-spread urbanization seemed to create a new kind of crime. Professor Sayre identified two historical reasons why legislatures felt compelled to create this new kind of offense: (1) the shift of emphasis away from protection of individual interests; and (2) the practical need for criminal law machinery to enforce regulations. Sayre, *supra* note 15, at 65-67; see also Binavince, *supra* note 16, at 27-31 ("The earlier premise . . . was the security of the individual . . . to insulate him from the injustice of the social order was its fundamental purpose . . . [Modern society though demanded] a more extensive and effective regulation of social life.").

⁶¹ See *Nemadi*, 140 Misc.2d at 716, 531 N.Y.S.2d at 697 (upholding the strict liability enforcement of a statute penalizing landlords for failure to install window guards). The court noted that "[e]ffective enforcement of such broad based programs would be illusory if intent were made an element of these offenses." *Id.*

⁶² *United States v. Staples*, 114 S. Ct. 1793, 1812 (1994) (Stevens, J., dissenting) (noting that strict liability enforcement of statutes necessarily involves a possibility of injustice).

⁶³ *United States v. Morissette*, 342 U.S. 242, 259 (1952).

the statutes are only enforced against those responsible for the hazard.

Perhaps the chief mitigating factor is the moderate penalty typically attached to public welfare offenses.⁶⁴ One commentator has called the possibility of subjecting an unwitting offender to a severe penalty "revolting to the community sense of justice."⁶⁵ Society, however, readily will tolerate penalizing an unwitting offender with a moderate fine—particularly where doing so might contribute to the general social betterment. Thus the traditional use of *mens rea* as justifying punishment is not needed.⁶⁶

In addition to moderate penalties, another mitigating factor of these statutes is that they target only those already on "notice" that they have a heightened duty to the public. This "notice" is implicit in the responsibilities of persons involved in businesses that directly impact upon the public welfare. A person who deals with food preparation, hazardous substances or pharmaceuticals should know of the potential public hazards involved in these fields because it is his or her job to know. Thus alerted, such persons, therefore, take affirmative steps at their peril to protect the public welfare.⁶⁷ Moreover, liability is limited only to those with an opportunity to protect against the harm. Courts will consider whether the defendant was "helpless" to prevent the harm despite the due

⁶⁴ While recognizing a social value in strict liability enforcement of certain statutes, courts have long been reluctant to construe a strict liability crime where the statute carries a significant penalty. See *Staples*, 114 S. Ct. at 1796; *Price v. Sheffield Farms Co.*, 225 N.Y. 25, 29 (1918) ("The scope of the duty is one problem; the extent to which the breach may be visited with punishment, another.").

⁶⁵ Sayre, *supra* note 15, at 72 ("To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure.").

⁶⁶ *Tenement House v. McDevitt*, 215 N.Y. 160, 169 (1915) ("The law is not oblivious of considerations of degree . . . there is nothing that need shock any mind in the payment of a small pecuniary penalty.").

⁶⁷ *Staples v. United States*, 114 S. Ct. at 1798 (An individual in a responsible relation to the danger from which the statute seeks to protect the public, bears the risk of liability). See, e.g., Saltzman, *supra* note 38, at 1582. Professor Saltzman observes that statutes that target only those engaged in a particular business significantly decrease the potential injustice of strict liability enforcement. The individual is considered to have "assumed the risk;" criminal liability is imposed only upon those who chose to engage in an activity for which such liability is a necessary risk, regardless of the care taken."

vigilance. For instance, a statute making a landlord liable for prostitution that occurs on his premises will not be enforced when there is only a single incident of prostitution. This is because the landlord could not prevent this one incident with even a high level of vigilance.⁶⁸ Similarly, employees of a corporation which has committed a violation are not liable unless they are in a "responsible relation" to the harm. Thus where a corporation has violated the statute, only those employees who had the authority and responsibility to take preventive measures will be held liable.⁶⁹

Despite these restrictions, the standard of enforcement is more like strict liability than negligence. The entirely helpless are not liable. But those with a duty to act under the statutes are held to a standard of care greater than reasonableness. The Supreme Court has characterized the burden as "stringent" and "perhaps onerous." But because of their responsible relation to a known public hazard, this standard is what "the public has a right to expect."⁷⁰

⁶⁸ The social-welfare offense statute at issue in *Tenement House* compelled the owner of a tenement house to "prevent at his peril a vicious use which can rarely be continued without his fault" (e.g., use of the premises for prostitution). Judge Cardozo held that liability would not extend to situations where the owner was helpless to prevent occurrence, despite all due vigilance. *Tenement House*, 215 N.Y. at 167.

⁶⁹ *United States v. Dotterweich*, 320 U.S. 277 (1943). See also *United States v. Park*, 421 U.S. 658, 673 (1975) ("The duty imposed by Congress on responsible corporate agents is, we emphasize, one that requires the highest standard of foresight and vigilance, but . . . does not require that which is objectively impossible.").

⁷⁰ *Park*, 421 U.S. at 671. Nevertheless, courts often characterize social-welfare offenses in terms that suggest a negligence standard. For instance, in *Morissette*, the Supreme Court noted that often the offenses "are not in the nature of positive aggressions or invasions . . . but are in the nature of neglect where the law requires care, or inaction where it imposes a duty." *Morissette v. United States*, 342 U.S. 242, 255-56 (1952). The Court further noted that "[t]he accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect . . . from one who assumed his responsibilities." *Id.* For further discussion of this issue, see Saltzman, *supra* note 38, at 1581-85; see also *Tenement House*, 215 N.Y. at 167, where the court observes that the legislature "frames its rules to meet the average rather than the exceptional case."

C. *Threshold Mens Rea in Enhanced Penalty Cases*

Over the past decade, strict liability has emerged in a new form in the enforcement of enhanced penalties for narcotics offenses. Driven by escalating social alarm over the nation's drug problem, federal and state legislatures have created statutes and other provisions mandating significantly enhanced penalties linked to particular aggravating elements of drug crimes.⁷¹ The aggravating elements include: the type of controlled substance possessed,⁷² the quantity possessed,⁷³ whether there were sales to a minor,⁷⁴ and the proximity of drug sales to schools.⁷⁵

While courts consistently have enforced the enhanced penalties on a strict liability basis,⁷⁶ prosecutors must prove a "knowing" mens rea for the elements of the substantive crime. This creates what may be called a "threshold mens rea," established at trial for the underlying offense.⁷⁷ Courts hold that this threshold mens rea, establishing a base level of criminal or anti-social behavior, is sufficient culpability to justify imposing a wide range of sentences under enhanced penalty provisions.⁷⁸

⁷¹ See generally Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 192-94 (1993).

⁷² 21 U.S.C. § 841(b)(1) (1988 & Supp. II 1990) (providing for enhanced penalty for possession of crack cocaine).

⁷³ 21 U.S.C. § 841(b) (1994).

⁷⁴ 21 U.S.C. § 859 (1994).

⁷⁵ 21 U.S.C. § 860 (1994).

⁷⁶ *United States v. de Velasquez*, 28 F.3d 2, 5 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 679 (1994).

⁷⁷ This Comment employs the term "threshold mens rea" as a way of distinguishing this apparently new kind of strict liability (in the absence of any identifying label used by the federal courts). See *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 533 (E.D.N.Y. 1993) (Abandoning culpability distinctions at the sentencing stage assumes that "once a person crosses the threshold into the federal narcotics laws, the mens rea principle falls away and, thereafter, only acts count . . .").

⁷⁸ *Id.* Antecedents of this kind of strict liability include the moral-wrong and lesser-legal-wrong doctrines of culpability. Like the federal-enhanced penalty provisions, these doctrines assume that culpability is necessary only to establish a base level of criminality or immorality. For a discussion of the moral- and lesser-wrong doctrines, see *supra* note 34-36 and accompanying text. With the notable exception of statutory rape and felony murder, these theories have found little practical

This new application of strict liability is made possible by several innovations in federal criminal law instituted by Congress in the 1980s. Congress, responding to concerns about judges' discretionary power at sentencing, enacted legislation designed to control the sentencing phase of the criminal proceeding.⁷⁹ Such legislation took two forms: the Sentencing Guidelines, a set of instructions applicable to all federal crimes; and a series of mandatory-minimum statutes, prescribing penalties for certain kinds of narcotics and firearm offenses. Both forms of legislation link punishment to various factors that are not elements of the substantive crime—such as aggravating factors of the crime or aspects of the defendant's personal history. Courts apply these factors on a strict liability basis.⁸⁰

The lack of a scienter requirement has less of an impact on the defendant under the Sentencing Guidelines. In determining the sentence, the Guidelines instruct judges to address multiple factors related both to the crime and the defendant's history and circumstances.⁸¹ Thus, a particular aggravating

application in the criminal law. A tangentially related practice is the strict liability enforcement of the jurisdictional element in certain federal crimes. The jurisdictional element is generally a morally neutral factor which could not be construed as an aggravating element of the substantive crime. *United States v. Kierschke*, 315 F.2d 315 (6th Cir. 1963). The defendant's knowledge of this factor is "irrelevant" because it does not bear on his criminality. *United States v. Baker*, 693 F.2d 183 (D.C. Cir. 1982). However, scienter requirements for the substantive elements of the crime remain in effect. Thus, in the federal crime of possession of a stolen automobile, prosecutors must prove the defendant knowingly possessed the car, and knew that the car was stolen. But it need not be shown that the defendant knew the car was transported in interstate commerce, because this is a purely jurisdictional element. *Pilgrim v. United States*, 266 F.2d 232 (9th Cir. 1962).

⁷⁹ These Congressional initiatives included the Sentencing Reform Act, the Sentencing Guidelines, and the mandatory-minimum statutes. The initiatives were intended to make sentencing more certain by limiting judicial discretion. Congress also was motivated by widespread disaffection with the rehabilitative model of punishment. See Hatch, *supra* note 71, at 62.

⁸⁰ The mandatory-minimum statutes are silent as to mens rea. Through statutory construction, courts have determined that Congress intended these penalties to be enforced on a strict liability basis. See *infra* notes 81-87 and accompanying text. The Sentencing Guidelines originally contained a provision instructing the court to consider the defendant's mental state, but this was later dropped; see *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 530 (E.D.N.Y. 1993). Currently, the Guidelines do not require a sentencing court to consider a defendant's knowledge of quantity. UNITED STATES SENTENCING COMMISSION FEDERAL SENTENCING MANUAL, § 1b1.3, comment n.2 (West 1994); see also *United States v. de Velasquez*, 28 F.3d 2, 5 (2d Cir. 1994).

⁸¹ Each factor is given a particular weight. Some factors, such as aggravating

element applied on a strict liability basis is not the sole determinant of the defendant's fate.⁸² The mandatory-minimum statutes are far more severe. These statutes require judges to impose a specified minimum sentence linked to an aggravating factor.⁸³ Thus, a defendant's mistake of fact as to quantity can carry very serious consequences.⁸⁴

Courts interpreting the mens rea requirements of both the mandatory-minimum statutes and the Sentencing Guidelines have emphasized their tendency to bifurcate the trial into discrete phases: a trial phase and a penalty phase.⁸⁵ At the trial phase, prosecutors establish a threshold mens rea to convict the defendant of the substantive crime. At the penalty phase, therefore, there is no need to prove an additional mens rea for any of the aggravating factors linked to severity of

factors in the crime, will add to the sentence. Mitigating factors, based on the defendant's family circumstances or history, will reduce the sentence. See *Cordoba-Hincapie*, 825 F. Supp. at 530.

⁸² See *United States v. Ekwunoh*, 813 F. Supp. 168 (E.D.N.Y.), sentence vacated and remanded, 12 F.3d 368 (2d Cir. 1993). Additionally, because the Sentencing Guidelines permit a measure of discretion, theoretically the judge, in determining the sentence, may take into account evidence of the defendant's mistake of fact. *Id.*

⁸³ For instance, under the substantive crime of possession with intent to distribute, prosecutors establish a threshold mens rea for the defendant's knowledge of possession of a controlled substance according to the statute's requirements. After conviction, the judge determines punishment based on the mandatory minimum statute for quantity, without reference to the defendant's knowledge of quantity. See *United States v. Pineda*, 847 F.2d 64 (2d Cir. 1988).

Another factor contributing to the relative harshness of the mandatory-minimum statutes are the sentencing effects of so-called "cliffs." "Cliffs" refers to the fact that a defendant could receive dramatically different sentences for an almost identical amount of drugs, depending on whether the quantity possessed is just under or just over the statutory threshold. This effect is much diminished under the Sentencing Guidelines because of the greater number of intermediary grades. See Steven J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV., 199, 209 (1993).

⁸⁴ In practice, the severity of mandatory minimums has been somewhat tempered by the tendency of prosecutors to use them as bargaining chips. The New York narcotics laws that also link penalty to quantity possessed originally had a mandatory-prosecution provision, but this was later dropped as unduly harsh. See Schulhofer, *supra* note 83, at 202-08.

⁸⁵ In fact, under the Sentencing Guidelines, prosecutors need not even allege certain facts linked to enhanced penalties. *United States v. Campuzano*, 905 F.2d 677, 679 (2d Cir. 1990); see also Schulhofer, *supra* note 83, at 205-06 (Mandatory minimums are fact based, not charge based. Where a judge finds by a preponderance of the evidence that the defendant possessed a certain quantity, then the enhanced penalty is imposed.).

sentence. These are not part of the "corpus delicti" of the crime, and therefore are factors beyond the reach of mens rea.⁸⁶

Courts applying penalties on this basis repeatedly emphasize that the defendant's culpability has been sufficiently established at trial. The courts reason that any level of involvement in illegal narcotics activity constitutes such an obvious wrong that all further culpability distinctions are pointless.⁸⁷ This serves to distinguish these cases from pure strict liability cases and implicitly endorses the continuing importance of a culpability requirement.

Over the past decade, the Second Circuit has heard a series of appeals of enhanced penalties imposed under a threshold mens rea theory in narcotics cases. These penalties arise from statutes or Guidelines linking sentence lengths to various aggravating factors, including the type of drug, the proximity of the sale to a school house and the quantity in the possession of the defendant at the time of arrest. Through the years, the Second Circuit has developed an almost pure strict liability standard for these aggravating factors. The court precludes a defendant from using lack of knowledge as an affirmative defense—even where knowledge of the aggravating element was not reasonably foreseeable.

The Second Circuit elucidated its basic position in *United States v. Falu*,⁸⁸ a 1985 case involving what has come to be known as the school-yard enhanced-penalty statute. The school-yard statute mandates an additional prison term when a defendant distributes a controlled substance within 1,000 feet of a school.⁸⁹ The enhanced-penalty statute does not specify a mens rea for knowledge of the school's proximity; the statute for the substantive crime of possession with intent to distribute a controlled substance specifies "knowingly" as the culpability requirement.⁹⁰

The defendant in *Falu* claimed he should not be subject to the enhanced penalty because he did not know he was near a school. He argued that the court should construe the statute as

⁸⁶ *United States v. de Velasquez*, 28 F.3d 2, 5 (1994).

⁸⁷ *Id.* at 5; *United States v. Falu*, 776 F.2d 46, 50 (2d Cir. 1985).

⁸⁸ 776 F.2d 46 (2d Cir. 1985).

⁸⁹ 21 U.S.C. § 860 (Supp. II 1990).

⁹⁰ *Falu*, 776 F.2d at 48; 21 U.S.C. § 845(a) (1988).

requiring knowledge, because otherwise a defendant would not have "fair notice" of the enhanced penalties. He pointed out that in urban areas, schools are often not clearly visible—indeed, the prosecution stipulated that the school could not be seen from where the drug sale occurred.⁹¹

Nevertheless, the court imposed the enhanced penalty on a strict liability basis. It held that to do otherwise would "undercut" the congressional intent behind the statute, which was to create an entirely drug-free zone in areas surrounding schools.⁹² The court further held that the statute was a rational means toward that end; yet the court did not address how and to what extent imputing a knowledge requirement onto the statute would undercut the statute's effectiveness.⁹³

According to the court, it was not "criminalizing otherwise innocent activity" by imposing the enhanced penalty. The defendant's culpability had been proven at trial, said the court, providing a threshold of "obviously anti-social conduct."⁹⁴ The court acknowledged that schools are not always recognizable, but held that persons involved in narcotics should "bear the burden" of ascertaining whether a school is nearby or face the enhanced penalty.⁹⁵

In *United State v. Collado-Gomez*,⁹⁶ using essentially the same reasoning, the Second Circuit again enforced an enhanced-penalty statute without proof of knowledge. In *Collado-Gomez*, the statute mandated additional penalties for possession of crack cocaine. The defendant claimed he thought the drug he possessed was heroin, not crack cocaine. Unlike *Falu*, the defendant in *Collado-Gomez* mounted a constitutional challenge, arguing that due process required proof of knowledge before the enhanced penalty could be applied.⁹⁷

Despite the fact that the defendant was expressly challenging the statute on constitutional grounds, the court hardly

⁹¹ *Falu*, 776 F.2d at 49.

⁹² *Id.* at 50.

⁹³ *Id.*

⁹⁴ *Id.* In support of this proposition, the court cited four federal cases; three of these involved strict liability for jurisdictional elements, and not enhanced penalties. Thus, they do not support the court's position.

⁹⁵ *Id.* at 50.

⁹⁶ 834 F.2d 280 (2d Cir. 1987).

⁹⁷ *Id.* at 280-81.

elaborated on its reasoning in *Falu*. It held that due process was satisfied because Congress had a "clear, unequivocal and rational" purpose in enacting the statute.⁹⁸ The court observed that, like the enhanced penalties of the school-yard statute, Congress enacted enhanced penalties for possession of crack cocaine in order to deter "a particularly insidious drug transaction."⁹⁹ However the court appeared to sidestep the fact that the defendant was not challenging the constitutionality of the statute per se, but its enforcement without proof of mens rea.¹⁰⁰

At this point, the Second Circuit had clearly established that mandatory-minimum statutes did not require proof that a defendant have knowledge of the aggravating factor linked to punishment.¹⁰¹ However it remained unresolved whether a defendant could establish as an affirmative defense that he could not have reasonably foreseen the quantity possessed. In *United States v. Ekwunoh*,¹⁰² District Court Judge Jack B. Weinstein sought to establish a foreseeability requirement for quantity.

In *Ekwunoh*, Judge Weinstein determined that the defendant's sentence should not be dependent solely on the quantity of narcotics she actually possessed because that amount was not foreseeable. The defendant, sent by her boyfriend, had collected a suitcase at the airport which contained

⁹⁸ *Id.* at 281.

⁹⁹ *Id.*

¹⁰⁰ *Id.* Moreover, the court dismissed the possibility that proof of knowledge for the aggravating factor would protect individuals of limited culpability. Such a requirement, the court held, would only protect "those who are simply indifferent about the illegal narcotic drugs they sell." *Id.* The court observed that the defendant's claim that he believed he possessed not crack but heroin "points up the remoteness of the danger" that enhanced penalties would be unjustly applied. *Id.* at n.1.

¹⁰¹ In *United States v. Pineda*, 847 F.2d 64 (2d Cir. 1988), the Second Circuit applied identical reasoning to the quantity issue. The defendant claimed that the strict liability enforcement of the enhanced-penalty statute linked to quantity violated both his due process and equal protection rights. In its one page opinion, the court dismissed the due process challenge as "frivolous," recounting its reasoning from *Falu* and *Collado-Gomez*. *Id.* at 65. The court dismissed the equal protection claim after finding that Congress had a rational basis for classifying penalties based on weight. The court did not identify this basis. Moreover, as in *Collado-Gomez*, the court side-stepped the defendant's specific constitutional challenge of the statute's lack of mens rea requirement. *Id.*

¹⁰² 813 F. Supp. 168 (E.D.N.Y. 1993).

more than a kilogram of heroin. She had made similar pickups for her boyfriend, a drug smuggler, on previous occasions. This previous experience led her to believe the suitcase would contain no more than 400 grams of heroin. The court imposed a sentence based on the quantity the defendant had expected to possess,¹⁰³ noting that she "was no more than an obedient underling" in her boyfriend's narcotics operation.¹⁰⁴

The court held that it was "essential" to require foreseeability for quantity-based sentences under either the mandatory-minimum statutes or the Guidelines.¹⁰⁵ In justifying its apparent departure from Second Circuit precedent, the *Ekwunoh* court observed that the Circuit's position on mens rea was of "doubtful constitutionality,"¹⁰⁶ but the court did not base its opinion on constitutional grounds.

Indeed, the legal grounding for the court's opinion was somewhat unclear. The court provided an exposition of the historical importance of mens rea and the real world protection it offered unwitting offenders from unfairly severe sentences. The court concluded that dispensing with mens rea for quantity would involve an "erosion of a fundamental protection of our Anglo-American system of criminal justice," which Congress could not have intended. As additional precedent, the *Ekwunoh* court cited the "foreseeability" requirement that the Sentencing Guidelines specify as the mens rea for conspiracy offenses. The court held that the Guidelines' mens rea requirements should apply to the mandatory-minimum quantity-based statutes for possession. The court did not clarify, however, exactly why a mens rea requirement for conspiracy should apply to a possession offense.¹⁰⁷

The *Ekwunoh* court's decision on the defendant's culpability was clearly influenced by her relatively peripheral role in the narcotics enterprise. Among the court's paramount concerns was the protection mens rea offers to individuals of limited culpability. In furtherance of that end, the court proposed a "foreseeability" test for quantity as a sentencing factor under which an individual's position in the narcotics enterprise plays

¹⁰³ *Id.* at 179-80.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 178-80.

¹⁰⁶ *Id.* at 171.

¹⁰⁷ *Ekwunoh*, 813 F. Supp. at 174-75.

an operative role. For defendants with a minor role, the quantity imputed would be the lesser of what the defendant actually possessed or what he reasonably believed he possessed. Actual quantity would determine the sentence of any other defendant, including one who was willfully blind to the quantity of drugs in her possession, one who had no limiting belief as to quantity, and one who was a "central or directing force" in the narcotics enterprise.¹⁰⁸

When *Ekwunoh* reached the Second Circuit, the court looked skeptically on Judge Weinstein's proposal to employ a foreseeability standard but reserved decision on the issue.¹⁰⁹ Instead, the court reversed on the ground that the lower court had made a clearly erroneous ruling, by determining that the defendant could not have foreseen the quantity of drugs she possessed.¹¹⁰

Meanwhile, in another case, Judge Weinstein continued to insist on the importance of mens rea in determining penalties. In *United States v. Cordoba-Hincapie*,¹¹¹ two Colombian defendants had separately smuggled a quantity of heroin into the United States, each believing the substance to be cocaine. As recounted in the court's opinion, the defendants were persons of minimal sophistication and education, who served the narcotics enterprise in the lowly position of "drug mule." Thus, the court found their mistake of fact to be credible and calculated their penalties under the Sentencing Guidelines for cocaine possession.¹¹²

The *Cordoba-Hincapie* court held that there is a rebuttable presumption that defendants know the nature of the controlled substance in their possession. But the defendant can challenge this presumption at sentencing. As in *Ekwunoh*, the *Cordoba-Hincapie* court obliquely acknowledged that this position was contrary to Second Circuit precedent. The court partly justified its departure from precedent by distinguishing the facts of *Cordoba-Hincapie* from the Second Circuit cases. It went on to observe, however, that in the previous holdings, the Second Circuit had dismissed "the importance of the mens rea princi-

¹⁰⁸ *Id.* at 174.

¹⁰⁹ *United States v. Ekwunoh*, 12 F.2d 368, 370-71 (2d Cir. 1993).

¹¹⁰ *Id.*

¹¹¹ 825 F. Supp. 485 (E.D.N.Y. 1993).

¹¹² *Id.* at 488-89.

ple without considering the integral role that principle plays in the rational operation of a carefully constructed criminal code that has deterrence as a primary objective."¹¹³

The most unusual aspect of *Cordoba-Hincapie* was that the court endeavored to find a constitutional grounding for the mens rea principle. The court stated that due process implicitly requires proof of mens rea. As support, it pointed to the long legal and political history of culpability requirements. It further noted that the requirement is a matter of "fundamental fairness," a chief concern of due process. The court acknowledged that the Supreme Court has upheld the strict liability of enforcement of certain crimes, but asserted that this does not preclude a constitutional grounding for some form of mens rea requirement. According to the court, the extent of culpability required should be determined by factors such as the nature of the crime and the penalty imposed.¹¹⁴

Additionally, the *Cordoba-Hincapie* court rejected the Second Circuit's position that a defendant's mental state was relevant only to conviction and not to sentencing. It stated, to the contrary, that culpability was uniquely critical under the "complex penalty hierarchy" of the narcotics statutes and the Sentencing Guidelines. The court observed that "it is not prudent to construct an elaborate ladder of punishment and then automatically bump defendants up that ladder without regard to their mental states." Mistakes of fact, the court noted, are "equally relevant in applying the criminal law to the guilty as to the innocent."¹¹⁵

The Second Circuit did not adopt the tests suggested in *Cordoba-Hincapie* and *Ekwunoh*. In *United States v. Imariagbe*¹¹⁶ the court precluded a defendant from using lack of knowledge as an affirmative defense in a drug possession case. In this case, the defendant offered "credible" testimony that he did not know the amount of heroin he possessed. Yet, the court held this to be irrelevant to the punishment phase of trial, and imposed a sentence based on the quantity actually possessed.¹¹⁷

¹¹³ *Id.* at 531.

¹¹⁴ *Id.* at 515-18.

¹¹⁵ *Id.* at 533.

¹¹⁶ 999 F.2d 706 (2d Cir. 1993).

¹¹⁷ *Id.* at 707-08.

In another case, the Second Circuit took a further step toward applying a pure strict liability standard at sentencing. *Ekwunoh* had left open the question of whether a "foreseeability" standard should be applied to a defendant's knowledge of quantity. In *United States v. de Velasquez*,¹¹⁸ the court expressly rejected that notion. The court held that "as a general proposition, a defendant may be sentenced for the entire quantity of drugs in his possession even if the total quantity was not foreseeable."¹¹⁹

The defendant in *de Velasquez* had been convicted for smuggling heroin into the country. After her arrest at the airport, customs agents determined that she was carrying heroin in her stomach and in her shoes. The woman admitted knowledge of the heroin she had swallowed but claimed she was unaware and could not have reasonably foreseen the additional heroin she carried in her shoes.¹²⁰

The court held that under the Guidelines the sentence should be determined by the total quantity of heroin she carried, even if that amount was unforeseeable.¹²¹ The court reasoned that once a defendant "knowingly traffics in drugs," he bears the risk "that his conduct may be more harmful to society than he intends or foresees." Thus, it held that courts should disregard a defendant's "fortuitous lack of knowledge or foreseeability—fortuities which apparently occur with some frequency."¹²²

Despite the sternness of this language, the *de Velasquez* court did qualify its strict liability rule to make a small allowance for a mistake of fact. The court stated that strict liability should be applied in the "ordinary mine-run case," but added that in an unusual situation, the defendant's belief might be so far removed from actuality that sentencing for actual quantity would be "grossly unfair."¹²³ The court observed that "a fertile

¹¹⁸ 28 F.3d 2 (2d Cir. 1994).

¹¹⁹ *Id.* at 3.

¹²⁰ *Id.*

¹²¹ The court cited a section of Sentencing Guidelines commentary which provides that drug couriers should be sentenced without regard to the reasonable foreseeability of the quantity of drugs possessed. *Id.* at 5.

¹²² *Id.* at 6.

¹²³ *de Velasquez*, 28 F.3d at 6 (quoting *United States v. Imariagba*, 999 F.2d 706, 708 (2d Cir. 1993)).

imagination can conjure bizarre situations where the defendant's possession is tenuous and fleeting."¹²⁴ In such a case, a downward departure under the Guidelines would be appropriate.¹²⁵ The court did not further define the distinctions between an "extraordinary case" and an "ordinary mine-run" case.¹²⁶

II. BACKGROUND OF MENS REA FOR NARCOTICS CASES IN NEW YORK STATE

Like the federal enhanced-penalty provisions, New York State drug laws mandate specified penalties based on the nature and quantity of the controlled substance a defendant possessed. The element of quantity acts to divide the substantive offense into seven degrees or grades of increasing seriousness. Defendants who possess a minimum amount of a controlled narcotic are guilty of seventh degree possession, those who possess the maximum specified amount are guilty of first degree possession. The statute requires the imposition of penalties of increasing severity for each degree of offense. The statute is divided into similar degrees and penalties based on the nature of the substance possessed.

The New York narcotics statute specifies a "knowing"

¹²⁴ *Id.* at 5.

¹²⁵ Such a discretionary downward departure would presumably only be possible when the defendant was sentenced under the Sentencing Guidelines. Under the mandatory minimums, which do not permit judicial discretion, the judge would be obligated to impose the minimum quantity-based sentence, even when victim of an extraordinary mistake of fact. See *supra* notes 83-84 and accompanying text.

¹²⁶ *de Velazquez*, 28 F.3d at 6. It is unclear to what extent—if any—the Second Circuit's allowance for the "extraordinary case" will mitigate the general strict liability rule. A district court case, *United States v. Coates*, 739 F. Supp. 146 (S.D.N.Y. 1990), involving the school-yard enhanced-penalty statute, is perhaps illustrative of the extreme situation contemplated by the court in *de Velazquez*. In *Coates*, the police caught the defendants in possession of cocaine while the defendants were waiting for departure aboard an Amtrak train at Penn Station in New York City. Prosecutors sought to impose an additional penalty under the school-yard statute, because the train awaiting departure was located less than 1,000 feet away from the Taylor Business school, an adult vocational facility. Calling this "simple overreaching" and "beyond logical and acceptable bounds," the court refused to apply the statute. *Id.* at 153. The court suggested the importance of mens rea, calling the defendant's presence near the school "undoubtedly unknowing." *Id.* The court did not suggest guidelines for a proper application of the statute beyond noting the absurdity of its use in the given circumstances.

culpability level. By the time *People v. Ryan* was decided, it was well-established that this mens rea extended to both knowledge of possession and, unlike in the federal courts, knowledge of the nature of the substance possessed. Prosecutors may establish knowledge simply by proving possession itself, which gives rise to a rebuttable presumption of knowledge.¹²⁷ The presumption may be rebutted by evidence of a defendant's mistake of fact.¹²⁸

While the Court of Appeals had never directly addressed the mens rea requirement for the element of weight before *Ryan*,¹²⁹ a 1980 case appeared to indicate that a defendant's knowledge of weight was an element to be considered at sentencing. In *People v. Scarborough*,¹³⁰ the defendant had claimed that prosecutors had not proven her knowledge of either the nature or weight of the controlled substance. Without elaborating on the issue, the court concluded that the prosecutors had met their burden.¹³¹

¹²⁷ *People v. Reisman*, 29 N.Y.2d 278, 277 N.E.2d 396, 327 N.Y.S.2d 342 (1971). This case held that while the statute required proof that the defendant's "knowingly" possessed the controlled substance, the defendant's actual possession created a rebuttable presumption of this knowledge. The court held that this proposition followed from the "ancient rule" that possession of the "fruits of any crime" creates an inference of guilt. *Id.* at 285, 277 N.E.2d at 400, 327 N.Y.S.2d at 348. The court noted that this inference was particularly well-suited to narcotics offenses, because controlled substances are valuable and the trade in narcotics is conducted "with the utmost secrecy and care". *Id.* at 287, 277 N.E.2d at 401, 327 N.Y.S.2d at 349.

¹²⁸ *People v. Tramuta*, 109 A.D.2d 765, 486 N.Y.S.2d 82 (2d Dep't 1985). Here, the defendant was convicted of sale and possession of LSD to undercover officers. However, throughout a protracted series of negotiations and at the actual sale, both the defendant and the officers referred to the drug as mescaline. After the defendant's arrest, it turned out that the substance was in fact not mescaline but LSD. Although the terms mescaline and LSD are often used interchangeably, and actual mescaline is rarely available in New York, evidence showed the defendant was unaware of these facts. Based on this lack of knowledge, the court upheld the conviction and the sentence for the lesser charge of sale and possession of mescaline. *Id.* at 767-68, 486 N.Y.S.2d at 83-84.

¹²⁹ A 1978 trial court decision denied the defendant's motion to reduce charges based on his lack of knowledge of weight. The court stated that the evidentiary difficulties of establishing knowledge of weight precluded requiring a mens rea for this element. *People v. Davis*, 95 Misc.2d 1010, 408 N.Y.S.2d 748 (Sup. Ct. Dutchess County 1978).

¹³⁰ 49 N.Y.2d 364, 402 N.E.2d 1127, 426 N.Y.S.2d 224 (1980).

¹³¹ *Id.* at 374, 402 N.E.2d at 1133, 426 N.Y.S.2d at 230. This is indicative of the then "prevailing view of the law" that knowledge of quantity was not an element of a narcotics offense. Prosecutors and trial courts both acted on this as-

III. *PEOPLE V. RYAN*

A. *Facts and Procedural History*

The defendant, Robert Ryan, placed an order for hallucinogenic mushrooms with his friend, Hopkins. Hopkins proceeded to order the mushrooms—"in the usual shipment"—from a mutual friend in San Francisco, who then sent the mushrooms to New York.¹³² The police in New York had been tipped off to the transaction and intercepted the package. An investigator, disguised as a Federal Express employee, delivered the package to Hopkins. Upon accepting the package, Hopkins was arrested.¹³³

Hopkins thereupon decided to help the police inculcate his friend Ryan, who was still awaiting his order of mushrooms. Hopkins phoned Ryan to tell him that the shipment had arrived.¹³⁴ During this call, Hopkins made two references to weight: he first told Ryan that the shipment contained "a shit load of mushrooms" to which Ryan responded, "I know." Subsequently, Hopkins indicated that the shipment contained about two pounds of mushrooms.¹³⁵ After this conversation, Hopkins delivered a substitute package to Ryan. Thinking it contained his mushrooms, Ryan accepted the package. Police officers then arrested Ryan.¹³⁶

Ryan was charged with attempted second-degree possession of a controlled substance.¹³⁷ At trial, the prosecution es-

sumption. *People v. Crooks*, 160 Misc.2d 813, 610 N.Y.S.2d 1021 (Sup. Ct. Kings County 1994). See also *People v. Quinones*, 161 Misc.2d 901, 905, 615 N.Y.S.2d 630, 632 (Sup. Ct. New York County 1994) ("Although the *Ryan* issue may have been ripe for litigation in this case and countless others, the fact remains that no one thought of it in some twenty years, including the framers of the pattern jury instructions."). In the dozen years between *Scarborough* and *Ryan*, the reported cases indicate that knowledge of quantity was not an issue at the appellate level.

¹³² *People v. Ryan*, 82 N.Y.2d 497, 498-99, 626 N.E.2d 51, 53-54, 605 N.Y.S.2d 235, 236-37 (1994). The hallucinogenic ingredient in hallucinogenic mushrooms is the controlled substance psilocybin.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ A felony which requires possession of at least 625 milligrams of an hallucinogen. N.Y. PENAL LAW § 220.18(5) (McKinney 1989). Ryan also faced a lesser-

tablished that the package Ryan ordered contained a quantity of hallucinogen above the statutory threshold. The prosecution did not establish a definition of the typical amount of psilocybin for hallucinogenic mushrooms.¹³⁸ At the close of trial, the court denied Ryan's motion to dismiss, which he made on the grounds that prosecutors did not prove knowledge of quantity.¹³⁹ Ryan was convicted of second-degree attempted possession of a controlled substance.¹⁴⁰ The Third Department denied Ryan's appeal, on the grounds that the specified mens rea "knowingly" modified possession itself and not the quantity possessed.¹⁴¹

B. *The Court of Appeals Decision*

The Court of Appeals began by noting that the knowledge requirement had long applied to the nature of the controlled substance.¹⁴² Because the nature of the substance (in this case, an hallucinogen) is specified after the weight requirement, the court reasoned that "knowingly" must also apply to weight.¹⁴³ The court concluded, in fact, that this was the obvious meaning of the statute.¹⁴⁴

The court next examined this conclusion according to two rules of statutory construction found in the New York Penal Law. First, the court observed that the rule which precludes the imposition of strict liability in the absence of express statutory language mandated a mens rea requirement for weight.¹⁴⁵ The court then applied the Penal Law rule which

included charge of seventh-degree possession, a misdemeanor with no minimum weight requirement. *Ryan*, 82 N.Y.2d at 498-99, 626 N.E.2d at 53-54, 205 N.Y.S.2d at 236-37.

¹³⁸ It also did not establish whether psilocybin occurs naturally in a variety of mushroom or is added. *Id.*

¹³⁹ *People v. Ryan*, 184 A.D.2d 24, 25, 591 N.Y.S.2d 218, 219 (3d Dep't 1992).

¹⁴⁰ The court sentenced him to ten years to life imprisonment, a sentence partly determined by Ryan's second-offender status. *Id.*

¹⁴¹ *Id.* at 25, 591 N.Y.S.2d at 220.

¹⁴² *Ryan*, 82 N.Y.2d at 501, 626 N.E.2d at 54, 605 N.Y.S.2d at 238 The relevant portion of the penal law states: "A person is guilty of criminal possession of a controlled substance in the second degree when he knowingly and unlawfully possesses 5.625 milligrams of a hallucinogen." N.Y. PENAL LAW § 220.18(5).

¹⁴³ *Ryan*, 82 N.Y.2d at 502, 626 N.E.2d at 51, 605 N.Y.S.2d at 238.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

mandates that the culpability level specified in a statute presumptively applies to every element of the crime, absent clear legislative intent to the contrary. The court concluded that the mens rea "knowingly" specified by the statute at issue in *Ryan* presumptively applied to the element of weight, because there was no evidence of legislative intent to the contrary.

The court observed that its holding was consistent with basic ideas of fairness and proportionality. It stated that to subject a defendant to "drastic differences" in potential penalties based upon quantity without culpability distinctions based on mental state "would be inconsistent with notions of individual responsibility and proportionality prevailing in the penal law."¹⁴⁶ The court further observed that a defendant who is unaware of the quantity of drugs he possesses is "not deserving of enhanced punishment [linked to that quantity]."¹⁴⁷

The court next suggested several evidentiary guidelines for proving knowledge of quantity. In aggregate-weight cases, prosecutors could establish an inference of knowledge through evidence of the negotiations surrounding a drug sale or thorough evidence showing that the defendant "handled" the controlled substance.¹⁴⁸ The court acknowledged the greater evidentiary hurdles with pure weight cases, but suggested these could be solved through either evidence showing the typical weight per dose, or evidence showing the defendant knew he had a typical dose.¹⁴⁹

The court concluded that prosecutors had not shown Ryan's knowledge of the weight of the psilocybin, a controlled substance measured according to its pure weight.¹⁵⁰ Although there was evidence that he knew of the two pound aggregate weight of the mushrooms, this was insufficient for a pure weight offense.¹⁵¹ For an inference of knowledge, the court needed evidence establishing the "typical" amount of psilocybin in a dose of mushrooms and establishing how psilocybin gets into mushrooms.¹⁵² Thus, the court reduced the charges

¹⁴⁶ *Id.* at 502-03, 626 N.E.2d at 51-52, 605 N.Y.S.2d at 238-39; see N.Y. PENAL LAW § 15.05(4) (McKinney 1989).

¹⁴⁷ *Ryan*, 82 N.Y.2d at 503-05, 626 N.E.2d at 52-53, 605 N.Y.S.2d at 239-41.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 505-06, 626 N.E.2d at 53-54, 60 N.Y.S.2d at 241-42.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² In other words, whether it grows naturally or is injected. *Ryan*, 82 N.Y.2d

against Ryan from second degree attempted possession, to seventh degree attempted possession, for which there is no weight threshold.

C. Analysis

The Court of Appeals' holding in *People v. Ryan* is consistent with the long-established rule making proof of mental culpability for each element of a crime a prerequisite to criminal conviction and punishment. Moreover, the narcotics statute at issue in *Ryan* is intrinsically different from the social-welfare and regulatory-offense statutes which represent the chief exception to this general rule. Unlike social-welfare offenses, the penal statute in *Ryan* targets persons engaged in a purely criminal activity; it carries serious penalties, ranging up to life imprisonment. Dispensing with culpability requirements for conviction under this statute would be a rare and unwarranted expansion of strict criminal liability.¹⁵³

1. Narcotics Offense Statutes Fall Outside the Established Use of Strict Criminal Liability

Narcotics offense statutes serve a different purpose than social-welfare statutes or regulatory criminal statutes. Narcotics statutes seek not to control but to eliminate a criminal activity: the use and sale of substances which the legislature has determined pose a danger to society. Traditional strict liability crimes regulate certain industries which, though potentially hazardous, provide important benefits to society. Early narcotics offense statutes were also regulatory, but with the increase in society's alarm over the nation's escalating drug problem, the purpose of anti-drug legislation has under-

at 500, 626 N.E.2d at 49, 605 N.Y.S.2d 237.

¹⁵³ New York prosecutors, in their efforts to induce the legislature to override *Ryan*, mischaracterize the holding as a departure from standard rules, ignoring the long-standing links between mens rea and severity of punishment. See Gary Spencer, *Ryan Ruling Held Retroactive*, N.Y.L.J. Feb. 17, 1995, 1, 8 (Prosecutors arguing against retroactive application of *Ryan* characterize the holding as a "dramatic shift away from customary and established law . . ."); Gryta, *supra* note 9 (Kevin Dillon, President of the New York State District Attorneys Association, calls *Ryan* an "unprecedented departure," while arguing the holding is "devastating to enforcement of the state's drug laws . . .").

gone a corresponding change. The purpose of criminalizing drug use is no longer a matter of convenience or promoting social efficiency. Contemporary narcotics legislation is designed primarily to punish and deter persons engaged in what has been deemed a purely destructive criminal activity.¹⁶⁴

This legislative intent corresponds to a general social perception that the sale and use of controlled substances represent grave, intrinsic wrongs. The criminal nature of drug crime now exists independently of legislative initiative. It has become akin to traditional common law offenses such as murder, robbery, rape and arson. Like these more traditional offenses, it sparks in society a sense of outrage and the desire for retribution. The depth of this feeling can be gauged by the scorn and alarm which frequently greet proposals to legalize or decriminalize certain kinds of drug use. Indeed, despite the lack of a clear antecedent in the common law, drug crime can now be fairly categorized as a *mala in se* offense.

The imposition of strict liability for offenses is inappropriate, given the intrinsically criminal nature of drug offenses. Strict liability has rarely been applied to such purely criminal activities. This is partly because of the very opprobrium with which society responds to such activity. It is unfair to impose such a high degree of infamy upon a person who unwittingly committed a bad act.

Additionally, the characteristics which tend to mitigate the harshness of certain strict liability crimes are not present in narcotics offenses. One reason strict liability is palatable for a social-welfare offense is that liability is imposed on those in a responsible relation to the harm caused. These individuals are typically business persons whose position affords them a large measure of knowledge and authority. By knowingly accepting the great power of their positions, such persons must also accept the special risks and burdens of a strict liability regime. A heightened duty to protect the public is a reasonable exchange for the privileges of their position. It would, however, be pointless and deeply inequitable to extend strict liability to the secretaries, stock-clerks and other low-level employees of a

¹⁶⁴ See *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 497 (E.D.N.Y. 1993) (discussing the transformation of narcotics statutes into largely punitive offenses, as social perceptions about the acceptability of drug use have changed).

business engaged in harmful acts—even though such persons may, in the course of their employment, unwittingly contribute to the harm caused. Thus, the traditional strict liability crime is properly limited to those persons who, because of the power of their positions, must bear an unusually high responsibility to society.

By contrast, narcotics offense statutes must maintain the traditional culpability requirements because these statutes target persons at all levels of the criminal organization. Criminals working at the lowest levels of the drug trade—such as couriers and facilitators—may be persons of limited sophistication and knowledge. Through exploitation by their superiors in the drug trade, persons knowingly engaged in minor narcotics crime may unwittingly commit far more serious bad acts, carrying much harsher penalties. Because such persons function in roles bereft of special power or knowledge, it would be unfair to impose an additional punishment for these acts. Society may rationally punish such low-level drug criminals only for those harmful acts committed with knowledge, as evidenced by the traditional *mens rea* requirement.

Additionally, a strict liability regime for drug crime would be particularly harsh on the unwitting offender because of the potentially severe penalties these offenses carry. Society should tolerate strict liability only for those offenses where punishment is not the prime means of correcting or preventing harm. Punishment is at the heart of the narcotics offense, functioning as both deterrent and retribution. Indeed, legislators generally respond to escalating levels of drug crime by increasing penalties. Thus, drug defendants commonly face mandatory prison terms of ten or twenty years in both state and federal courts. Applying this level of penalty on a strict liability basis is an unjustified and virtually unprecedented departure from the principal that punishment requires proof of mental culpability.

Applying traditional culpability requirements for each material element of a narcotics crime ensures that a drug criminal's punishment reflects his true measure of guilt. *Mens rea* provides an accurate gauge of the drug criminal's fitness for punishment—as it does for the killer, the hoodlum and the thief. It remains the fairest and most reliable means for society to determine the degree of responsibility such criminals must bear for their acts and gives courts a rational way to determine

severity of punishment. Thus, the *Ryan* rule does not exculpate drug criminals of limited culpability. Instead, it ensures that each drug criminal incurs a level of blame and punishment that is tailored to his or her actual responsibility for the harm caused.

2. Social Concerns Do Not Justify Extending Strict Liability to Narcotics Crimes

Rising levels of drug crime and attendant social ills do not warrant a departure from the rule requiring proof of mens rea prior to punishment and conviction. Strict liability is unlikely to curb drug crime because it will not deter those criminals most responsible for the increase in such crime. The powerful and sophisticated drug dealers who pose the greatest menace to society will have little reason to alter their activities just because courts institute strict liability for enhanced penalties. The greatest deterrent effect of strict liability is that defendants are unable to escape enhanced penalties by feigning a lack of awareness. It is difficult, however, for the powerful drug dealer to feign unawareness or lack of intent, because evidence of the scope and complexity of his operation creates an inference of knowledge. Moreover, the profits and power derived from continuing his criminal activities will substantially outweigh a marginally increased risk of receiving an enhanced punishment.

Strict liability applied to enhanced penalties may, to a small extent, deter lower-level drug criminals. If a person peripherally involved in the drug trade knows that courts will punish him for his actions, regardless of mistake or accident, he may choose not to risk further crime. The risk of receiving a long prison term may outweigh the meager benefits of a limited involvement in the drug trade. However deterring an occasional or peripheral drug criminal will have minimal impact on serious narcotics crime because these criminals play a small role in the narcotics operation. Even this small deterrence value impacts only those low-level criminals who know that the courts apply strict liability. Additionally, the low-level criminal's involvement with narcotics may arise from desperate circumstances, such as poverty or a sudden financial crisis, in

for crimes committed knowingly. Thus, while *Ryan* maintains the important protective power of the mens rea requirement, it does not diminish the deterrent and retributive impact of drug laws. Moreover, *Ryan* does not create an unusual or unprecedented new burden for prosecutors. Establishing mens rea has long been the prosecutor's task. Proving knowledge of quantity is not any more onerous a burden than proving knowledge for possession of stolen goods or for assaulting an officer. As with these roughly analogous crimes, difficulties of proof can be solved through inferences and presumptions. While this task poses certain administrative and labor burdens on prosecutors and the court system, these demands have long been accepted as a necessary part of a fair justice system.

Beyond this administrative burden, the *Ryan* holding will have only a small impact on the prosecution and conviction of drug criminals. Use of the evidentiary tools suggested in the court's opinion will largely ensure that criminals do not escape punishment for the crimes for which they are culpable. Indeed for drug sale cases, which pose the greatest social danger, proof of knowledge of weight can easily be inferred from evidence of negotiations or possession of weighing tools.¹⁵⁶ In possession cases, evidence that the defendant handled the controlled substance may create an inference of knowledge. This may be particularly true if the substance weighs significantly more than the statutory threshold. Thus, a defendant who possesses so-called "dealership" quantities will not escape full punishment. Where the defendant possesses only slightly above the threshold, he still faces a jail term according to the next highest degree of the crime.¹⁵⁷

¹⁵⁶ In its first post-*Ryan* holding on the issue, the Court of Appeals held that evidence arising from a heroin sale—particularly evidence that the defendant negotiated a weight-based purchase price—could create an inference that the defendant knew the weight of the heroin. *People v. Hill*, N.Y.L.J., Feb. 17, 1995, at 27. Evidence of this sort is readily available in the large majority of prosecutions involving drug dealers. See *Fisher*, *supra* note 13, at 1. As Judge *Fisher* points out, *Ryan* may actually prove to be a boon to prosecutors because, following the standard rule of evidence, evidence of past narcotics crime and misconduct may be introduced to counter a defendant's claimed mistake of fact as to quantity.

Although the holding in *Hill* confirms that *Ryan* will not result in lower penalties in cases involving a drug transaction, law enforcement officials redoubled their efforts to pass legislation eliminating the requirement. *Spencer*, *supra* note 153, at 8 (Manhattan D.A. announces that eliminating *Ryan* remained "our top legislative priority.").

¹⁵⁷ Lower courts are split as to what evidence of "handling" is sufficient to

3. Proof of a Defendant's Threshold Mens Rea Does Not Justify Imposing an Enhanced Penalty

The *Ryan* holding is significant because the court chose not to apply the threshold mens rea doctrine which is now routinely used in federal enhanced-penalty cases. The *Ryan* holding is directly contrary to the federal notion that a mens rea indicating a threshold level of criminal or antisocial culpability fairly may subject a defendant to a range of penalties. By contrast, the New York Court of Appeals hewed to the traditional notion that proportionality demands proof of mens rea for an element that determines penalty.

The federal enhanced-penalty cases divorce mens rea from its historic role of justifying the imposition of punishment. Punishment is legitimate and meaningful only when its severity is linked to the culpable mental state of the defendant. The law historically reserves its greatest penalties for those who act with a high level of awareness. For instance, a person who kills with minimal awareness of his action faces a moderate penalty; but a person who kills with intent is more blameworthy and is, therefore, subject to a long prison term or death. By contrast, in the federal narcotics cases applying enhanced penalties, the same level of awareness may justify either a moderate penalty or life imprisonment.

Penalty distinctions, such as those created by the mandatory-minimum statutes and Sentencing Guidelines become meaningless if courts impose them without reference to personal culpability. There is no logic or value to mandating an enhanced penalty for possession of a greater quantity of nar-

create an inference of knowledge and this issue is pending in the Court of Appeals. Anderson, *supra* note 13, at 1. Additionally, judicial attention has thus far been focused on the retroactivity of the holding, which has precluded a full discussion of the evidentiary issues. Despite this uncertainty, however, it seems clear that evidence of handling, combined with some evidence of the defendant's familiarity with the drug, creates a sufficient inference of knowledge of quantity. See *People v. Okehoffurum*, 201 A.D.2d 508, 607 N.Y.S.2d 695 (2d Dep't 1994) (evidence that the defendant carried a briefcase containing heroin for which he expected to receive three to five thousand dollars satisfied the mens rea requirement for quantity); *People v. Sanchez*, 205 A.D.2d 472, 613 N.Y.S.2d 912 (1st Dep't 1994) (insufficient to show that the defendant simply "held" the controlled substance, without other evidence indicating his familiarity with narcotics).

cotics if all those who possess any quantity are equally guilty. Without culpability distinctions, quantity becomes a kind of happenstance—a lottery which determines whether a particular defendant spends a year in prison or a lifetime. If legislatures wish to create a single mens rea for a particular drug crime, then they must abolish enhanced penalties based on particularly harmful forms of that crime.

The underlying assumption of threshold mens rea is that the only real culpability distinction is between a good person and a bad person. This is an archaic notion with little relevance to the complexities of contemporary narcotics crime. Narcotics crime is a broad field, encompassing a wide range of activities which people undertake with varying levels of intent, awareness and motive. There is an atavistic appeal to the idea that anyone who engages in narcotics crime deserves whatever punishments he gets; the legislature and courts should resist the lure of this kind of stark morality because it ignores basic culpability distinctions among those engaged in drug crime.

The legal and moral importance of determining relative blameworthiness must extend even to those already engaged in criminal activity in order to correspond to society's intuitive need to determine who is more deserving of blame and punishment. The proper gauge of relative culpability is a person's state of mind. For example, anyone who deals drugs near a school knowingly engages in a bad act, whether or not he is aware of the school. But a person who chooses to deal drugs in front of a clearly labeled elementary school deserves a greater share of blame and punishment than a dealer who is unaware of a school's proximity. This is not necessarily because of a difference in motive—indeed both persons may be equally indifferent to the school's proximity. However, the dealer with awareness had the opportunity to exercise moral judgment by moving away from the school and chose not to exercise it; he is thus more culpable than the dealer without awareness.

Under threshold mens rea, the law becomes oblivious to this basic distinction. Because it no longer has a mechanism to determine relative blameworthiness, severity of punishment is not calculated according to blame. The law becomes removed from a fundamental and widely shared collective understand-

ing about the nature of guilt and the purpose of punishment.¹⁵⁸

Adopting a system of threshold mens rea, on the other hand, has societal as well as moral repercussions. It is in society's interest to encourage criminals to become less criminal. To this end, the law must provide drug criminals with a personal interest in avoiding the most destructive forms of narcotics crime such as dealing very dangerous drugs, and dealing to a minor or near a school. Maintaining culpability distinctions promotes this goal because criminals know that the law will only punish them for those bad acts committed with awareness. Under threshold mens rea, a criminal knows he will be punished for both those bad acts done knowingly and those done by mistake. He has less cause to exercise self-control and plan his activities to inflict the least damage on society. This in turn will encourage increased recklessness and disregard of consequence among drug criminals.¹⁵⁹

4. The *Ryan* Mens Rea Requirement Has a Constitutional Basis

The concern with fairness and proportionality which underlies the mens rea requirement indicates that the *Ryan* holding can be based on constitutional grounds. Due process mandates a mens rea requirement for all mala in se crimes because mens rea provides persons of limited culpability with critical protection from an unwarranted deprivation of personal liberty. However, courts rarely elucidate specific due process limits on strict liability criminal prosecution (although they often

¹⁵⁸ The federal courts hold that the drug offender "bears the burden" that his conduct will be more harmful than intended. See *supra*, note 95 and accompanying text. But, as a commentator observes about this concept as it relates to felony murder, "the principle that the wrongdoer must run the risk explicitly obscures the question of actual responsibility for the harmful result." George P. Fletcher, *Reflections on Felony Murder*, 12 SW. UNIV. L. REV. 413, 428 (1980).

¹⁵⁹ This principle is properly understood not just as using self-interest to deter the drug offender from more serious narcotics offenses, but as an incentive to internalize the moral and social values underlying the enhanced penalty provision. See, e.g., Saltzman, *supra* note 38, at 1587, on the moralizing effect of a culpability requirement. ("Some behavioral scientists have suggested that some human behavior can be explained in terms of an internal scale of moral judgment which each individual develops by learning from others, society in general, and law in particular.")

point to concerns of fairness and proportionality as being at the heart of the mens rea requirement). This is because the courts' primary function in mens rea cases has been to discern the legislative intent behind ambiguous penal statutes. The *Ryan* court's presentation of its holding as the product of pure statutory interpretation is consistent with this approach.

Statutory interpretation no longer provides sufficient grounds for insuring that proof of culpability remains a requirement of narcotics offense prosecutions. Statutory interpretation only protects defendants against over-zealous prosecutors who seek to create strict liability offenses from ambiguous statutes. In the volatile political climate surrounding narcotics crime, it is increasingly legislatures that may demand strict liability prosecution of these offenses.¹⁶⁰ Without a constitutional basis, the legislature is free to mandate strict liability even for common-law crimes carrying severe penalties. The fundamental protections of mens rea will be readily sacrificed to accommodate political demands for a swifter and sterner criminal justice system.

The Supreme Court of the United States has not elucidated a clear constitutional ground which could be used to anchor the *Ryan* holding. In fact, the Court has thus far defined few constitutional limits to the use of strict liability.¹⁶¹ However, due process does prohibit the strict liability enforcement of a statute which penalizes a failure to act when the defendant

¹⁶⁰ This is exemplified by the swift and negative response of legislators and prosecutors to the *Ryan* holding. Weeks after the decision, legislators introduced competing bills to eliminate the holding. N.Y.A.B. 9119 (Jan. 18, 1994); N.Y.S.B. 6632 (Feb. 7, 1994); N.Y.A.B. 9490 (Feb. 17, 1994) (all proposing to expressly amend the Penal Law to preclude a mens rea requirement for knowledge of quantity); N.Y.S.B. S6912 (March 7, 1994). Republican legislators and Governor Mario Cuomo were unable to pass this legislation only because Democrats, wishing to provide some level of protection to low-level drug couriers, favored a statutory rebuttable presumption of knowledge.

¹⁶¹ *Morrisette* is perhaps the Court's most forceful and oft-quoted expression of the equitable concerns underlying the mens rea rule. Yet the holding is grounded on interpretation of an ambiguous statute and does not create a constitutional ground for a scienter requirement. Almost as an afterthought, the Court notes that it would be obligated to enforce the statute had the legislature expressly dispensed with scienter. *Morrisette v. United States*, 342 U.S. 246, 246 (1952). See also *Liparotta v. United States*, 471 U.S. 419, 424-25 (1985) (Court construes a culpability requirement in an ambiguous statute in order to avoid "criminalizing otherwise innocent conduct," while observing that a contrary conclusion would not create a constitutional problem).

was not "on notice" of the duty.¹⁶² This suggests that due process may also require proof of a defendant's knowledge of each substantive element of a crime.¹⁶³

Moreover, a due process ground for *Ryan* would be consistent with previous statements of New York courts regarding constitutional limits on strict liability. Strict liability is unconstitutional in New York wherever its application would "shock a sense of fair play."¹⁶⁴ Courts have not defined the scope of this constitutional limit to strict liability. However, it is logical that severity of punishment should be a determinative factor. Indeed, one New York court has stated that strict liability enforcement of a penal statute carrying a penalty of up to six months in jail would violate due process.¹⁶⁵ Thus, New York courts apply strict liability to social-welfare offenses only because they are essentially regulatory and not punitive in nature.

The quantity-based New York drug laws are highly puni-

¹⁶² *Lambert v. California*, 355 U.S. 225 (1957).

¹⁶³ The Court has defined an eighth amendment ground for a culpability requirement in capital crimes. In *Enmund v. Florida*, 458 U.S. 782, 800 (1981), the Court refused, on eighth amendment grounds, to enforce a death sentence for a defendant convicted of felony murder. The Court observed that the retributive value of such a sentence "very much depends on the degree of [the defendant's] . . . culpability—what [his] intentions, expectations, and actions were." In dissent, Justice O'Connor noted disapprovingly that the holding was "especially disturbing because it makes intent a matter of federal constitutional law" *Id.* at 824. Because the Court is reluctant to apply eighth amendment protection to non-capital offenses, the felony murder doctrine remains intact. Nevertheless, given the conceptual similarity between threshold mens rea and felony murder, *Enmund* appears to raise the theoretical possibility of an eighth amendment ban on enforcing particularly harsh quantity-based penalties on a threshold mens rea basis. For a discussion of the Eighth Amendment as it relates to felony murder, see Nelson E. Roth & Scott E. Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 472-85 (1985).

¹⁶⁴ *People v. Colozzo*, 54 Misc.2d 687, 691, 283 N.Y.S.2d 409, 415 (Sup. Ct. N.Y. County 1967). While New York courts have not defined how due process limits strict liability, cases suggest that these limits exist. *See id.* (stating that due process will limit the state's power to create a strict liability offense); *People v. Northrop*, 99 Misc. 2d 383, 385, 416 N.Y.S.2d 187, 189 (N.Y. City Ct. 1979) ("[t]here are instances where due process limits the police power").

¹⁶⁵ In *People v. H.W.S. Holding Corp.*, 12 Misc.2d 125, 175 N.Y.S.2d 391 (Nassau County Ct. 1958), the court stated that a criminal statute dealing with apartment maintenance could not be enforced without proof of scienter because of the potential harshness of the penalty (up to six months in jail). Because the defendant had constructive knowledge of the illegal conditions, the court suggested, but did not reach, the constitutional issue.

tive: the legislature mandated long prison terms as both a deterrent to and retribution for drug crime. Under strict liability, a defendant's mistake of fact as to quantity may well subject him to life imprisonment. This indeed contravenes fundamental notions of fairness and proportionality to a shocking degree.

Consequently, if a defendant lacks knowledge of the quantity of narcotics possessed, then imposing a prison sentence linked to that quantity is a violation of the defendant's due process rights. The period of incarceration attributable to the enhanced penalty is an unwarranted curtailment of the most fundamental liberty interest—the liberty interest in personal freedom. Incarceration is justified solely by society's compelling interest in punishing and incapacitating persons who knowingly commit bad acts. Society does not have a compelling or even a rational interest in punishing a person for events and circumstances beyond his or her knowledge and control. It is a gratuitous act to incarcerate a criminal for an additional five, ten or twenty years because of a mistake of fact about the quantity of narcotics he or she possessed. This violates standards of fairness and proportionality which the Constitution guarantees.¹⁶⁶

CONCLUSION

People v. Ryan correctly affirms the importance of the legal and moral principle that courts must not inflict punishment without proof of mental culpability. It recognizes that the importance of mens rea extends beyond a threshold determination of the defendant's guilt or innocence. Mens rea provides equally important distinctions about the relative culpability of persons who have committed a particular bad act. Such culpability distinctions are the most rational and just way for courts to determine the severity of a defendant's punishment. The alternative—strict liability—is properly limited to a discrete category of social-welfare offenses, carrying minimal punish-

¹⁶⁶ See *Colozzo*, 54 Misc.2d at 690, 283 N.Y.S.2d at 415 ("Due process of law . . . is a concept of what is fundamentally just, fair and right . . ."); *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 516 (E.D.N.Y. 1993) ("fundamental conceptions of fairness would dictate that a general culpability requirement be deemed an essential aspect of due process").

ment and social opprobrium. Because the narcotics offense in *Ryan* was fundamentally different from a social-welfare offense, the court's holding was proper and consistent with established principles of criminal law.

Therefore, in responding to *Ryan*, the New York state legislature erred in adopting a threshold mens rea regime for narcotics crime. Threshold mens rea, as it is elucidated in the federal courts, rests upon the flawed moral assumption that all narcotics offenders are equally deserving of punishment. By not allowing for a mistake of fact, it can subject unsophisticated, low-level narcotics offenders to punishment that is dramatically disproportionate to their personal culpability. Moreover, it provides minimal benefits to society as compensation for this risk to individual injustice. Prosecutors are fully able to establish scienter for a truly culpable defendant through evidentiary inferences and presumptions. Additionally, any deterrent impact of threshold mens rea is limited to low-level drug criminals who pose the least menace to society. For its brief period of effectiveness, the *Ryan* holding made New York State an exemplar of the fundamental values of fairness and proportionality in enforcing criminal statutes. The legislature should have allowed these values to stand by not overriding the Court of Appeals decision.

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