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## Stated Culpability Requirements

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## STATED CULPABILITY REQUIREMENTS

*Scott England\**

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## INTRODUCTION

It is difficult to overstate the Model Penal Code's importance for American criminal law. Since its publication by the American Law Institute in 1962,<sup>1</sup> the Model Penal Code ("MPC" or "the Code") has had an outsized impact on legislatures, courts, and legal scholarship.<sup>2</sup> Indeed, more than thirty states have enacted criminal codes influenced by the MPC.<sup>3</sup> American courts have cited the Code and its commentary as persuasive authority thousands of times, and commentators have likewise spilled much ink discussing the MPC's meaning and significance.<sup>4</sup> For good reason, George Fletcher once described the Code as "the central document of American criminal justice."<sup>5</sup>

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1. MODEL PENAL CODE (AM. L. INST., Proposed Official Draft 1962).

2. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326–28 (2007).

3. The MPC's official commentary identifies thirty-four criminal codes influenced at least in part by the Code. MODEL PENAL CODE & COMMENTS., PART I: GEN. PROVISIONS xi (AM. L. INST. 1985). That list includes Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, and Wyoming. *Id.* The number of states influenced by the Code may be lower or higher, depending on how one counts. See Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1318 n.38 (2011) ("The MPC nose counting is complicated by the extent to which some states have adopted it with changes. Depending on the extent of those changes, some states are counted by some commentators as having adopted the MPC in whole, in part, or only being 'influenced' by it.") (citing Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 692 n.45 (1983)).

4. See Robinson & Dubber, *supra* note 2, at 327–28. As of April 2022, the phrase "Model Penal Code" appeared in more than 5,600 state cases and more than 2,600 federal cases. See *Results for: "Model Penal Code,"* LEXISNEXIS (last visited Feb. 27, 2022, 1:35 PM), <https://plus.lexis.com/search/?pdmfid=1530671&crd=71c29cac-a3b3-440d-8898-0f4e7ecf0654&pdsearchterms=%22Model+Penal+Code%22&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqtype=and&pdquerytemplateid=&comp=s8ttk&earg=pdsf&prid=a2e586e0-d526-42fc-bb4a-4189434f2c37>. The same phrase appeared in more than 10,000 secondary sources, including over 6,900 law reviews and journals. *Id.* Of course, countless other authorities discuss statutory provisions influenced by the MPC without mentioning the Code itself. See Robinson & Dubber, *supra* note 2, at 327–28.

5. George P. Fletcher, *Dogmas of the Model Penal Code*, 2 BUFF. CRIM. L. REV. 3, 3 (1998). Similar statements abound in the literature. For example, Sanford Kadish once

The Code has influenced American criminal law most significantly through its culpability provisions.<sup>6</sup> The Code's central culpability provision, section 2.02, establishes four culpability levels to be used in defining criminal offenses: purpose, knowledge, recklessness, and negligence.<sup>7</sup> Importantly, section 2.02(1) generally requires culpability for "each material element of the offense."<sup>8</sup> As a result, the Code generally demands, at a minimum, that criminal offenses impose culpability requirements that correspond to their objective elements. Additionally, the MPC often requires that a defendant act with a particular purpose, such as taking another's property "with purpose to deprive him thereof" in order to commit theft.<sup>9</sup> If an offense imposes such a "specific" or "ulterior" intent requirement, culpability is still required for each objective element.<sup>10</sup>

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observed that the Code was so influential that "it . . . permeated and transformed the substantive criminal law of this country." Sanford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521, 538 (1988).

6. Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 952 (1999) ("The Code's mens rea proposals dissipated . . . clouds of confusion with an astute and perspicuous analysis that has been adopted in many states and has infused thinking about mens rea everywhere."); Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 691 (1983) ("Section 2.02 . . . is perhaps 'the single most important provision of the Code' and the most significant and enduring achievement of the Code's authors.") (quoting Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 601 (1963)); David Wolitz, *Herbert Wechsler, Legal Process, and the Jurisprudential Roots of the Model Penal Code*, 51 TULSA L.J. 633, 669 (2016) ("The most celebrated and perhaps most influential feature of the Model Penal Code has been its articulation of the traditional mens rea requirement of criminal law and the hierarchy of culpable mental states it delineated: purpose, knowledge, recklessness, and negligence.").

7. MODEL PENAL CODE § 2.02(2) (AM. L. INST., Proposed Official Draft 1962). Some states use the same levels with slightly different terminology. The most common alteration is to replace "purpose" with "intent." Danye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 238 (1997) (finding that, as of 1997, approximately three-quarters of MPC states used "intentionally" in place of "purposely").

8. MODEL PENAL CODE § 2.02(1).

9. *Id.* § 223.2(1) (theft by unlawful taking or disposition); *see also id.* § 211.3 (terroristic threats); *id.* § 213.5 (indecent exposure); *id.* § 221.1(1) (burglary); *id.* § 224.1(1) (forgery); *id.* § 224.2 (simulating objects of antiquity or rarity, etc.); *id.* § 224.9(1) (rigging publicly exhibited contest); *id.* § 224.10 (defrauding secured creditors); *id.* § 223.5 (theft of property lost, mislaid, or delivered by mistake); *id.* § 240.2(1) (threats and other improper influence in official and political matters); *id.* § 241.3 (unsworn falsification to authorities); *id.* § 241.5(1) (false reports to law enforcement authorities); *id.* § 241.7 (tampering with or fabricating physical evidence); *id.* § 241.9 (impersonating a public servant); *id.* § 242.2 (resisting arrest or other law enforcement); *id.* § 242.3 (hindering apprehension or prosecution); *id.* § 250.1(1) (riot); *id.* § 250.2(1) (disorderly conduct); *id.* § 250.8 (disrupting meetings and processions); *id.* § 250.12(1)(a) (unlawful eavesdropping or surveillance).

10. PAUL H. ROBINSON, 1 CRIMINAL LAW DEFENSES § 61(a)(2) (1984).

The MPC's stated-culpability provision, section 2.02(4), plays a critical role in enforcing the Code's requirement of culpability for each offense element.<sup>11</sup> Section 2.02(4) applies "[w]hen the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof."<sup>12</sup> If a statute prescribes a culpability requirement without distinguishing between multiple elements, the culpability requirement "shall apply to all the material elements of the offense, unless a contrary purpose plainly appears."<sup>13</sup> For example, suppose that a criminal code defines arson to occur when a person "knowingly damages a building of another by starting a fire or using an explosive." Section 2.02(4) would apply because the offense definition prescribes a culpability requirement of knowledge without distinguishing between the objective elements of the offense. Applying section 2.02(4), arson would thus require an actor to (1) knowingly damage a building (2) that he or she knows belongs "to another" by (3) knowingly starting a fire or knowingly using an explosive. Therefore, a person would not commit arson by damaging a building the actor believes to be his or her own, or by damaging a building by starting a fire unwittingly.<sup>14</sup>

Numerous offenses in the MPC implicate section 2.02(4) because they prescribe culpability requirements without distinguishing between multiple offense elements.<sup>15</sup> More importantly, however, section 2.02(4) has implications for countless real-world criminal offenses. As will be discussed later in this Article, a majority of MPC jurisdictions have enacted stated-culpability provisions influenced by the Code.<sup>16</sup> As a practical matter, a provision like section 2.02(4) stands to affect far more offenses in a given state criminal code than in the MPC itself. After all, state criminal codes have ballooned in the six decades since the MPC's publication,<sup>17</sup> and state criminal codes, like the MPC, routinely prescribe

11. MODEL PENAL CODE § 2.02(4).

12. *Id.*

13. *Id.*

14. *See id.* § 2.02(2)(b) (defining "knowingly").

15. *See, e.g., id.* § 210.1(1) (criminal homicide); *id.* § 210.5 (causing or aiding suicide); *id.* § 211.1(1) (simple assault); *id.* § 211.1(2)(b) (aggravated assault); *id.* § 211.2 (recklessly endangering another person); *id.* § 212.2 (felonious restraint); *id.* § 212.3 (false imprisonment); *id.* § 212.4 (interference with custody); *id.* § 220.1(1) (arson); *id.* § 220.2(1) (causing catastrophe); *id.* § 220.3(1) (criminal mischief); *id.* § 230.4 (endangering welfare of children); *id.* § 241.4 (false alarms to agencies of public safety); *id.* § 241.5(1) (falsely incriminating another); *id.* § 241.8(1) (tampering with public records or information); *id.* § 242.1 (obstructing administration of law or other governmental function); *id.* § 242.2 (resisting arrest or other law enforcement).

16. *See infra* notes 159–66, 173–74 and accompanying text.

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

culpability requirements for offenses without distinguishing between objective elements.<sup>18</sup> Section 2.02(4), then, has significant ramifications for hundreds if not thousands of criminal offenses in MPC jurisdictions.

Unfortunately, section 2.02(4) is deeply flawed. Section 2.02(4) itself is unclear about when and how it applies, and the MPC's commentary reveals the drafters' own confusion about the provision's role in the Code's culpability scheme. Predictably, state courts have struggled with applying stated-culpability provisions, often exploiting their weaknesses to justify the imposition of strict liability.<sup>19</sup> As a result, many states circumvent the Code's general rule that culpability is required for "each material element of [an] offense."<sup>20</sup>

This Article comprehensively reviews the law of stated culpability requirements in MPC jurisdictions. Part I provides an overview of section 2.02(4), explaining how the provision works and its role in the MPC's culpability scheme. Part II then identifies section 2.02(4)'s main weaknesses, drawing on both the provision itself and the Code's commentary. Next, Part III reviews the law in the twenty-five states with culpability provisions influenced by the MPC, identifying specific problems that section 2.02(4) has created in the case law. Finally, Part IV recommends new stated-culpability rules that improve section 2.02(4) and more rigorously enforce the Code's requirement of culpability for each offense element.

#### I. THE MODEL PENAL CODE'S STATED-CULPABILITY PROVISION

The MPC prohibits imposing strict liability for serious criminal offenses.<sup>21</sup> Section 2.02(1) generally demands that a defendant act "purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense."<sup>22</sup> The Code recognizes only section 2.05 as an exception to the general rule that culpability is required for each offense element.<sup>23</sup> Section 2.05 permits such strict or "absolute" liability only for (1) offenses that are mere civil

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18. See, e.g., ME. REV. STAT. ANN. tit. 17-A, § 34(2) (West 2021); N.H. REV. STAT. ANN. § 626:2(I) (2021); N.J. REV. STAT. § 2C:2-2(c)(1) (2021) (all using the Model Penal Code's language about prescribing a culpability requirement "without distinguishing").

19. Danye Holley, *Culpability Evaluations in the State Supreme Courts from 1977 to 1999: A "Model" Assessment*, 34 AKRON L. REV. 401, 408 (2001) ("Many of these outcomes were very disturbing because state supreme courts were . . . holding that at least one objective element . . . was a strict-liability element.").

20. MODEL PENAL CODE § 2.02(1).

21. See *id.* § 2.05.

22. *Id.* § 2.02(1).

23. *Id.* § 2.05.

violations<sup>24</sup> and (2) criminal offenses outside the criminal code for which “a legislative purpose to impose absolute liability . . . plainly appears.”<sup>25</sup> Even when a legislature intends to impose absolute liability for an existing offense outside of the criminal code, section 2.05 automatically reduces the offense’s grade to a civil violation.<sup>26</sup>

Section 2.02(4) helps enforce the Code’s requirement of culpability for each offense element. The provision applies “[w]hen the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof.”<sup>27</sup> Hence, the provision anticipates that an offense definition may explicitly state a single culpability requirement, followed by consecutive objective elements. For such an offense, section 2.02(4) clarifies that the culpability requirement “shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.”<sup>28</sup>

The Code’s official commentary explains section 2.02(4)’s role in the Code’s culpability scheme. The commentary emphasizes that culpability requirements “must be addressed . . . with respect to each material element” of the crime, and that requires consulting both the offense definition and section 2.02.<sup>29</sup> In particular, section 2.02(4) was designed to resolve ambiguity about whether a stated culpability requirement “applies to all the elements of the offense or only to the element that it immediately introduces.”<sup>30</sup> For such a statute, the Code assumes that the culpability requirement “was meant to apply to all material elements.”<sup>31</sup> If the legislature intends a different result, the commentary notes, “proper drafting ought to make it clear.”<sup>32</sup> The commentary provides an example involving false imprisonment, an offense that occurs when one “knowingly restrains another unlawfully so as to interfere substantially

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

25. *See id.* § 2.05(1)(b).

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

27. *Id.* § 2.02(4).

28. *Id.*

29. MODEL PENAL CODE & COMMENTS., PART I § 2.02 cmt. 1 at 229–30 (AM. L. INST. 1985).

30. *Id.* § 2.02 cmt. 6 at 245.

31. *Id.*

32. *Id.*

with his liberty.”<sup>33</sup> According to the commentary, section 2.02(4) would require that the actor both know that he or she is restraining the victim and know “the unlawful character of the restraint.”<sup>34</sup>

Importantly, the MPC’s default culpability provision, section 2.02(3), provides a backstop preventing the imposition of absolute liability. Section 2.02(3) applies “[w]hen the culpability sufficient to establish a material element of an offense is not prescribed by law.”<sup>35</sup> In doing so, the provision seems designed to cover objective elements not covered by section 2.02(4).<sup>36</sup> After all, section 2.02(4) applies when a statute “prescribes the kind of culpability that is sufficient for the commission of an offense,”<sup>37</sup> while section 2.02(3) applies when a culpability requirement “is not prescribed by law.”<sup>38</sup> When an offense fails to prescribe a culpability requirement for a given element, the element is satisfied “if a person acts purposely, knowingly or recklessly with respect thereto.”<sup>39</sup> Significantly, the Code’s culpability requirements are hierarchical, such that proof of a more culpable mental state will satisfy a requirement of a less serious one.<sup>40</sup> Hence, as a practical matter, section 2.02(3) is intended to require recklessness for any offense element that lacks a stated culpability level under section 2.02(4).<sup>41</sup>

Together, then, sections 2.02(3) and (4) are designed to ensure that culpability is required for each objective element of an offense. Using burglary as an example, the commentary shows how the provisions are meant to work together to prevent absolute liability.<sup>42</sup> Under the Code, a person commits burglary if he or she “enters a building . . . with purpose to commit a crime therein,”<sup>43</sup> and a separate provision aggravates the offense if it is committed “in the dwelling of another at night.”<sup>44</sup> The commentary clarifies that the actor must have a purpose to commit a crime at the time of entry, but purpose is not required as to entering “the dwelling of another at night.”<sup>45</sup> Instead, “[s]ection 2.02(3) should control

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33. *Id.* (quoting MODEL PENAL CODE § 212.3).

34. *Id.* at 245–46. This portion of the commentary fails to clarify whether knowledge is also necessary to satisfy the requirement of restraining the victim “so as to interfere substantially with his liberty.” *Id.* This Article discusses that aspect of the offense in Section II.B.2. *See infra* Section II.B.2.

35. MODEL PENAL CODE § 2.02(3).

36. *See id.* § 2.02(4).

37. *Id.*

38. *Id.* § 2.02(3).

39. *Id.*

40. *See id.* § 2.02(5).

41. *See id.* § 2.02(3).

42. MODEL PENAL CODE & COMMENTS., PART I § 2.02 cmt. 6 at 246 (AM. L. INST. 1985).

43. MODEL PENAL CODE § 221.1(1).

44. *Id.* § 221.1(2).

45. MODEL PENAL CODE & COMMENTS., PART I § 2.02 cmt. 6 at 246.

elements of this character, and therefore recklessness should suffice in the absence of special provision to the contrary.”<sup>46</sup>

Section 2.02(1) generally requires culpability for each objective element, and that requirement is limited only by extremely narrow exceptions set out in section 2.05.<sup>47</sup> Importantly, sections 2.02(3) and (4) are not intended to justify the imposition of absolute liability.<sup>48</sup> Instead, they are designed to prevent it.

## II. SHORTCOMINGS OF THE MODEL PENAL CODE’S APPROACH

Despite playing a critical role in the Code’s culpability scheme, section 2.02(4) is a deeply flawed provision. Unfortunately, it is difficult to square some of section 2.02(4)’s language with its purpose, and the Code’s own commentary is inconsistent about its proper application.<sup>49</sup> This Part discusses three shortcomings of section 2.02(4). First, section 2.02(4) appears to exclude culpability requirements for grading provisions by limiting its application to “the law defining [the] offense.”<sup>50</sup> Second, section 2.02(4) is too broad in applying a stated culpability requirement to “all the material elements of the offense.”<sup>51</sup> Third, section 2.02(4)’s legislative-intent exception is unnecessary and ill conceived.

### A. *Excluding Culpability Requirements for Grading Provisions*

By its terms, section 2.02(4) appears to exclude culpability requirements that might apply to grading provisions. For reasons that are unclear, the provision applies only when “the law defining an offense” states a culpability requirement without distinguishing between objective elements.<sup>52</sup> The drafters’ choice of language is confusing, in part, because the Code’s default culpability provision, section 2.02(3), does not directly limit itself to objective elements that appear in offense definitions.<sup>53</sup> The two provisions also appear back to back, suggesting at

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46. *Id.*

47. *See* MODEL PENAL CODE §§ 2.02(1), 2.05.

48. *See id.* §§ 2.02(3), 2.02(4).

49. *Compare id.* § 2.02(4), with MODEL PENAL CODE & COMMENTS., PART I § 2.02 cmt. 1 at 231–32.

50. MODEL PENAL CODE § 2.02(4).

51. *Id.*

52. *Id.*

53. *See id.* § 2.02(3) (“When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.”).

first blush that the Code imposes a narrower rule for stated culpability requirements than it does for default culpability requirements.<sup>54</sup>

Even more problematically, the MPC itself frequently distinguishes offense definitions from grading provisions. Indeed, when the MPC uses separate provisions to define and grade a criminal offense, as it often does, the Code uses subsection titles to differentiate them. For such offenses, grading provisions always use the word “grading,” while offense definitions always say either “definition” or “defined.”<sup>55</sup> Hence, section 2.02(4) strongly implies that it is limited to offense definitions in applying only to “the law defining an offense.”<sup>56</sup>

The Code’s drafters may have limited section 2.02(4)’s scope because another culpability provision, section 2.02(10), addresses culpability requirements stated in grading provisions.<sup>57</sup> Section 2.02(10) applies “[w]hen the grade or degree of an offense depends on whether the offense is committed purposely, knowingly, recklessly or negligently.”<sup>58</sup> In such a case, the “grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.”<sup>59</sup> For example, as the Code’s commentary explains, an actor does not commit an offense purposely or knowingly if the actor was merely reckless or negligent as to at least one offense element.<sup>60</sup> Section 2.02(10) would instead classify the offense as being committed recklessly or negligently, even if the actor was purposeful as to another offense element.<sup>61</sup> In other words, the provision identifies “the lowest common denominator” in terms of the actor’s culpability and grades the offense accordingly.<sup>62</sup>

Significantly, however, section 2.02(10) fails to address how culpability requirements apply to new offense elements that appear in

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54. See *id.* § 2.02. As I have discussed elsewhere, however, the Code indirectly limits section 2.02(3) to offense definitions in applying only to “material elements of an offense.” See Scott England, *Default Culpability Requirements: The Model Penal Code and Beyond*, 99 OR. L. REV. 43, 56 (1999). The problem arises because the Code “defines ‘element’ to mean conduct, circumstances, or results that are ‘included . . . in the definition of the offense.’” *Id.* (quoting MODEL PENAL CODE § 1.13(9)).

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

56. *Id.* § 2.02(4).

57. *Id.* § 2.02(10).

58. *Id.*

59. *Id.*

60. See MODEL PENAL CODE & COMMENTS., PART I § 2.02 cmt. 12 at 252 (AM. L. INST. 1985).

61. See *id.*

62. *Id.* at 251–52.

grading provisions.<sup>63</sup> Although the Code grades some offenses according to whether they are “committed” with specified states of mind,<sup>64</sup> the MPC much more commonly uses grading provisions to impose new objective elements beyond those required by offense definitions.<sup>65</sup> Moreover, several grading provisions state culpability requirements for multiple new offense elements, thus directly implicating section 2.02(4). For example, burglary is graded as a more serious offense if the actor “purposely, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone.”<sup>66</sup> Similarly, the Code aggravates the offense of criminal mischief when “the actor purposely causes pecuniary loss in excess of \$5,000, or a substantial interruption or impairment of public communication, transportation, supply of water, gas or power, or other public service.”<sup>67</sup> Both grading provisions prescribe culpability levels without distinguishing between objective elements of the offense, thus raising the question of whether they apply to all aggravating elements or just the ones that immediately follow. Section 2.02(4) does not appear to apply to either provision, however, because the Code limits section 2.02(4)’s application to culpability requirements that appear in offense definitions.<sup>68</sup>

Despite section 2.02(4)’s language, the Code’s commentary reveals that the drafters intended for section 2.02 to apply to grading provisions. The commentary’s two clearest examples involve the MPC’s default culpability provision, section 2.02(3), which requires, at a minimum, recklessness for any offense element that lacks a stated culpability level under section 2.02(4).<sup>69</sup> The first example involves theft, which the Code grades according to the stolen property’s value without stating any culpability requirements.<sup>70</sup> The commentary explicitly states that section 2.02(3) requires at least recklessness as to the property’s value.<sup>71</sup>

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63. See *id.* at 252 (“Subsection (10) . . . does not apply to . . . offenses graded on a different basis . . .”).

64. See, e.g., MODEL PENAL CODE § 210.2(1)(a) (murder); *id.* § 210.3(1)(a) (manslaughter); *id.* § 210.4(1) (negligent homicide).

65. See, e.g., *id.* § 220.3(2) (criminal mischief); *id.* § 221.1(2) (burglary); *id.* § 222.1(2) (robbery); *id.* § 224.1(2) (forgery); *id.* § 240.2(2) (threats and other improper influence in official and political matters); *id.* § 241.8(2) (tampering with public records or information); *id.* § 242.6(4) (escape); *id.* § 250.2(2) (disorderly conduct); *id.* § 251.2(3) (promoting prostitution).

66. *Id.* § 221.1(2)(a).

67. *Id.* § 220.3(2).

68. See *id.* § 2.02(4).

69. See *supra* notes 35–41 and accompanying text.

70. See MODEL PENAL CODE § 223.1(2).

71. See MODEL PENAL CODE & COMMENTS., PART II § 223.1 cmt. 3 at 144 (AM. L. INST. 1980) (“Since valuation is related to ‘the harm or evil . . . sought to be prevented by the law defining the offense,’ the dollar amounts that are specified in Subsections (2)(a) and (2)(b) are ‘material elements of the offense’ as that term is defined in Section 1.13(9) and (10).”)

Likewise, the MPC aggravates the offense of burglary when it is committed “in the dwelling of another at night.”<sup>72</sup> Again, the commentary explicitly states that recklessness is required for those elements because they are material elements of the offense.<sup>73</sup>

To say the least, it would be highly illogical for the Code to apply section 2.02(3) to grading provisions but fail to do so for section 2.02(4). After all, section 2.02(3) provides a backstop to section 2.02(4), allowing courts to impose culpability requirements only if they are not prescribed by law.<sup>74</sup> As a result, a court cannot apply section 2.02(3) to a grading provision until it first identifies the provision’s prescribed culpability requirements under section 2.02(4). Moreover, if a requirement imposed by a grading provision is a material element of an offense for purposes of section 2.02(3), it should count as a material element for purposes of section 2.02(4). Therefore, the MPC surely does not mean what it says when it limits section 2.02(4)’s application to offense definitions.

Nevertheless, by its terms, section 2.02(4) appears to exclude offense elements that appear in grading provisions.<sup>75</sup> As will be discussed later, many state criminal codes also limit their stated-culpability provisions to the elements that appear in offense definitions.<sup>76</sup> Predictably, several courts have imposed absolute liability for new offense elements that appear in grading provisions.<sup>77</sup>

#### *B. Applying Stated Culpability Requirements to All Offense Elements*

In addition to being unclear about when section 2.02(4) applies, the Code is unclear about how it applies. The Code’s first shortcoming in that area occurs because section 2.02(4) too broadly applies a stated culpability requirement to “all the material elements of the offense” when an offense “prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material

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The culpability provisions of Section 2.02 thus are fully applicable to the values used to differentiate grades of theft.” (citation omitted).

72. MODEL PENAL CODE § 221.1(2).

73. MODEL PENAL CODE & COMMENTS., PART II § 221.1 cmt. 4 at 81 (“It should be noted finally that the phrase ‘dwelling of another at night’ relates to the ‘harm or evil . . . sought to be prevented by the law defining the offense’ and is thus a ‘material element’ of the offense of burglary as that term is used in Sections 1.13(9), 1.13(10), and 2.02. The consequence is that a culpability level of recklessness is established by Section 2.02(3) for this element and that mistakes by the defendant will be governed by the general provisions of Section 2.04.”).

74. See *supra* notes 35–41 and accompanying text.

75. See MODEL PENAL CODE § 2.02(4).

76. See *infra* Section III.A.

77. See *infra* Section III.D.

elements thereof.”<sup>78</sup> To understand why section 2.02(4) is too broad, it is helpful to first review some more straightforward examples of how the drafters intended for section 2.02(4) to apply. As discussed below, the provision is generally implicated in three situations. The Code handles the first two situations very well, but it struggles with the third.

#### 1. Series of Consecutive Offense Elements

The first common statutory pattern occurs when an offense states a culpability requirement that is followed by a series of consecutive objective elements. For example, the MPC states that reckless endangerment occurs when one “recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.”<sup>79</sup> The stated culpability requirement, “recklessly,” immediately precedes “engages in conduct,” which is followed by the phrase “which places or may place another person in danger of death or serious bodily injury.”<sup>80</sup> Additionally, those elements are uninterrupted, as they continue the offense’s main clause without adding any language that might be understood as distinguishing the requirement of endangerment from the offense’s conduct element.<sup>81</sup>

The same statutory pattern occurs when an offense states a culpability requirement in an introductory clause that continues in a subsection. The Code defines arson, for instance, to occur when one “starts a fire or causes an explosion with the purpose of: (a) destroying a building or occupied structure of another.”<sup>82</sup> Setting aside the first requirement of starting a fire or causing an explosion, note that the offense prescribes a culpability requirement of purpose, followed immediately by the consecutive offense elements of (1) destroying (2) a building or occupied structure (3) of another.<sup>83</sup> Moreover, those elements are not interrupted by any language suggesting that purpose may be required only as to “destroying.”<sup>84</sup>

When this statutory pattern occurs, the Code’s commentary correctly explains that section 2.02(4) applies to all the objective elements that immediately follow a stated culpability level.<sup>85</sup> As discussed earlier, the Code’s definition of reckless endangerment requires that one “recklessly

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78. MODEL PENAL CODE § 2.02(4).

79. *Id.* § 211.2.

80. *Id.*

81. *See id.*

82. *Id.* § 220.1(1).

83. *Id.*

84. *See id.*

85. *See* MODEL PENAL CODE & COMMENTS., PART I § 2.02 cmt. 1 at 229–30 (AM. L. INST. 1985).

engage[] in conduct which places or may place another person in danger of death or serious bodily injury.”<sup>86</sup> The commentary for the offense makes clear that section 2.02(4) requires recklessness for both the actor’s conduct and the result of endangering another person.<sup>87</sup> Applying the definition of recklessness to the endangerment requirement, the commentary states that “the actor must perceive and consciously disregard a substantial and unjustifiable risk that his action will or may place another in danger of death or serious [bodily] injury.”<sup>88</sup> Absolute liability is inappropriate for the requirement of endangerment, the commentary explains, because the recklessness requirement “excludes . . . unconscious risk creation.”<sup>89</sup>

Likewise, absolute liability is inappropriate for one form of arson because the offense explicitly requires that the defendant act “with the purpose of . . . destroying a building or occupied structure of another.”<sup>90</sup> The commentary confirms that purpose is required both for destroying a building or occupied structure<sup>91</sup> and for the fact that the property belongs to another.<sup>92</sup> Moreover, the MPC’s commentary reaches the same result for other offenses in which culpability requirements are immediately followed by consecutive, uninterrupted, objective elements.<sup>93</sup>

The commentary is correct in applying stated culpability requirements to such offense elements. After all, section 2.02(4)’s central function is to resolve the ambiguity that is created when a single culpability requirement precedes a series of objective elements.<sup>94</sup> In such a situation, the stated culpability requirement should apply to each objective element.

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86. MODEL PENAL CODE § 211.2.

87. See MODEL PENAL CODE & COMMENTS., PART I § 211.2 cmt. 3 at 203.

88. *Id.*

89. *Id.*

90. MODEL PENAL CODE § 220.1(1)(a).

91. See MODEL PENAL CODE & COMMENTS., PART II § 220.1 cmt. 4 at 16–18 n.63 (AM. L. INST. 1980) (“Under the Model Penal Code, the requirement of a purpose to destroy a building or occupied structure means that the actor must *know* of the characteristics of the place to be destroyed, although of course he need not know that it is legally classified as a ‘building or occupied structure’ by the law of arson.”).

92. *Id.* § 220.1 cmt. 6 at 22–23 (“Paragraph (1)(a) does adopt the conclusion . . . that second-degree felony sanctions should be reserved for a purpose to destroy the property ‘of another.’”).

93. See, e.g., *id.* § 230.4 cmt. 3 at 451–52 (explaining that section 2.02(4) requires knowledge for “all elements” of endangering welfare of children); *id.* § 250.9 cmt. 2 at 415 n.14 (explaining that section 2.02(4) requires purposefulness for “all material elements” of desecrating venerated objects).

94. See *id.* § 2.02 cmt. 6 at 245 (“Subsection (4) seeks to assist in the resolution of a common ambiguity in penal legislation, the statement of a particular culpability requirement in the definition of an offense in such a way that it is unclear whether the requirement applies to all the elements of the offense or only to the element that it immediately introduces.”).

## 2. Consecutive Offense Elements That Are Arguably Interrupted

The MPC is also generally effective in handling the second common statutory pattern implicating section 2.02(4). The second pattern occurs when an offense states a culpability requirement that is immediately followed by consecutive objective elements that are arguably interrupted by language that distinguishes them.<sup>95</sup> Such interruptions may occur if a word or phrase introduces an offense element in a way that suggests that the stated culpability requirement might not apply.

For example, the Code defines the offense of felonious restraint to apply when one “knowingly: (a) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury.”<sup>96</sup> Under section 2.02(4), it is clear that the offense requires knowledge both for restraining another and doing so unlawfully.<sup>97</sup> Arguably, however, section 2.02(4) dictates a different result for the element of exposing the victim to the risk of serious bodily injury. That element immediately follows the phrase “in circumstances,” which could be understood to distinguish that element from the ones for which knowledge is required.<sup>98</sup> The Code’s commentary, however, makes clear that the phrase “in circumstances” does not preclude section 2.02(4) from requiring knowledge as to endangerment.<sup>99</sup>

False imprisonment provides a second example of interrupting language that arguably distinguishes offense elements. Under the Code, false imprisonment occurs when one “knowingly restrains another unlawfully so as to interfere substantially with his liberty.”<sup>100</sup> Again, section 2.02(4) plainly requires knowledge for restraining another and doing it unlawfully,<sup>101</sup> but it is less clear what culpability is required for interfering with the victim’s liberty. That element appears right after the phrase “so as to,” which some might interpret to distinguish the last objective element from the first two.<sup>102</sup> Unfortunately, the commentary

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95. *See id.*; MODEL PENAL CODE §§ 212.2(a), 212.3 (AM. L. INST., Proposed Official Draft 1962).

96. MODEL PENAL CODE § 212.2(a) (AM. L. INST., Proposed Official Draft 1962).

97. *See id.* § 2.02(4).

98. *See id.* § 212.2(a).

99. *See* MODEL PENAL CODE & COMMENTS., PART I § 212.2 cmt. 2 at 241–42 (AM. L. INST. 1985) (“[I]t should be noted that Section 212.2 requires proof that the accused acted knowingly. Thus, he must have been aware that he was restraining his victim, that the restraint was unlawful, and that it exposed the victim to physical danger.”).

100. MODEL PENAL CODE § 212.3.

101. *See supra* note 94 and accompanying text (citing MODEL PENAL CODE & COMMENTS., PART I § 2.02 cmt. 6 at 245).

102. *See* MODEL PENAL CODE § 212.3.

fails to address how section 2.02 applies to the requirement of substantial interference with liberty.<sup>103</sup>

Hence, the commentary does not provide much guidance about how to approach stated culpability requirements for consecutive objective elements that are arguably interrupted. The commentary suggests that such language does not preclude the application of a stated culpability requirement, and that seems to be the right result.<sup>104</sup> In any event, it is apparent that the drafters did not intend for section 2.02(4) to authorize the imposition of absolute liability.<sup>105</sup> Even assuming that interrupting language somehow distinguishes one offense element from others, a culpability requirement of recklessness should be imposed under section 2.02(3).<sup>106</sup>

### 3. Offense Elements That Are Distinguished Grammatically

The Code struggles most with the third and final common statutory pattern implicating section 2.02(4). The pattern occurs when an offense states a culpability requirement in one part of a sentence, and another part requires an objective element without specifying a mental state.<sup>107</sup> Problems arise most commonly when an offense requires that a defendant act with a particular purpose that does not correspond to any objective elements.<sup>108</sup> When an offense requires such “specific” or “ulterior” intent, the offense definition typically distinguishes the culpability requirement from the remaining elements grammatically.<sup>109</sup> The same pattern can occur when an offense indicates grammatically that a culpability requirement applies to some objective elements but not others.<sup>110</sup>

As Paul Robinson has noted, section 2.02(4) risks applying a stated culpability requirement to all offense elements when a more limited application is intended.<sup>111</sup> Professor Robinson gives two examples, both of which involve offenses with specific-intent requirements.<sup>112</sup> The first example is burglary,<sup>113</sup> which the MPC defines to occur when one “enters a building or occupied structure . . . with purpose to commit a crime

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103. See MODEL PENAL CODE & COMMENTS., PART I § 2.02 cmt. 6 at 245–46.

104. See *id.*

105. See *id.*

106. See MODEL PENAL CODE § 2.02(3) (requiring, at minimum, recklessness when a culpability level is not prescribed for an offense element).

107. See ROBINSON, *supra* note 10, at § 61(b)(6).

108. See *id.* § 61(b)(8).

109. See *id.* § 61(a)(2).

110. See *id.* § 61(b)(6).

111. *Id.*

112. *Id.* §§ 61(b)(6), (7).

113. *Id.* § 61(b)(6).

therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.”<sup>114</sup> Because the offense definition requires the actor to have a “purpose to commit a crime,”<sup>115</sup> section 2.02(4) might be read to require purpose as to every other element of the offense. Professor Robinson’s second example, harassment,<sup>116</sup> is committed when, acting “with purpose to harass another, [one] . . . insults . . . another in a manner likely to provoke violent or disorderly response.”<sup>117</sup> If section 2.02(4) is applied literally, it may require purpose for all offense elements, demanding that a defendant intentionally insult another for the purpose of provoking a violent or disorderly response.<sup>118</sup>

In applying stated culpability requirements so broadly, the Code puts section 2.02(4) at tension with section 2.02(3).<sup>119</sup> Under section 2.02(3), recklessness, at a minimum, is required for any offense element that lacks a prescribed culpability level.<sup>120</sup> But if section 2.02(4) applies a stated culpability level to every element of the offense, there is no room for section 2.02(3) to operate because all offense elements have prescribed culpability levels.<sup>121</sup> Hence, as a practical matter, section 2.02(4) threatens to limit section 2.02(3)’s application to offenses that fail to state any culpability requirements at all.

Regrettably, the Code’s commentary fails to clarify how section 2.02 applies to offense elements that are grammatically distinguished from culpability requirements.<sup>122</sup> Section 2.02’s commentary never explains how an offense may distinguish between offense elements.<sup>123</sup> Instead, the commentary vaguely observes that “[w]hen a distinction is intended, as it often is, proper drafting ought to make it clear.”<sup>124</sup> But elsewhere, the commentary is inconsistent about whether particular offenses distinguish between offense elements. When they do, section 2.02(3) requires at least recklessness for any offense element that lacks a prescribed culpability level.<sup>125</sup> But if section 2.02(4) applies, the stated culpability requirement attaches to all offense elements.<sup>126</sup>

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114. MODEL PENAL CODE § 221.1(1) (AM. L. INST., Proposed Official Draft 1962).

115. *See id.* § 2.02(4); *see also* ROBINSON, *supra* note 10, at § 61(b)(6).

116. ROBINSON, *supra* note 10, at § 61(b)(7).

117. MODEL PENAL CODE § 250.4.

118. ROBINSON, *supra* note 10, at § 61(b)(7).

119. *Id.*

120. MODEL PENAL CODE § 2.02(3) (requiring conduct committed recklessly, knowingly, or purposely for offense elements lacking a prescribed culpability level).

121. *See id.*

122. *See* MODEL PENAL CODE & COMMENTS., PART I § 2.02 cmt. 6 at 245–46 (AM. L. INST. 1985).

123. *See id.*

124. *Id.* at 245.

125. MODEL PENAL CODE § 2.02(3).

126. *Id.* § 2.02(4).

The commentary's inconsistency is illustrated by the offenses of resisting arrest and theft of lost property, which use similar forms.<sup>127</sup> First, a person resists arrest under the Code "if, for the purpose of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance."<sup>128</sup> Note that the offense requires a purpose to prevent a public servant from making a lawful arrest or performing another duty.<sup>129</sup> After imposing that requirement, the definition uses a comma to begin a new clause that requires objective elements without introducing a new culpability requirement.<sup>130</sup>

Similarly, the Code defines theft of lost property by using commas to begin new clauses after stating the culpability requirements of knowledge and purpose:

A person who comes into control of property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient is guilty of theft if, with purpose to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to have it.<sup>131</sup>

Grammatically, the culpability level of knowledge seems to apply only to the requirement that the property was "lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient."<sup>132</sup> Following that clause, the offense definition then imposes a specific-intent requirement of a purpose to deprive the owner of the property at issue.<sup>133</sup> Finally, the offense definition's last clause requires that the actor fail to take reasonable measures to restore that property to the owner without prescribing a culpability requirement.<sup>134</sup>

Analytically, there is no meaningful difference between the offense definition for resisting arrest and the last part of the offense definition for theft of lost property. Both impose specific-intent requirements and then begin new clauses that require objective elements without

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127. *See id.* §§ 242.2, 223.5.

128. *Id.* § 242.2.

129. *See id.*

130. *See id.*

131. *Id.* § 223.5.

132. *See id.*

133. *See id.*

134. *See id.*

specifying new culpability requirements.<sup>135</sup> Nevertheless, the MPC's commentary treats the two offenses very differently. For resisting arrest, the commentary notes that the culpability requirement of purpose does not apply to the offense's objective elements.<sup>136</sup> Instead, citing section 2.02(3), the commentary states that "recklessness will suffice with respect to the elements that the actor created a substantial risk of bodily harm or that the means he employed justified or required substantial force to overcome the resistance."<sup>137</sup> In contrast, the MPC's commentary states that section 2.02(4), rather than subsection section 2.02(3), governs the last clause of the offense definition for theft of lost property.<sup>138</sup> Revealingly, the commentary is also inconsistent in its treatment of other offenses that grammatically distinguish clauses with objective elements from those with stated culpability requirements.<sup>139</sup>

As discussed earlier, section 2.02(4) is generally effective in applying a stated culpability requirement to consecutive objective elements that appear in the same part of the sentence.<sup>140</sup> The Code properly recognizes that the culpability requirement applies to such elements because the offense fails to distinguish between them even if it uses minor interrupting language.<sup>141</sup> The MPC struggles with culpability requirements, however, when an offense distinguishes between objective elements using punctuation, syntax, or both.<sup>142</sup> For offenses that distinguish between elements grammatically, section 2.02(4) goes too far in applying a stated culpability requirement to all the elements of the offense.<sup>143</sup> That broad rule precludes the application of section 2.02(3),

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135. *See id.* §§ 242.2, 223.5.

136. MODEL PENAL CODE & COMMENTS., PART II § 242.2 cmt. 7 at 220 (AM. L. INST. 1980).

137. *Id.*

138. *Id.* § 223.5 cmt. 2 at 227 n.8. Confusingly, the commentary applies a culpability requirement of knowledge, rather than purpose, for the requirement of failing to take reasonable measures to restore property to the owner. *See id.* ("By operation of Section 2.02(4) . . . the knowledge requirement of Section 223.5 is fully applicable to the requirement that the actor fail to take reasonable measures to restore the property to a person entitled to have it."). The commentary seems to refer to the first part of the offense definition, which requires that the actor know that the property was "lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient." *See* MODEL PENAL CODE § 223.5. But the offense's second clause imposes an intervening culpability requirement of a "purpose to deprive the owner" of the property. *See id.* The commentary fails to address the proper scope of that culpability requirement.

139. *Compare* MODEL PENAL CODE & COMMENTS., PART II § 223.2(1) cmt. 7 at 177–78 (applying section 2.02(3) to theft by unlawful taking), *and id.* § 224.1 cmt. 5(c) at 300 (applying section 2.02(3) to forgery), *with id.* § 223.8 cmt. 2(c) at 268–69 (applying section 2.02(4) to theft by failure to make required disposition).

140. *See supra* Section II.B.2.

141. *See supra* Section II.B.2.

142. *See supra* Section II.B.3.

143. *See supra* Section II.B.3.

which requires proof of recklessness for any element that lacks a culpability level after applying section 2.02(4).<sup>144</sup>

*C. Providing a Legislative-Intent Exception*

The Code's final major shortcoming is in providing a legislative-intent exception in section 2.02(4). When an offense states a culpability requirement without distinguishing between offense elements, the stated culpability requirement applies to each element "unless a contrary purpose plainly appears."<sup>145</sup> Section 2.02(4)'s legislative-intent exception is redundant at best; at worst, it threatens to undermine the Code's culpability scheme by authorizing the imposition of absolute liability.

The MPC's commentary says little about section 2.02(4)'s legislative-intent exception. The drafters justified the exception's inclusion because the Code adopts "the view that if a particular kind of culpability has been articulated at all by the legislature as sufficient with respect to any element of the offense, the assumption is that it was meant to apply to all material elements."<sup>146</sup> As discussed above, however, section 2.02(4) is sometimes too broad in applying a stated culpability requirement to all objective elements of an offense.<sup>147</sup> That rule of construction is particularly problematic when an offense indicates grammatically that a culpability requirement applies to some objective elements but not others. But rather than restrict a stated-culpability provision's application to particular elements, the drafters chose to rein in section 2.02(4) with an exception that itself is quite broad.<sup>148</sup>

The drafters' approach is puzzling for three reasons. First, the Code's default culpability provision, section 2.02(3), does not provide a legislative-intent exception.<sup>149</sup> If anything, such an exception makes far more sense for a default culpability provision than for a stated-culpability provision; by its nature, the latter applies when an offense explicitly prescribes a mental state.<sup>150</sup> In contrast, a default culpability provision imposes culpability requirements when an offense is silent about culpability.<sup>151</sup> To say the least, the drafters made an odd choice in permitting legislative intent to trump a statute's plain language but not trump an interpretive rule like section 2.02(3).

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144. See MODEL PENAL CODE § 2.02(3).

145. *Id.* § 2.02(4).

146. MODEL PENAL CODE & COMMENTS., PART I § 2.02(4) cmt. 6 at 245 (AM. L. INST. 1985).

147. See *supra* Section II.B.3.

148. See MODEL PENAL CODE § 2.02(4).

149. See *id.* § 2.02(3).

150. See *id.* § 2.02(4).

151. See *id.* § 2.02(3).

Second, the legislative-intent exception is largely redundant because section 2.02(4) is limited to offense definitions that prescribe culpability requirements “without distinguishing” between objective elements.<sup>152</sup> Presumably, when an offense does meaningfully distinguish between objective elements, section 2.02(4) is not even implicated. In fact, the commentary states that a legislature can draft any offense in a way that makes clear that “a distinction is intended.”<sup>153</sup> But if an offense clearly limits the application of a stated culpability requirement, it necessarily specifies a mental state in a way that distinguishes between offense elements.<sup>154</sup> Hence, section 2.02(4)’s legislative-intent exception seems completely superfluous.

Finally, if the legislative-intent exception has any effect, it is to significantly weaken stated culpability requirements. To have meaning, the phrase “unless a contrary purpose plainly appears” must provide an exception to the ordinary rule that a culpability requirement applies to more than just the first element it precedes.<sup>155</sup> Under this reading of the provision, the legislative-intent exception precludes the application of a stated culpability requirement even if the statute prescribes a mental state without distinguishing between offense elements.<sup>156</sup> The exception could apply, then, even when an offense prescribes a culpability requirement that applies to consecutive objective elements that appear in the same part of the sentence. Put differently, the exception possibly creates a loophole permitting the imposition of absolute liability.

Of course, absolute liability was the last thing that the MPC’s drafters wanted. For that reason, section 2.02(1) generally requires culpability for each objective element of an offense,<sup>157</sup> and section 2.05 authorizes absolute liability only in extremely limited circumstances.<sup>158</sup> Nevertheless, as explained next in Part III, numerous state courts have seized on section 2.02(4)’s weaknesses to justify the imposition of absolute liability.

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152. *Id.* § 2.02(4).

153. MODEL PENAL CODE & COMMENTS., PART I § 2.02(4) cmt. 6 at 245 (AM. L. INST. 1985).

154. *See id.* (“When a distinction is intended, as it often is, proper drafting ought to make it clear.”).

155. *See id.*

156. *See id.*

157. MODEL PENAL CODE § 2.02(1).

158. *See id.* § 2.05.

### III. PROBLEMS WITH STATED CULPABILITY REQUIREMENTS IN MODEL PENAL CODE STATES

To date, twenty-five states have enacted culpability provisions influenced significantly by the MPC: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maine, Missouri, Montana, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, and Utah.<sup>159</sup> Section 2.02(4) has been particularly influential, with nineteen states including similar stated-culpability provisions in their criminal codes.<sup>160</sup> Hence, only six MPC states lack rules like section 2.02(4) despite otherwise being influenced by the Code's culpability rules: Alaska, Kentucky, Ohio, Tennessee, Texas, and Utah.<sup>161</sup>

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159. See ALA. CODE §§ 13A-2-1 to -6 (2021); ALASKA STAT. ANN. §§ 11.81.600–620 (West 2021); ARIZ. REV. STAT. ANN. §§ 13-201 to -204 (2021); ARK. CODE ANN. §§ 5-2-201 to -206 (West 2021); COLO. REV. STAT. ANN. §§ 18-1-501 to -504 (West 2021); CONN. GEN. STAT. ANN. §§ 53a-5 to -6 (West 2021); DEL. CODE ANN. tit. 11, §§ 251–64 (West 2021); HAW. REV. STAT. ANN. §§ 702-204 to -220 (West 2021); 720 ILL. COMP. STAT. ANN. 5/4-3 to 4-9 (West 2021); IND. CODE ANN. § 35-41-2-2 (West 2021); KAN. STAT. ANN. §§ 21-5202 to -5204, -5207 (West 2021); KY. REV. STAT. ANN. §§ 501.010–.070 (West 2021); ME. REV. STAT. ANN. tit. 17-A, §§ 32–36 (West 2021); MO. ANN. STAT. §§ 562.016–.031 (West 2021); MONT. CODE ANN. §§ 45-2-101 to -104 (West 2021); N.H. REV. STAT. ANN. §§ 626:2–:3 (2021); N.J. STAT. ANN. §§ 2C:2-2 to -4 (West 2021); N.Y. PENAL LAW §§ 15.00–.20 (McKinney 2021); N.D. CENT. CODE ANN. §§ 12.1-02-02 to -05 (West 2021); OHIO REV. CODE ANN. §§ 2901.20–.22 (West 2021); OR. REV. STAT. ANN. §§ 161.085–.115 (West 2021); 18 PA. STAT. AND CONS. STAT. ANN. §§ 302–05 (West 2021); TENN. CODE ANN. §§ 39-11-301 to -302 (West 2021); TEX. PENAL CODE ANN. §§ 6.02–.04 (West 2021); UTAH CODE ANN. §§ 76-2-102 to -104 (West 2021).

My list is the same as that of Danye Holley. See Holley, *supra* note 7, at 236–53. Darryl Brown used a similar list for his survey of states that have codified versions of MPC sections 2.02(3) and (4). See Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 289 n.8 (2012). My survey differs from Professor Brown's only by including Montana. Significantly, Montana has enacted a stated-culpability provision influenced by section 2.02(4) of the MPC. See *id.*; MONT. CODE ANN. § 45-2-103(4).

160. ALA. CODE § 13A-2-4(a); ARIZ. REV. STAT. ANN. § 13-202(A); ARK. CODE ANN. § 5-2-203(a); COLO. REV. STAT. ANN. § 18-1-503(4); CONN. GEN. STAT. ANN. § 53a-5; DEL. CODE ANN. tit. 11, § 252; HAW. REV. STAT. ANN. § 702-207; 720 ILL. COMP. STAT. ANN. 5/4-3(b); IND. CODE ANN. § 35-41-2-2(d); KAN. STAT. ANN. § 21-5202(f); ME. REV. STAT. ANN. tit. 17-A, § 34(2); MO. ANN. STAT. § 562.021; MONT. CODE ANN. § 45-2-103(4); N.H. REV. STAT. ANN. § 626:2(I); N.J. STAT. ANN. § 2C:2-2(c)(1); N.Y. PENAL LAW § 15.15(1); N.D. CENT. CODE ANN. § 12.1-02-02(3); OR. REV. STAT. ANN. § 161.115(1); 18 PA. STAT. AND CONS. STAT. ANN. § 302(d).

161. See ALASKA STAT. ANN. § 11.81.610; KY. REV. STAT. ANN. § 501.040; TENN. CODE ANN. § 39-11-301; TEX. PENAL CODE ANN. § 6.02; UTAH CODE ANN. § 76-2-102. Ohio has a code provision that addresses stated culpability requirements, but it does not purport to clarify their proper scope. See OHIO REV. CODE ANN. § 2901.21(A)(2) (requiring “the requisite degree of culpability for each element as to which a culpable mental state is specified by the language defining the offense”).

Among the nineteen states with stated-culpability provisions, nine have provisions that are identical or nearly identical to section 2.02(4).<sup>162</sup> Eight states differ from the MPC mostly in omitting either section 2.02(4)'s language about distinguishing between offense elements,<sup>163</sup> or its legislative-intent exception,<sup>164</sup> which are largely duplicative.<sup>165</sup> Arkansas and Oregon have made more significant changes to their stated-culpability provisions, but both states still generally follow section 2.02(4).<sup>166</sup>

As Darryl Brown observed in a previous survey of state culpability provisions, the MPC's culpability presumptions "have had surprisingly little effect on courts that define mens rea requirements when interpreting criminal statutes."<sup>167</sup> In general, MPC jurisdictions have been quite willing to impose absolute liability even for serious criminal offenses,<sup>168</sup> and states' alterations to section 2.02(4) "explain[] little of the trend of state decisions" concerning absolute liability.<sup>169</sup> My view is that MPC jurisdictions' stated-culpability provisions often fail to prevent absolute liability because, like section 2.02(4) itself, they are deeply flawed. As a result, states' deviations from section 2.02(4) make little difference. In fact, jurisdictions with stated-culpability provisions are just as likely to impose absolute liability as states without such rules.

162. See ARIZ. REV. STAT. ANN. § 13-202(A); DEL. CODE ANN. tit. 11, § 252; HAW. REV. STAT. ANN. § 702-207; KAN. STAT. ANN. § 21-5202(f); ME. REV. STAT. ANN. tit. 17-A, § 34(2); MONT. CODE ANN. § 45-2-103(4); N.H. REV. STAT. ANN. § 626:2(I); N.J. STAT. ANN. § 2C:2-2(c)(1); 18 PA. STAT. AND CONS. STAT. ANN. § 302(d).

163. See ALA. CODE § 13A-2-4(a); COLO. REV. STAT. ANN. § 18-1-503(4); CONN. GEN. STAT. ANN. § 53a-5; N.Y. PENAL LAW § 15.15(1); N.D. CENT. CODE ANN. § 12.1-02-02(3); OR. REV. STAT. ANN. § 161.115(1).

164. See 720 ILL. COMP. STAT. ANN. 5/4-3(b); IND. CODE ANN. § 35-41-2-2(d); N.D. CENT. CODE ANN. § 12.1-02-02(3); MO. ANN. STAT. § 562.021.

165. See MODEL PENAL CODE § 2.02(4) (AM. L. INST., Proposed Official Draft 1962); *supra* notes 145–46 and accompanying text.

166. ARK. CODE ANN. § 5-2-203(a) (West 2021) ("If a statute defining an offense prescribes a culpable mental state and does not clearly indicate that the culpable mental state applies to less than all of the elements of the offense, the prescribed culpable mental state applies to each element of the offense."); OR. REV. STAT. ANN. § 161.115(1) ("If a statute defining an offense prescribes a culpable mental state but does not specify the element to which it applies, the prescribed culpable mental state applies to each material element of the offense that necessarily requires a culpable mental state.")

167. Brown, *supra* note 159, at 285.

168. See *id.* at 297 (finding "widespread judicial endorsement of strict-liability elements" in MPC states and concluding that the Code's culpability provisions "have had only modest effect").

169. *Id.* at 319–21. Professor Brown's assessment was based on his review of decisions interpreting both sections 2.02(3) and (4) of the MPC. See *id.* In a previous article, I reached a different conclusion than Professor Brown about the significance of states' deviations from section 2.02(3). See England, *supra* note 54, at 83 n.248 and accompanying text.

This Part discusses four main ways in which state courts have erred in applying stated culpability requirements. First, many state courts refuse on principle to apply prescribed mental states to offense elements that appear in grading provisions. Second, some courts have illogically applied stated culpability requirements to offense elements even though they are distinguished from other requirements. Third, numerous courts ignore stated culpability requirements based on weak evidence of legislative intent. Finally, when state courts decline to apply prescribed mental states, they also routinely disregard criminal codes' default culpability rules.

A. *Failing to Apply Stated Culpability Requirements to Grading Provisions*

As discussed earlier, section 2.02(4) is too narrow since it applies only when “the law defining an offense” states a culpability requirement without distinguishing between objective elements.<sup>170</sup> The MPC's commentary reveals that the drafters intended for the Code's culpability rules to apply beyond offense definitions, including to grading provisions.<sup>171</sup> Nevertheless, by its terms, section 2.02(4) appears to exclude offense elements that appear outside offense definitions.<sup>172</sup>

MPC jurisdictions have overwhelmingly followed suit. In fact, in every MPC state with a rule modeled after section 2.02(4), the provision applies only to statutes defining offenses.<sup>173</sup> In other words, the only MPC jurisdictions without such a limitation are the six states that lack stated-culpability provisions.<sup>174</sup> In states both with and without rules influenced by section 2.02(4), courts have generally struggled in applying stated culpability requirements to grading provisions. In fact, courts often impose absolute liability not only for grading provisions but also for

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170. See *supra* note 50 and accompanying text.

171. See *supra* notes 63–74 and accompanying text.

172. See *supra* notes 75–77 and accompanying text.

173. ALA. CODE § 13A-2-4(a) (2021); ARIZ. REV. STAT. ANN. § 13-202(A) (2021); ARK. CODE ANN. § 5-2-203(a) (West 2020); COLO. REV. STAT. ANN. § 18-1-503(4) (West 2021); CONN. GEN. STAT. ANN. § 53a-5 (West 2020); DEL. CODE ANN. tit. 11, § 252 (West 2021); HAW. REV. STAT. ANN. § 702-207 (West 2021); 720 ILL. COMP. STAT. ANN. 5/4-3(b) (West 2021); IND. CODE ANN. § 35-41-2-2(d) (West 2021); KAN. STAT. ANN. § 21-5202(f) (West 2021); ME. REV. STAT. ANN. tit. 17-A, § 34(2) (West 2021); MO. ANN. STAT. § 562.021(2) (West 2021); MONT. CODE ANN. § 45-2-103(4) (West 2021); N.H. REV. STAT. ANN. § 626:2(I) (2021); N.J. STAT. ANN. § 2C:2-2(c)(1) (West 2021); N.Y. PENAL LAW § 15.15(1) (McKinney 2021); N.D. CENT. CODE ANN. § 12.1-02-02(3)(a) (West 2021); OR. REV. STAT. ANN. § 161.115(1) (West 2021); 18 PA. STAT. AND CONS. STAT. ANN. § 302(d) (West 2021).

174. See ALASKA STAT. ANN. § 11.81.610 (West 2021); KY. REV. STAT. ANN. § 501.040 (West 2021); OHIO REV. CODE ANN. § 2901.21(2) (West 2021); TENN. CODE ANN. § 39-11-301 (West 2021); TEX. PENAL CODE ANN. § 6.02 (West 2021); UTAH CODE ANN. § 76-2-102 (West 2021).

statutes that define aggravated offenses. Sadly, jurisdictions with stated-culpability provisions have fared no better than jurisdictions without them.

Courts often limit their states' versions of section 2.02(4) by distinguishing requirements in grading provisions from other offense requirements. In *People v. Scheffer*, for example, the Colorado Court of Appeals interpreted an offense that criminalizes the possession of a controlled substance.<sup>175</sup> There, the statute at issue provides that "it is unlawful for any person knowingly to . . . possess . . . a controlled substance" with intent to distribute it.<sup>176</sup> At the time, the statute graded the offense more seriously if it involved more than one gram of a schedule II controlled substance than if it involved one gram or less.<sup>177</sup> The court observed that the grading provisions at issue did not require culpability as to the amount of a controlled substance possessed.<sup>178</sup> The defendant argued that under Colorado's version of section 2.02(4), the culpability requirement of knowledge applied to every element of the offense, including the weight of the drugs he was charged with possessing.<sup>179</sup> The court rejected the defendant's argument, reasoning that requirements for aggravating offenses "are generally regarded and treated as sentence enhancement provisions, not essential elements of an offense."<sup>180</sup> The court concluded that a requirement that appears in a grading provision is not an offense element because "[a] defendant still may be convicted of the underlying offense without any proof of the sentence enhancer."<sup>181</sup>

Other courts have sidestepped states' versions of section 2.02(4) by distinguishing offense definitions for aggravated crimes from ordinary offense definitions. For example, New York's Appellate Division recently interpreted the culpability requirements for an offense that criminalizes assaulting an elderly person in *People v. Burman*.<sup>182</sup> The offense provides that a person commits the felony of second-degree assault when, "[w]ith intent to cause physical injury to a person who is sixty-five years of age

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175. *People v. Scheffer*, 224 P.3d 279, 287–88 (Colo. App. 2009).

176. COLO. REV. STAT. ANN. § 18-18-405(1)(a) (West 2022).

177. *See Scheffer*, 224 P.3d at 287–88 (citing COLO. REV. STAT. ANN. §§ 18-18-405(2)(a)(I)(A), (2.3)(a)).

178. *Id.* at 288.

179. *Id.*

180. *Id.*

181. *Id.* (quoting *Armintrout v. People*, 864 P.2d 576, 580 (Colo. 1993)). The *Scheffer* court erred in distinguishing grading requirements from offense elements, but it likely still reached the right conclusion under Colorado law. As the court observed later in the opinion, a stated culpability level is not required for an element when a statute plainly limits its application. *Id.* at 290 (citing § 18-1-503(4)). The statute at issue in *Scheffer* plainly limited the application of the knowledge requirement because the grading provision appeared as a separate sentence with its own subsection. *See id.*

182. *People v. Burman*, 102 N.Y.S.3d 850, 850–51 (App. Div. 2019).

or older, he or she causes such injury to such person, and the actor is more than ten years younger than such person.”<sup>183</sup> Significantly, the statute explicitly requires “intent to cause physical injury to a person who is sixty-five years of age or older.”<sup>184</sup> New York’s stated-culpability provision states that when an offense prescribes “one and only one” mental state, “it is presumed to apply to every element of the offense unless an intent to limit its application clearly appears.”<sup>185</sup> Although the offense definition therefore requires intent as to the victim’s age, the *Burman* court refused to require any culpability as to that element.<sup>186</sup> The court reasoned, in part, that the offense is intended to aggravate assault to a felony when the victim is elderly.<sup>187</sup> Quoting the New York Court of Appeals, the court observed that the criminal code “is replete with offenses which . . . elevate the degree of criminal responsibility without coupling a requirement of proof of a culpable mental state.”<sup>188</sup>

Similarly, Indiana courts circumvent the state’s stated-culpability provision by characterizing elements as mere “aggravating circumstances.”<sup>189</sup> For instance, in *Markley v. State*, the Indiana Court of Appeals held that the state’s version of section 2.02(4) did not apply to a provision that aggravated the offense of battery when a defendant caused serious bodily injury.<sup>190</sup> The court concluded that serious bodily injury was an offense element, but it was not an “element of the prohibited conduct” as required under Indiana’s stated-culpability provision.<sup>191</sup> Rather, the court characterized the requirement as “an aggravating circumstance which . . . increases the penalty for the offense committed without proof of any culpability separate from the culpability required for the conduct elements of the offense.”<sup>192</sup> As a result, the mental state

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183. N.Y. PENAL LAW § 120.05(12) (McKinney 2021).

184. *Id.*

185. *Id.* § 15.15(1).

186. *Burman*, 102 N.Y.S.3d at 852–53.

187. *Id.*

188. *Id.* at 852 (quoting *People v. Mitchell*, 571 N.E.2d 701, 703 (N.Y. 1991)). Similarly, in another case, the appellate division held that culpability was not required as to the proximity of a drug sale to a school. *People v. Gonzalez*, 658 N.Y.S.2d 305, 306 (App. Div. 1997) (“The ‘school grounds’ element is clearly an aggravating factor, designed to increase the penalties for certain types of drug sales, and the structure of the statute is essentially the same as statutes in which the culpable mental state has been held inapplicable to an aggravating factor.”).

189. *See, e.g.*, *Markley v. State*, 421 N.E.2d 20, 21 (Ind. Ct. App. 1981).

190. *Id.* at 21–22.

191. *Id.* at 21 (quoting IND. CODE ANN. § 35-41-2-2(d) (West 2021)).

192. *Id.* Likewise, in *Owens v. State*, the Indiana Court of Appeals held that the state’s version of section 2.02(4) did not apply to a provision that graded battery as a felony if the victim was a law enforcement officer. 742 N.E.2d 538, 543 (Ind. Ct. App. 2001). Following *Markley*, the court held “that the element of ‘bodily injury to a law enforcement officer’ is an aggravating circumstance, which . . . increases the penalty for the offense committed

required for ordinary battery did not apply.<sup>193</sup> More recently, in *Foster v. State*, the Indiana Court of Appeals concluded that aggravated battery also did not require culpability as to the extent of injury even though the offense was defined as “knowingly inflict[ing] injury on a person that causes protracted loss or impairment of the function of a bodily member or organ.”<sup>194</sup> According to the court, Indiana’s stated-culpability provision did not apply because the requirement was “an aggravating circumstantial element, rather than an additional element of prohibited conduct.”<sup>195</sup>

Courts have drawn similar distinctions in MPC states that lack provisions like section 2.02(4). For example, in *State v. Wilcox*, the Ohio Court of Appeals declined to require any culpability as to whether the defendant knew the victim of an assault was a peace officer.<sup>196</sup> The court concluded that strict liability was appropriate because the grading provision did not prescribe a mental state and “simply enhance[d] the degree of the offense and potential penalty.”<sup>197</sup> Likewise, in *Price v. State*, the Texas Court of Criminal Appeals interpreted a grading provision that aggravates assault when “the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person’s throat or neck or by blocking the person’s nose or mouth.”<sup>198</sup> The court determined the scope of the offense’s culpability requirement was based on what it called “the gravamen of the offense.”<sup>199</sup> The court concluded that bodily injury was the sole gravamen, meaning that no culpability was required as to the defendant’s conduct in applying pressure to the victim’s throat or neck or blocking the victim’s nose or mouth.<sup>200</sup> Strict liability was appropriate for those elements, the court reasoned, because the conduct was “clearly wrongful . . . regardless of the means used to effect the result.”<sup>201</sup>

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without proof of any culpability separate from the culpability required for the conduct elements of the offense.” *Id.*

193. See *Markley*, 421 N.E.2d at 22.

194. *Foster v. State*, No. 53A01-1209-CR-414, 2013 WL 3376962, at \*3 (Ind. Ct. App. July 8, 2013) (quoting § 35-42-2-1.5(2)).

195. *Id.* at \*3.

196. *State v. Wilcox*, 827 N.E.2d 832, 834 (Ohio Ct. App. 2005).

197. *Id.* at 833; see also *State v. Watson*, No. CA2005-12-038, 2007 WL 97592, at \*2–3 (Ohio Ct. App. Jan. 16, 2007).

198. *Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015) (quoting TEX. PENAL CODE ANN. § 22.01(b)(2)(B) (West 2021)).

199. *Id.*

200. See *id.* at 442–43.

201. *Id.* at 443. In an earlier case, *McQueen v. State*, the Texas Court of Criminal Appeals interpreted the offense definition for unauthorized use of a motor vehicle, which occurs when a person “intentionally or knowingly operates another’s boat, airplane, or motor-propelled vehicle without the effective consent of the owner.” 781 S.W.2d 600, 603 (Tex.

The Texas Court of Criminal Appeals is hardly alone in using normative judgments about blameworthiness to interpret offenses' culpability requirements. For instance, the Alaska Court of Appeals interpreted an offense definition for second-degree criminal mischief in *Ortberg v. State*.<sup>202</sup> At the time, a person committed the offense if "having no right to do so . . . [and] with intent to damage property of another, the person damage[d] property of another in an amount of \$500 or more."<sup>203</sup> The court held that no culpability was required as to the extent of the damage because the remaining offense elements demonstrated "an awareness or consciousness of wrongdoing."<sup>204</sup> Finally, in *Commonwealth v. Flemings*, the Pennsylvania Supreme Court declined to apply a stated culpability requirement without even addressing the state's version of section 2.02(4).<sup>205</sup> The offense at issue was aggravated assault, which occurred at the time when one "knowingly cause[d] bodily injury to a police officer . . . in the performance of duty."<sup>206</sup> Perplexingly, the court relied on the United States Supreme Court's interpretation of a similar federal statute,<sup>207</sup> which, of course, was not binding. The *Flemings* court concluded that a defendant is sufficiently blameworthy in committing any assault, and thus the defendant "must take his victim as he finds him."<sup>208</sup> Hence, despite the offense's plain language, the defendant did not need to know that the victim was a police officer.<sup>209</sup>

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Crim. App. 1989) (quoting PENAL § 31.07(a)). The court held that the statute required knowledge for all elements of the offense, including the owner's lack of consent. *Id.* at 604. The statute requires knowledge for that element, the court reasoned, because it "separates lawful operation of another's motor vehicle from unauthorized use." *Id.* Grammatically, the offenses in *Price* and *McQueen* are essentially the same because they prescribe culpability requirements followed by consecutive, uninterrupted objective elements. Unlike Texas courts, the MPC would require culpability for both statutes because section 2.02(4) does not distinguish aggravating elements from other offense elements. See MODEL PENAL CODE § 2.02(4) (AM. L. INST., Proposed Official Draft 1962).

202. See *Ortberg v. State*, 751 P.2d 1368, 1374 (Alaska Ct. App. 1988) (discussing ALASKA STAT. ANN. § 11.46.482(a)(1) (West 2021)).

203. *Id.*

204. *Id.* On appeal, the state correctly observed that Alaska's default culpability provision requires recklessness as to the extent of damage. See *id.* (citing § 11.81.610(b)). But the court rejected the argument, instead holding that the statute imposes absolute liability. *Id.*

205. See *Commonwealth v. Flemings*, 652 A.2d 1282, 1283–84 (Pa. 1995).

206. *Id.* at 1283. In *State v. Reed*, the Missouri Court of Appeals interpreted a similar statute. See 402 S.W.3d 146, 150–51 (Mo. Ct. App. 2013). The court correctly concluded that the statute required the defendant to know that the victims were police officers. *Id.* at 150.

207. See *Flemings*, 652 A.2d at 1284 (discussing *United States v. Feola*, 420 U.S. 671 (1975)).

208. *Id.* at 1285.

209. *Id.* The holding in *Flemings* seems to violate Pennsylvania's rule that penal statutes should be strictly construed. See 1 PA. STAT. AND CONS. STAT. ANN. § 1928(b)(1) (West 2021). As the Pennsylvania Supreme Court itself has recognized, strict construction requires that "where doubt exists concerning the proper scope of a penal statute, it is the accused who

In total, then, at least seven MPC states have declined to apply prescribed mental states to elements because they enhance criminal liability. In doing so, courts seem to assume that culpability is not required for elements that aggravate conduct that is already criminal.<sup>210</sup> That assumption finds some support in the MPC itself, given that section 2.02(4) seems to apply only to offense definitions.<sup>211</sup> Nevertheless, in imposing absolute liability for aggravating elements, courts have strayed far from the drafters' vision for criminal liability. The drafters intended for section 2.02 to apply to all elements, including ones that aggravate criminal liability.<sup>212</sup> Moreover, grading distinctions, like those between guilt and innocence, should reflect actors' relative blameworthiness. That, in turn, depends in no small part on culpability, which the Code generally requires for every material element of an offense.<sup>213</sup> Courts should never circumvent that requirement based on their own judgments about defendants' blameworthiness.

*B. Applying Stated Culpability Requirements Too Broadly*

When courts in MPC states err in applying stated culpability requirements, they usually do so in ways that benefit prosecutors. But in a few states, courts have interpreted culpability requirements in ways that hinder prosecution. As discussed earlier, section 2.02(4) is too broad in applying a stated culpability requirement to all offense elements.<sup>214</sup> The Code particularly struggles when an offense prescribes a mental state in one part of a sentence, and another part requires an objective element without prescribing a new mental state.<sup>215</sup> In such a situation, it can be unclear whether the objective element requires the stated culpability level or the default culpability level of recklessness.<sup>216</sup>

Likewise, in all nineteen states with stated-culpability provisions like section 2.02(4), prescribed mental states apply to all offense elements

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should receive the benefit of such doubt." *Commonwealth v. Booth*, 766 A.2d 843, 846 (Pa. 2001). Hence, even assuming that the offense at issue in *Flemings* was ambiguous, the court should have resolved the ambiguity in the defendant's favor by requiring knowledge that the victim was a police officer.

210. For similar reasons, Darryl Brown has observed that the "prevailing principle," even in MPC jurisdictions, is that "no proof of culpability is required beyond that needed to ensure that an actor is not convicted for purely innocent conduct." Brown, *supra* note 159, at 324–25. Under current law, culpability requirements serve "primarily, and often exclusively, to distinguish innocent actors from guilty ones." *Id.* at 325.

211. See MODEL PENAL CODE § 2.02(4) (AM. L. INST., Proposed Official Draft 1962).

212. See *supra* notes 69–73 and accompanying text.

213. See MODEL PENAL CODE § 2.02(1).

214. See *supra* Section II.B.3.

215. See *supra* notes 95–103 and accompanying text.

216. See *supra* notes 119–34 and accompanying text.

in the absence of contrary legislative intent.<sup>217</sup> As this Article will discuss in Section III.C, many courts are all too eager to find legislative intent to evade a prescribed culpability level.<sup>218</sup> In a few states, however, courts have applied stated culpability requirements too broadly.<sup>219</sup> The problem occurs, as under the MPC, when offenses indicate grammatically that they do not apply to every objective element.<sup>220</sup>

In at least four states, courts have applied stated culpability levels to offense elements even though they are distinguished grammatically by punctuation, syntax, or both. The problem arises in two situations. The first situation is the one that creates problems for the MPC: an offense definition states a culpability requirement in one clause, and another clause requires an offense element without stating a culpability level. Additionally, some states err when a statute distinguishes an element from others by requiring it in a completely separate provision. Both situations will be discussed in turn.

#### 1. Applying Stated Culpability Requirements Too Broadly in Offense Definitions

First, at least three states have applied stated culpability levels to offense elements that are distinguished grammatically within offense definitions. Those states are Arkansas, Hawaii, and Pennsylvania, and all three have enacted both stated-culpability provisions like section 2.02(4)<sup>221</sup> and default culpability provisions modeled after section 2.02(3).<sup>222</sup> As a result, when determining the culpability required for an objective element, courts in the three states should always choose between any stated mental states and the default level of recklessness. In all three states, however, courts have broadly applied stated

217. See ALA. CODE § 13A-2-4(a) (2021); ARIZ. REV. STAT. ANN. § 13-202(A) (2021); ARK. CODE ANN. § 5-2-203(a) (West 2021); COLO. REV. STAT. ANN. § 18-1-503(4) (West 2021); CONN. GEN. STAT. ANN. § 53a-5 (West 2021); DEL. CODE ANN. tit. 11, § 252 (West 2021); HAW. REV. STAT. ANN. § 702-207 (West 2021); 720 ILL. COMP. STAT. ANN. 5/4-3(b) (West 2021); IND. CODE ANN. § 35-41-2-2(d) (West 2021); KAN. STAT. ANN. § 21-5202(f) (West 2021); ME. STAT. ANN. tit. 17-A, § 34(2) (West 2021); MO. ANN. STAT. § 562.021(1)–(2) (West 2021); MONT. CODE ANN. § 45-2-103(4) (West 2021); N.H. REV. STAT. ANN. § 626:2(I) (2021); N.J. STAT. ANN. § 2C:2-2(c)(1) (West 2021); N.Y. PENAL LAW § 15.15(1) (McKinney 2021); N.D. CENT. CODE ANN. § 12.1-02-02(3) (West 2021); OR. REV. STAT. ANN. § 161.115(1) (West 2021); 18 PA. STAT. AND CONS. STAT. ANN. § 302(d) (West 2021).

218. See *infra* Section III.C.

219. See *infra* Section III.B.1.

220. See *infra* Section III.B.1.

221. ARK. CODE ANN. § 5-2-203(a) (West 2021); HAW. REV. STAT. ANN. § 702-207 (West 2021); 18 PA. STAT. AND CONS. STAT. ANN. § 302(d) (West 2021).

222. ARK. CODE ANN. § 5-2-203(b); HAW. REV. STAT. ANN. § 702-204; 18 PA. STAT. AND CONS. STAT. ANN. § 302(c).

culpability levels without even considering the possibility of requiring recklessness.

For example, the Arkansas Court of Appeals recently interpreted the culpability requirements for kidnapping in *Wallace v. State*.<sup>223</sup> The defendant argued that he was entitled to a lesser-included-offense instruction for false imprisonment.<sup>224</sup> In Arkansas, kidnapping occurs if one “restrains another person so as to interfere substantially with the other person’s liberty with the purpose of: terrorizing the other person or another person.”<sup>225</sup> Thus, purpose appears to be a specific-intent requirement that does not apply to the offense’s objective elements. After all, the word “purpose” appears after the requirement of restraining the victim in a way that substantially interferes with his or her liberty.<sup>226</sup> Nevertheless, the court agreed with the defendant’s premise that the statute required a purpose to restrain the victim.<sup>227</sup> The court ultimately held that the defendant was not entitled to a jury instruction on false imprisonment based on the Arkansas Supreme Court’s decision in *Davis v. State*.<sup>228</sup> In that case, the court also assumed that purpose was required for all the objective elements of kidnapping, including the requirement of restraint.<sup>229</sup> Significantly, the *Davis* and *Wallace* courts both failed to consider the possibility that recklessness might be required as to restraint.<sup>230</sup>

The Hawaii Intermediate Court of Appeals recently used a similar approach for the offense of theft in *State v. Gaub*.<sup>231</sup> In *Gaub*, the circuit court granted the defendant’s motion to dismiss because the complaint failed to sufficiently allege the culpability requirements for second-degree theft.<sup>232</sup> Under the governing statute, theft occurs when “[a] person obtains or exerts unauthorized control over the property of another with intent to deprive the [owner] of the property.”<sup>233</sup> The offense definition grammatically distinguishes the offense’s objective elements from the culpability requirement of a purpose to deprive the owner of

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223. See *Wallace v. State*, 537 S.W.3d 269, 272 (Ark. Ct. App. 2017).

224. *Id.* at 271–72.

225. *Id.* at 272 (quoting ARK. CODE ANN. § 5-11-102(a)(6) (West 2021)).

226. *Id.*

227. See *id.* at 272.

228. See *id.* at 272–73 (referencing *Davis v. State*, 232 S.W.3d 476, 486–87 (Ark. 2006)).

229. *Davis*, 232 S.W.3d at 486 (“The mental state required for kidnapping is ‘purposely’ . . . First-degree false imprisonment requires a culpable mental state of ‘knowingly.’ Knowingly is a lesser mental state than purposely.”) (quoting *Moore v. State*, CACR 03-488, 2004 WL 161474, at \*1 (Ark. Ct. App. Jan. 28, 2004)).

230. See *Davis*, 232 S.W.3d at 486; *Wallace*, 537 S.W.3d at 272.

231. *State v. Gaub*, No. CAAP-15-0000547, 2017 WL 213513, at \*6 (Haw. Ct. App. Jan. 18, 2017).

232. *Id.* at \*1.

233. HAW. REV. STAT. ANN. § 708-830(1) (West 2021).

property.<sup>234</sup> Hence, the court should have required recklessness for the objective elements under Hawaii's version of section 2.02(3). But the court did not even address that possibility.<sup>235</sup> Instead, applying the state's version of section 2.02(4), the court held that a defendant must intend to obtain or exert control over the property of another.<sup>236</sup>

Finally, the Pennsylvania Superior Court applied a stated culpability requirement for trespass too broadly in *Commonwealth v. Targonski*.<sup>237</sup> In that case, the alleged trespass occurred when the defendant accidentally entered a neighbor's apartment during a confrontation in a hallway.<sup>238</sup> Under Pennsylvania law, trespass occurs when a person, "knowing that he is not licensed or privileged to do so, . . . enters . . . any building or occupied structure or separately secured or occupied portion thereof."<sup>239</sup> Significantly, the offense definition requires that the defendant know only that he or she is not licensed or privileged to enter.<sup>240</sup> After that, the definition uses a comma to begin a new clause that requires entry without prescribing a new mental state.<sup>241</sup> Because the offense definition distinguishes between elements, recklessness should be required for entry under Pennsylvania's version of section 2.02(4). Although the offense definition distinguishes the element of entry from the knowledge requirement, the court held that the statute required the defendant to enter the apartment knowingly.<sup>242</sup> The court failed to even address the possibility of applying Pennsylvania's default culpability level of recklessness.<sup>243</sup>

Arkansas, Hawaii, and Pennsylvania, much like the MPC, sometimes apply stated culpability requirements too broadly in offense definitions. In applying a stated culpability requirement even when an offense distinguishes between elements, courts significantly limit the effect of states' default culpability provisions.<sup>244</sup> Curiously, however, state courts do not seem to even recognize that the two provisions are at tension. Under state criminal codes, courts often face a choice between a

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234. *Id.*

235. *See Gaub*, 2017 WL 213513, at \*6.

236. *Id.*

237. *See Commonwealth v. Targonski*, No. 1758 MDA 2013, 2014 WL 10588466, at \*3 (Pa. Super. Ct. Sept. 26, 2014).

238. *Id.* at \*1 ("While Arsenault was pushed up against his locked apartment door, his roommate Rosan Patel heard commotion, looked out the peephole, and saw Arsenault being punched. As Patel opened the door to let him in, Arsenault tumbled into the apartment, followed by a 'cascade' of five to ten other people, including [Appellant].").

239. 18 PA. STAT. AND CONS. STAT. ANN. § 3503(a)(1)(i) (West 2020).

240. *Id.* § 3503(a)(1).

241. *See id.*

242. *Targonski*, 2014 WL 10588466, at \*6.

243. *See id.* at \*3–5.

244. *See, e.g., id.* at \*4–6.

prescribed mental state and a default culpability level. Courts often perceive the choice, however, as being one between the stated culpability level and absolute liability.<sup>245</sup>

## 2. Applying Stated Culpability Requirements Too Broadly for Grading Provisions

Courts in Hawaii and Oregon have also applied stated culpability requirements too broadly for grading provisions. By their nature, criminal codes always distinguish true grading provisions from offense definitions. Indeed, grading provisions are codified as separate sentences, and they frequently appear in their own sections or subsections. Hence, section 2.02(4) should rarely, if ever, apply a culpability requirement stated in an offense definition to a new objective element in a grading provision. Rather, if a grading provision fails to specify a culpability requirement for a new element, the Code imposes the default culpability level of recklessness under section 2.02(3).<sup>246</sup> As discussed earlier, the MPC's drafters made that clear in their commentary about the grading provisions for burglary and theft.<sup>247</sup>

Similarly, Hawaii and Oregon have default culpability provisions that require recklessness and negligence, respectively, for objective elements that lack stated culpability requirements.<sup>248</sup> Hence, when a grading provision fails to state a culpability requirement, a Hawaii court should require recklessness, and an Oregon court should require negligence. Courts in both states, however, have overlooked default culpability provisions when determining the culpability requirements for grading provisions. As a result, Oregon and Hawaii courts sometimes conclude that they can prevent absolute liability only by applying a culpability requirement stated separately in an offense definition.

By their own admission, Oregon courts have found culpability requirements to be "a chronically vexing problem."<sup>249</sup> Oregon courts have particularly struggled with the culpability requirements for grading provisions, as shown by the Oregon Supreme Court's decision in *State v. Blanton*.<sup>250</sup> The defendant in *Blanton* was convicted for furnishing

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245. See *supra* notes 167–69 and accompanying text.

246. See MODEL PENAL CODE § 2.02(3) (AM. L. INST., Proposed Official Draft 1962) (requiring recklessness "[w]hen the culpability sufficient to establish a material element of an offense is not prescribed by law").

247. See *supra* notes 66–73 and accompanying text.

248. HAW. REV. STAT. ANN. § 702-204 (West 2021); OR. REV. STAT. ANN. § 161.115(2) (West 2021).

249. *State v. Schodrow*, 66 P.3d 547, 549–50 (Or. Ct. App. 2003).

250. *State v. Blanton*, 588 P.2d 591, 29–30 (Or. 1978). Another issue for Oregon has been that its stated-culpability provision departs from section 2.02(4) by applying a prescribed mental state to each offense element "that necessarily requires a culpable mental state."

marijuana to a minor.<sup>251</sup> At the time, the offense definition criminalized “knowingly and unlawfully” furnishing drugs to another person, among other things.<sup>252</sup> The offense was ordinarily a Class B felony, but a separate grading provision aggravated the offense to a Class A felony “if the defendant [was] 18 years of age or over and the conviction is for furnishing a narcotic or dangerous drug to a person under 18 years of age and who is at least three years younger than the defendant.”<sup>253</sup> Importantly, the grading provision did not prescribe any culpability requirements as to the age of the person to whom a drug was provided.<sup>254</sup>

The court emphasized that, under Oregon’s version of MPC section 2.02(1), culpability was generally required “with respect to each material element of the offense.”<sup>255</sup> The court correctly concluded that age was a material element of the offense, meaning that absolute liability was inappropriate.<sup>256</sup> The court then applied the offense definition’s stated culpability level of knowledge even though it was prescribed in a separate subsection.<sup>257</sup> In doing so, the *Blanton* court ignored the language of Oregon’s culpability provisions.<sup>258</sup> Nowhere did the court acknowledge that the statute distinguished the age requirement from other offense elements, and the court never even considered the possibility of requiring negligence.<sup>259</sup>

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OR. REV. STAT. ANN. § 161.115(1) (West 2021). As I have written elsewhere, similar language has created significant problems for states when it appears in default culpability provisions. See England, *supra* note 54, at 61–66. Fortunately, the *Blanton* court limited the effect of the “necessarily require[d]” limitation by suggesting that offense elements require culpability whenever they “defin[e] the substance or quality of the forbidden conduct.” 588 P.2d at 29–30.

251. See *Blanton*, 588 P.2d at 29.

252. See *id.* at 28 (quoting §167.207(1) (repealed 1977)).

253. *Id.* (quoting § 167.207(4) (repealed 1977)).

254. See *id.*

255. *Id.* at 29 (quoting § 161.095(2)).

256. See *id.* at 30.

257. *Id.*

258. See *id.* at 29–30.

259. See *id.* More recently, in *State v. Jones*, the Oregon Court of Appeals reached a different conclusion about the culpability requirements for theft. 196 P.3d 97, 101–02 (Or. Ct. App. 2008). The court held that the offense definition’s requirement of an intent to deprive did not apply to a grading provision’s element of stealing property worth at least \$750. *Id.* at 102. The court reasoned, in part, that the statute grammatically distinguished the element of value from the remaining offense elements. *Id.* (“Grammatically, the culpable mental state—‘intent to deprive’—immediately precedes and directly modifies the prohibited acts of taking, appropriating, obtaining, or withholding property from an owner. . . . However, neither the grammatical structure nor the obvious legislative purpose of the statute suggests that the culpable mental state extends to elements beyond the prohibited act.”). The *Jones* court therefore imposed absolute liability as to the property’s value without addressing the possibility of negligence under Oregon’s default culpability provision. See *id.* at 101–02.

Hawaii courts also struggle when an offense definition states a culpability requirement, and a separate grading provision requires an objective element without prescribing any mental state. Hawaii courts have been especially confused about the culpability requirements for theft.<sup>260</sup> The problems originated in *State v. Mitchell*, decided by the Hawaii Intermediate Court of Appeals.<sup>261</sup> A year later, in *State v. Cabrera*, the Hawaii Supreme Court adopted the appellate court's interpretation,<sup>262</sup> and subsequent courts have followed both cases.<sup>263</sup> The *Mitchell* court considered what culpability was required as to the value of property obtained by theft.<sup>264</sup> Hawaii defines theft to require an intent to deprive the owner of property.<sup>265</sup> In a separate statutory section, the criminal code aggravates the offense based on the property's value, but without prescribing a new mental state.<sup>266</sup> The MPC uses the same approach.<sup>267</sup>

The *Mitchell* court held that Hawaii's stated-culpability provision required intent as to the value of stolen property.<sup>268</sup> The court relied heavily on the MPC's commentary about theft's grading provision, which emphasizes the importance of requiring culpability as to value.<sup>269</sup> Intent is required, the court reasoned, because the commentary states that stolen property's value "has criminological significance *only if it corresponds with what the thief expected or hoped to get.*"<sup>270</sup> Inexplicably, though, the court failed to address much more relevant MPC commentary that appears just two pages earlier.<sup>271</sup> That commentary explicitly states that because "no culpability is explicitly stated" in theft's grading provision, "the consequence under Section 2.02(3) . . . is a minimum culpability standard of recklessness."<sup>272</sup> Unsurprisingly, the *Mitchell* court also failed to consider Hawaii's version of section 2.02(3),<sup>273</sup> which

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260. See, e.g., *State v. Mitchell*, 965 P.2d 149 (Haw. Ct. App. 1998); *State v. Cabrera*, 978 P.2d 797 (Haw. 1999); *State v. Williams-Garcia*, No. CAAP-17-0000604, 2020 WL 735041 (Haw. Ct. App. Feb. 13, 2020); *State v. Gaub*, No. CAAP-15-0000547, 2017 WL 213513 (Haw. Ct. App. Jan. 18, 2017).

261. *Mitchell*, 965 P.2d at 155–57.

262. *Cabrera*, 978 P.2d at 804–07.

263. See *Williams-Garcia*, 2020 WL 735041, at \*3–4; *Gaub*, 2017 WL 213513, at \*3–5.

264. See *Mitchell*, 965 P.2d at 155.

265. HAW. REV. STAT. ANN. § 708-830(1) (West 2021).

266. *Id.* § 708-831(1)(b).

267. See MODEL PENAL CODE § 223.1(2) (AM. L. INST., Proposed Official Draft 1962) (grading theft); *id.* § 223.2 (defining theft by unlawful taking or disposition).

268. *Mitchell*, 965 P.2d at 156.

269. *Id.* (quoting MODEL PENAL CODE & COMMENTS., PART II § 223.1 cmt. 3 at 139, 146 (AM. L. INST. 1980)).

270. *Id.* (quoting MODEL PENAL CODE & COMMENTS., PART II § 223.1 cmt. 3 at 146).

271. See MODEL PENAL CODE & COMMENTS., PART II § 223.1 cmt. 3 at 144.

272. *Id.* § 223.1 cmt. 3 at 144.

273. *Mitchell*, 965 P.2d at 155–56.

also requires recklessness for elements that lack stated culpability requirements.<sup>274</sup> Likewise, the Hawaii Supreme Court also ignored the state's default culpability provision in *Cabrera*.<sup>275</sup>

In total, four states have applied stated culpability requirements too broadly in offense definitions, grading provisions, or both.<sup>276</sup> Courts frustrate the MPC's culpability scheme in applying stated-culpability provisions so broadly, but at least they err on the side of construing criminal statutes strictly. Much more commonly, state courts choose to impose absolute liability even in the face of stated culpability requirements. As will be discussed in the next two sections, courts often ignore both stated and default culpability requirements in ways that harm defendants by lowering the prosecution's burden of proof.

### *C. Ignoring Stated Culpability Requirements Based on Legislative Intent*

Section 2.02(4)'s greatest defect is providing a legislative-intent exception. As discussed earlier, the exception is unnecessary because section 2.02(4) is limited to offenses that prescribe mental states without distinguishing between offense elements.<sup>277</sup> More problematically, though, the exception can be interpreted to restrict the application of a mental state when it precedes a series of consecutive elements.<sup>278</sup> As written, section 2.02(4) thus threatens to undermine the Code's culpability scheme by authorizing absolute liability, rather than preventing it.

State courts in MPC jurisdictions commonly justify absolute liability based on purported legislative intent.<sup>279</sup> Courts often circumvent states' versions of section 2.02(4) even when offenses prescribe mental states without distinguishing between offense elements. The problem occurs most clearly when a statute explicitly states a single culpability requirement that is followed by consecutive objective elements. In that situation, section 2.02(4) is designed to resolve any ambiguity about whether the prescribed mental state applies to each element in the series or just the first one that it precedes.<sup>280</sup> The ordinary rule, again, is that

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274. HAW. REV. STAT. ANN § 702-204 (West 2021).

275. See *State v. Cabrera*, 978 P.2d 797, 804–07 (Haw. 1999).

276. See *supra* Parts III.B.1, III.B.2 (discussing state court applications of culpability requirements in Arkansas, Hawaii, Pennsylvania, and Oregon).

277. See *supra* notes 152–54 and accompanying text.

278. See *supra* Section II.C.

279. See England, *supra* note 54, at 70–74 (discussing absolute liability for offenses that fail to prescribe culpability requirements).

280. MODEL PENAL CODE & COMMENTS., Part I § 2.02 cmt. 6 at 245 (AM. L. INST. 1985).

the prescribed culpability level applies to each objective element.<sup>281</sup> Nevertheless, state courts often limit the scope of stated culpability requirements that immediately precede consecutive offense elements.

### 1. Series of Consecutive Offense Elements

Under section 2.02(4), a stated culpability level should almost always apply to each requirement in a series of consecutive, uninterrupted elements.<sup>282</sup> The culpability requirement applies to the entire series because it fails to distinguish between particular elements.<sup>283</sup> Moreover, section 2.02(4)'s legislative-intent exception does not apply because no "contrary purpose plainly appears" when a statute states a culpability requirement followed by a series of uninterrupted elements.<sup>284</sup> Significantly, the MPC's commentary makes clear that section 2.02(4) applies to all the objective elements that immediately follow a stated culpability level.<sup>285</sup> Under the Code's approach, then, a legislature need not repeat the culpability requirement for each new element in the series.

But many state courts refuse to apply a prescribed mental state to each requirement in a series of consecutive, uninterrupted elements. State courts often use weak evidence of legislative intent to evade stated culpability requirements. First, some courts erroneously infer that a legislature intends to impose absolute liability if it fails to individually prescribe a culpability requirement for each objective element.<sup>286</sup> For example, in *State v. Denby*, the Connecticut Supreme Court refused to apply a stated culpability requirement to an offense that criminalizes possessing a controlled substance with intent to sell it within one thousand feet of a school.<sup>287</sup> Significantly, the statute prescribed a culpability level of intent, followed by consecutive, uninterrupted elements that included the proximity requirement.<sup>288</sup> Therefore, the Connecticut Supreme Court should have required that the defendant possessed a controlled substance with the intent to sell it within one thousand feet of a school. Nevertheless, the court concluded that the statute did not require any culpability as to the requirement of proximity.<sup>289</sup> Instead, the court asserted that the statute's plain language required "that the defendant intended to sell or dispense those drugs in

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281. See MODEL PENAL CODE § 2.02(4) (AM. L. INST., Proposed Official Draft 1962).

282. See MODEL PENAL CODE § 2.02(4).

283. See *id.*

284. See *id.*

285. See *supra* notes 85–94 and accompanying text.

286. See, e.g., *State v. Denby*, 668 A.2d 682, 684–85 (Conn. 1995).

287. *Id.*

288. *Id.*

289. *Id.*

his or her possession at a specific location, which location happens to be within 1000 feet of an elementary or secondary school.”<sup>290</sup> Strangely, the court reasoned that the offense fails to require knowledge as to proximity even though the defendant argued that the statute requires intent for that element.<sup>291</sup> If the legislature had intended to require knowledge, the court continued, it could have done so by explicitly requiring that the defendant know that he was within one thousand feet of a school.<sup>292</sup> Later, in *State v. Vasquez*, the Connecticut Appellate Court followed *Denby*, holding that an amended version of the statute also did not require intent for the proximity requirement.<sup>293</sup> Under a proper application of Connecticut’s version of section 2.02(4), both courts should have required intent as to proximity.<sup>294</sup>

The Kansas Court of Appeals similarly inferred that the legislature intended to impose absolute liability because a statute failed to repeat a culpability requirement.<sup>295</sup> In *State v. Gillon*, the defendant was convicted for possessing a sawed-off shotgun.<sup>296</sup> According to the court, the offense criminalized “knowingly . . . possessing or carrying a shotgun with a barrel less than 18 inches in length.”<sup>297</sup> Under Kansas’s stated-culpability provision, the offense requires knowledge as to the length of a shotgun’s barrel because the statute prescribes the mental state of knowledge without distinguishing between offense elements.<sup>298</sup> But the *Gillon* court ignored the stated-culpability provision, instead concluding that the word “knowingly” modified only the phrase “possessing or carrying.”<sup>299</sup> The requirement did not apply to the length requirement, the court asserted, because that was “an adjective modifier, modifying the noun ‘shotgun.’”<sup>300</sup> Finally, the court reasoned that the legislature could have easily required knowledge by requiring that the “possessor or carrier know” that a gun’s barrel was under eighteen inches long.<sup>301</sup> Of course, such language is completely unnecessary under stated-culpability provisions influenced by section 2.02(4).<sup>302</sup> An offense must make clear

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290. *Id.*

291. *See id.*

292. *Id.* at 685.

293. *State v. Vasquez*, 783 A.2d 1183, 1190–91 (Conn. App. Ct. 2001).

294. *See* CONN. GEN. STAT. ANN. § 53a-5 (“When one and only one of such terms appears in a statute defining an offense, it is presumed to apply to every element of the offense unless an intent to limit its application clearly appears.”).

295. *See State v. Gillon*, 974 P.2d 1115, 1116 (Kan. Ct. App. 1999).

296. *Id.* at 1115.

297. *Id.* at 1116 (quoting KAN. STAT. ANN. § 21-4201(a)(7) (West 1996) (repealed 2011)).

298. *See* § 21-5202(f).

299. *Gillon*, 974 P.2d at 1116.

300. *Id.*

301. *Id.*

302. *See* MODEL PENAL CODE § 2.02(4) (AM. L. INST., Proposed Official Draft 1962).

that a culpability requirement does not apply to an element, rather than that it does.

Second, some courts limit stated culpability requirements by broadly characterizing offenses' purposes. In Illinois, for example, *People v. Ivy* has been particularly influential in interpreting offenses' culpability requirements.<sup>303</sup> In that case, the defendant was convicted for the offense of unlawful use of a weapon.<sup>304</sup> Much like the statute at issue in *Gillon*, the offense occurs when one "knowingly . . . [s]ells, manufactures, purchases, possesses, or carries . . . a shotgun having one or more barrels less than 18 inches in length."<sup>305</sup> The defendant was convicted for threatening another person with a duffel bag that contained a sawed-off shotgun.<sup>306</sup> The defendant presented evidence that the gun and bag belonged to her boyfriend, and she neither opened the bag nor knew the gun was a sawed-off shotgun.<sup>307</sup> The Illinois Appellate Court, however, held that the defendant only needed to know that she possessed a gun; she did not need to know that it was a sawed-off shotgun.<sup>308</sup> The court reasoned, in part, that sawed-off shotguns "are so inherently dangerous to human life that they constitute a hazard to society."<sup>309</sup> Hence, the court concluded that the legislature did not intend to require that the defendant be aware of the gun's characteristics.<sup>310</sup> The court failed to address Illinois's stated-culpability provision,<sup>311</sup> which is nearly identical to section 2.02(4).<sup>312</sup>

In *People v. Jones*, the Illinois Appellate Court used similar reasoning to limit the culpability required for the offense of criminal damage to property.<sup>313</sup> The offense occurs when one "knowingly damages any property of another."<sup>314</sup> In *Jones*, the alleged offense occurred when the

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303. *People v. Ivy*, 479 N.E.2d 399 (Ill. App. Ct. 1985).

304. *Id.* at 401.

305. 720 ILL. COMP. STAT. ANN. 5/24-1(a)(7)(ii) (West 2021).

306. *Ivy*, 479 N.E.2d at 401-02.

307. *Id.* at 402.

308. *Id.* at 403-04.

309. *Id.* at 403.

310. *Id.* at 403-04.

311. *See id.*

312. Compare 720 ILL. COMP. STAT. ANN. 5/4-3(b) (West 2012) ("If the statute defining an offense prescribed a particular mental state with respect to the offense as a whole, without distinguishing among the elements thereof, the prescribed mental state applies to each such element."), with MODEL PENAL CODE § 2.02(4) (AM. L. INST., Proposed Official Draft 1962) ("When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense . . .").

313. *People v. Jones*, 495 N.E.2d 1371, 1372-73 (Ill. App. Ct. 1986).

314. 720 ILL. COMP. STAT. ANN. 5/21-1(a)(1).

defendant totaled his estranged wife's car by driving into it.<sup>315</sup> The defendant testified that he was a co-owner of the car because he and his wife bought it together.<sup>316</sup> Although the offense requires knowingly damaging the property of another, the court held that “‘knowingly’ modifies the next word, ‘damages,’ but not ‘property of another.’”<sup>317</sup> The court ignored Illinois's version of section 2.02(4).<sup>318</sup> Instead, relying on *Ivy*,<sup>319</sup> the court vaguely concluded, without further explanation, that its interpretation was required by “[l]egislative intent and the construction of the statute.”<sup>320</sup>

Finally, state courts sometimes ignore governing stated-culpability provisions while following nonbinding authorities from other jurisdictions. In *Robertson v. State*, for instance, the Delaware Supreme Court reviewed a defendant's conviction for trafficking in cocaine.<sup>321</sup> At the time, the offense occurred when a defendant was “knowingly in actual or constructive possession of five grams or more of cocaine.”<sup>322</sup> In its analysis of the offense's culpability requirements, the court failed to even address Delaware's stated-culpability provision,<sup>323</sup> which applies whenever a statute prescribes a mental state without distinguishing between offense elements.<sup>324</sup> Rather, the court relied on a decision of the Florida Supreme Court, which interpreted the word “knowingly” in a similar statute to “modif[y] only the possession element of the offense and not the quantity.”<sup>325</sup> Thus, following a court not even governed by a provision like section 2.02(4), the Delaware Supreme Court concluded that the legislature did not intend to require culpability for the element of weight.<sup>326</sup>

In *Ex parte Washington*, the Alabama Supreme Court also ignored a binding stated-culpability provision to affirm a conviction for trafficking

315. See *Jones*, 495 N.E.2d at 1372.

316. See *id.*

317. *Id.* at 1373.

318. See *id.* at 1372–73.

319. *People v. Ivy*, 479 N.E.2d 399, 403–04 (Ill. App. Ct. 1985).

320. *Jones*, 495 N.E.2d at 1373.

321. *Robertson v. State*, 596 A.2d 1345, 1348 (Del. 1991).

322. *Id.* at 1354 (quoting DEL. CODE ANN. tit. 16, § 4753A (West 1991) (repealed 2011)).

323. See *id.* at 1355.

324. tit. 11, § 252.

325. *Robertson*, 596 A.2d at 1355 (quoting *Way v. State*, 475 So. 2d 239, 241 (Fla. 1985)).

326. *Id.* A year before the court's decision in *Robertson*, the Delaware legislature amended the statute to clarify that the prosecution did not need to prove that a defendant knew the weight of a controlled substance. See *id.* at 1355 n.6. The amendment did not apply to the defendant in *Robertson* because he was arrested before the statute became effective. *Id.* Therefore, the court could have easily concluded that knowledge was required at the time of the defendant's arrest. More importantly, though, the statute originally required knowledge as to the element of weight. *Id.*

in cocaine.<sup>327</sup> The Alabama trafficking statute applies when one “is knowingly in actual or constructive possession of[] 28 grams or more of cocaine.”<sup>328</sup> As the dissent noted, because the weight element appears before the reference to cocaine, the statute “is at least as positive in applying the mental state of knowledge to the *quantity* of cocaine as the text is in applying that same mental state to the *identity* of the cocaine.”<sup>329</sup> Yet the court held that the defendant did not need to know the weight of the drugs he possessed.<sup>330</sup> The court relied on multiple cases from states that have not adopted the MPC, including Georgia, Massachusetts, and South Carolina.<sup>331</sup> The court also discussed the Delaware Supreme Court’s decision in *Robertson*,<sup>332</sup> which itself relied on a decision from the non-MPC state of Florida.<sup>333</sup>

In sum, then, courts in at least five states refuse to apply a stated culpability level to each requirement in a series of consecutive elements. In all five states—Alabama, Connecticut, Delaware, Illinois, and Kansas—offenses themselves must make clear that stated-culpability provisions do not apply to particular offense elements.<sup>334</sup> But courts routinely overlook that requirement because they also completely ignore their states’ versions of section 2.02(4). Many courts seem to be looking for ways to justify absolute liability rather than ways to prevent it.

## 2. Consecutive Offense Elements That Are Arguably Interrupted

Additionally, in some states, courts have imposed absolute liability when a word or phrase introduces an offense element in a way that suggests that a stated culpability requirement might not apply. As discussed earlier, the MPC’s commentary does not offer much help in interpreting consecutive offense elements that are arguably

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327. See *Ex parte* Washington, 818 So. 2d 424, 425–27 (Ala. 2001).

328. ALA. CODE § 13A-12-231(2) (2021).

329. *Washington*, 818 So. 2d at 427 (Johnstone, J., dissenting).

330. *Id.* (majority opinion).

331. *Id.* at 426–27.

332. *Id.* at 426. In *Washington*, the court failed to address the New York Court of Appeals’ decision in *People v. Ryan*. See *id.* at 426–27. In *Ryan*, the court correctly held that New York’s stated-culpability provision required the defendant to know the weight of the controlled substance he was charged with possessing. *People v. Ryan*, 626 N.E.2d 51, 54 (N.Y. 1993) (“Inasmuch as the knowledge requirement carries through to the end of the sentence, eliminating it from the intervening element—weight—would rob the statute of its obvious meaning. We conclude, therefore, that there is a *mens rea* element associated with the weight of the drug.”) (citation omitted).

333. *Robertson v. State*, 596 A.2d 1345, 1355 (Del. 1991).

334. See ALA. CODE § 13A-2-4(a) (2021); CONN. GEN. STAT. ANN. § 53a-5 (West 2021); DEL. CODE ANN. tit. 11, § 252 (West 2021); 720 ILL. COMP. STAT. ANN. 5/4-3(b) (West 2021); KAN. STAT. ANN. § 21-5202(f) (West 2021).

interrupted.<sup>335</sup> But section 2.02(4) generally requires a stated culpability requirement to apply to all offense elements “unless a contrary purpose plainly appears.”<sup>336</sup> If a minor word or phrase only arguably distinguishes an element, it follows that the offense is unclear about whether the prescribed culpability level applies. Importantly, section 2.02(4) is designed to resolve precisely that kind of ambiguity.<sup>337</sup> Therefore, minor interrupting language can never plainly evince a purpose to restrict a culpability level that applies to a series of consecutive elements. If a legislature intends a different result, the statute needs to say so explicitly.

Courts have interpreted minor interrupting language differently in at least New Jersey and Colorado.<sup>338</sup> For example, in *State v. Smith*, the New Jersey Supreme Court imposed absolute liability for a statute that criminalizes possessing a defaced firearm.<sup>339</sup> The statute provides that a person commits the offense if he “knowingly has in his possession any firearm which has been defaced, except an antique firearm or an antique handgun.”<sup>340</sup> The court stated that the phrase “which has been defaced” appears “in an attenuated position from the word ‘knowingly.’”<sup>341</sup> If the legislature wanted to require knowledge of defacement, the court reasoned, it could have prohibited knowingly possessing “a defaced firearm.”<sup>342</sup> Nevertheless, the court assumed that the statute was ambiguous about the culpability required for defacement.<sup>343</sup> In resolving the ambiguity, the court failed to even consult New Jersey’s stated-culpability provision.<sup>344</sup> That provision, like section 2.02(4), generally resolves such an ambiguity by applying the stated culpability level.<sup>345</sup>

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335. See *supra* notes 95–106 and accompanying text.

336. MODEL PENAL CODE § 2.02(4) (AM. L. INST., Proposed Official Draft 1962).

337. MODEL PENAL CODE & COMMENTS., PART I § 2.02 cmt. 6 at 245 (AM. L. INST. 1985).

338. See, e.g., *State v. Smith*, 963 A.2d 281, 289 (N.J. 2009); *People v. DeWitt*, 275 P.3d 728, 735 (Colo. App. 2011), *overruled on other grounds* by *People v. Hasadinratana*, 493 P.3d 925, 926 (Colo. App. May 13, 2021).

339. *Smith*, 963 A.2d at 289.

340. N.J. STAT. ANN. § 2C:39-3(d) (West 2021).

341. *Smith*, 963 A.2d at 285. In *State v. Gandhi*, the New Jersey Supreme Court used a similar approach in interpreting the culpability requirements for the offense of stalking. See *State v. Gandhi*, 989 A.2d 256, 266 (N.J. 2010) (“Here, the proximity of ‘purposefully’ and ‘knowingly’ to the verb ‘engages’ emphasizes the relationship of those adverbs to that verb. In contrast, the clause emphasized by defendant . . . is remote from the key modifying adverbs.”).

342. *Smith*, 963 A.2d at 286.

343. *Id.*

344. See *id.* at 286–89.

345. See § 2C:2-2(c)(1). In *People v. Velasquez*, the New York Supreme Court held that a statute with similar language required knowledge of defacement. *People v. Velasquez*, 528 N.Y.S.2d 502, 504 (N.Y. Sup. Ct. 1988). That statute, like New Jersey’s, criminalizes knowingly possessing a firearm “which has been defaced.” N.Y. PENAL LAW § 265.02(3) (McKinney 2021).

Similarly, in *People v. DeWitt*, the Colorado Court of Appeals relied on a statute's use of minor interrupting language to disregard a stated culpability requirement.<sup>346</sup> The defendant in that case was convicted for the offense of possessing a weapon by a prior offender.<sup>347</sup> Under the statute, a person commits the offense if he or she "knowingly possesses, uses, or carries upon his or her person a firearm . . . subsequent to the person's conviction for a felony."<sup>348</sup> The *DeWitt* court held that the statute did not require the defendant to know that he had been convicted of a felony.<sup>349</sup> The court declined to apply the state's version of section 2.02(4), in part, because the phrase "subsequent to" distinguished the prior-conviction requirement from other offense elements.<sup>350</sup> That language would seem, at most, to render the statute ambiguous about whether a defendant must know of a prior conviction. Nevertheless, the court asserted that requiring knowledge would undermine the statute, whose purpose "is to limit the possession of firearms" by ex-felons.<sup>351</sup> Thus, the court refused to apply the rule of lenity because the offense's plain language did not require knowledge of a prior conviction.<sup>352</sup>

In employing such reasoning, courts limit stated-culpability provisions in ways that are fundamentally inconsistent with the MPC's vision for criminal liability. Stated-culpability provisions help enforce the Code's norm of requiring culpability for each objective element of an offense.<sup>353</sup> Never is a provision like section 2.02(4) implicated more clearly than when an offense prescribes a mental state that is immediately followed by consecutive objective elements. Even when minor language arguably distinguishes some requirements from others, section 2.02(4) resolves any ambiguity by applying the stated culpability level to each element in the series.<sup>354</sup> Vague considerations of legislative intent should never overcome section 2.02(4)'s rule of construction, but they have in many MPC states.<sup>355</sup>

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346. See *People v. DeWitt*, 275 P.3d 728, 735 (Colo. App. 2011), *overruled on other grounds* by *People v. Hasadinratana*, 493 P.3d 925 (Colo. App. 2021).

347. *Id.* at 730.

348. COLO. REV. STAT. ANN. § 18-12-108(1) (West 2021).

349. *DeWitt*, 275 P.3d at 735.

350. *Id.*

351. *Id.* at 735–36.

352. *Id.*

353. See MODEL PENAL CODE § 2.02(1) (AM. L. INST., Proposed Official Draft 1962).

354. See *id.* § 2.02(4).

355. See, e.g., *Ex parte Washington*, 818 So. 2d 424, 425–27 (Ala. 2001); *People v. DeWitt*, 275 P.3d 728, 735 (Colo. App. 2011), *overruled on other grounds* by *People v. Hasadinratana*, 493 P.3d 925, 926 (Colo. App. May 13, 2021); *State v. Denby*, 668 A.2d 682, 684–85 (Conn. 1995); *State v. Vasquez*, 783 A.2d 1183, 1190–91 (Conn. App. Ct. 2001); *Robertson v. State*, 596 A.2d 1345, 1348 (Del. 1991); *People v. Ivy*, 479 N.E.2d 399, 403–04 (Ill. App. Ct. 1985); *People v. Jones*, 495 N.E.2d 1371, 1372–73 (Ill. App. Ct. 1986); *State v. Gillon*, 974 P.2d 1115, 1116 (Kan. Ct. App. 1999); *State v. Smith*, 963 A.2d 281, 289 (N.J. 2009).

*D. Imposing Absolute Liability by Ignoring Default Culpability Provisions*

In summary, courts have made significant mistakes in applying stated culpability requirements in most of the twenty-five states with culpability provisions influenced by the MPC. Mistakes occur just as often in states with stated-culpability provisions as in states without them, and courts usually err in ways that benefit prosecutors rather than defendants.

The MPC's drafters took strong measures to prevent legislatures and courts from imposing absolute liability. Section 2.02(1) generally requires culpability for each element of the offense, and section 2.02(4) helps enforce that requirement by resolving ambiguities about the scope of prescribed mental states.<sup>356</sup> As discussed earlier, section 2.02(3) further protects against absolute liability by requiring a default culpability level of recklessness for any objective elements not covered by section 2.02(4).<sup>357</sup> Moreover, section 2.05 permits absolute liability only for an extremely narrow class of offenses.<sup>358</sup>

Hence, when determining the culpability required for a given element, a court should normally choose between any prescribed mental state and the default culpability level of recklessness. As discussed earlier, some courts apply stated-culpability provisions too broadly because they perceive their choices as being between stated culpability levels and absolute liability.<sup>359</sup> Hence, in Arkansas, Hawaii, Oregon, and Pennsylvania, courts have applied stated culpability levels to offense elements even though they are grammatically distinguished from other requirements.<sup>360</sup> In all four states, courts have overlooked state criminal codes' versions of section 2.02(3) when determining offenses' culpability requirements.<sup>361</sup>

Much more commonly, courts choose to impose absolute liability rather than to apply stated culpability requirements. In some states, that may occur in part because criminal codes fail to explicitly require culpability for each offense element.<sup>362</sup> Additionally, in many

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356. MODEL PENAL CODE § 2.02(1), (4).

357. See *supra* notes 35–41 and accompanying text.

358. See *supra* notes 23–26 and accompanying text.

359. See *supra* Section III.B.

360. See *supra* Section III.B.

361. See *supra* Section III.B.

362. See, e.g., ALASKA STAT. ANN. § 11.81.610 (West 2021); COLO. REV. STAT. ANN. § 18-1-503 (West 2021); CONN. GEN. STAT. ANN. § 53a-5 (West 2021); IND. CODE ANN. § 35-41-2-2 (West 2021); KY. REV. STAT. ANN. § 501.040 (West 2021); N.D. CENT. CODE ANN. § 12.1-02-02 (West 2021); OHIO REV. CODE ANN. § 2901.21 (West 2021); TEX. PENAL CODE ANN. § 6.02 (West 2021).

jurisdictions, courts legitimately face choices between stated culpability levels and absolute liability because criminal codes lack true default culpability provisions. Some MPC states never enacted rules like section 2.02(3),<sup>363</sup> and others apply default culpability requirements only when offenses fail to require any culpability at all.<sup>364</sup> Thus, when interpreting culpability requirements, many courts do not have the option of requiring default culpability levels.

But many MPC states do explicitly require culpability for each offense element,<sup>365</sup> and many have default culpability provisions that follow section 2.02(3) more closely.<sup>366</sup> Nevertheless, courts in such jurisdictions rarely consider default culpability rules when applying stated culpability requirements. In fact, my survey identified only one case in which a court addressed a state's default culpability requirement while refusing to apply a prescribed culpability level.<sup>367</sup> That is odd.

After all, default culpability provisions are designed to provide an extra line of defense against absolute liability. Section 2.02(4) applies when a statute "prescribes the kind of culpability that is sufficient for the commission of an offense,"<sup>368</sup> and section 2.02(3) applies when the required culpability "is not prescribed by law."<sup>369</sup> Hence, if a court concludes that a prescribed culpability level does not apply to an element, the court should always consult the criminal code's default culpability provision if one exists.

Courts in MPC states never do that, and that failure often creates harsh results. For example, as discussed earlier, the defendant in *People*

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363. See CONN. GEN. STAT. ANN. § 53a-5 (West 2021); IND. CODE ANN. § 35-41-2-2; ME. REV. STAT. ANN. tit. 17-A, § 34 (2021).

364. See ARIZ. REV. STAT. ANN. § 13-202(B) (2021); KAN. STAT. ANN. § 21-5202(g) (West 2021); MO. ANN. STAT. § 562.021(2) (West 2021); TEX. PENAL CODE ANN. § 6.02(b); UTAH CODE ANN. § 76-2-102 (West 2021).

365. See ALA. CODE § 13A-2-4(b) (2021); ARK. CODE ANN. § 5-2-204(b) (West 2021); HAW. REV. STAT. ANN. § 702-204 (West 2021); 720 ILL. COMP. STAT. ANN. 5/4-3(a) (West 2021); ME. REV. STAT. ANN. tit. 17-A, § 34(1); MONT. CODE ANN. § 45-2-103(1) (West 2021); N.H. REV. STAT. ANN. § 626:2(I) (2021); N.J. STAT. ANN. § 2C:2-2(a) (West 2021); N.Y. PENAL LAW § 15.15(2) (McKinney 2021); OR. REV. STAT. ANN. § 161.095(2) (West 2021); 18 PA. STAT. AND CONS. STAT. ANN. § 302(a) (West 2021); TENN. CODE ANN. § 39-11-301(a)(1) (West 2021).

366. See ALA. CODE § 13A-2-4(b); ALASKA STAT. ANN. § 11.81.610(b); ARK. CODE ANN. § 5-2-203(b); COLO. REV. STAT. ANN. § 18-1-503(2); DEL. CODE ANN. tit. 11, § 251(b) (West 2021); HAW. REV. STAT. ANN. § 702-204; 720 ILL. COMP. STAT. ANN. 5/4-3(b); KY. REV. STAT. ANN. § 501.040; MONT. CODE ANN. § 45-2-103(1); N.H. REV. STAT. ANN. § 626:2(I); N.J. STAT. ANN. § 2C:2-2(c)(3); N.Y. PENAL LAW § 15.15(2); N.D. CENT. CODE ANN. § 12.1-02-02(2) (West 2021); OHIO REV. CODE ANN. § 2901.21(C)(1); OR. REV. STAT. ANN. § 161.115(2); 18 PA. STAT. AND CONS. STAT. ANN. § 302(c); TENN. CODE ANN. § 39-11-301(c).

367. See *Ortberg v. State*, 751 P.2d 1368, 1374 (Alaska Ct. App. 1988) (rejecting the state's argument that recklessness was required).

368. MODEL PENAL CODE § 2.02(4) (AM. L. INST., Proposed Official Draft 1962).

369. *Id.* § 2.02(3).

*v. Ivy* was convicted for the offense of unlawful use of a weapon.<sup>370</sup> The defendant threatened the victim with a duffel bag that turned out to contain a sawed-off shotgun, and the defendant presented evidence that she did not know the gun's character.<sup>371</sup> The offense at issue applies to one who "knowingly . . . possesses or carries . . . a shotgun having one or more barrels less than 18 inches in length."<sup>372</sup> By its terms, the offense definition requires knowledge as to a shotgun's length. Nevertheless, the Illinois Appellate Court held that knowledge was not required because the legislature likely did not intend that result.<sup>373</sup> The court failed to address Illinois's default culpability provision,<sup>374</sup> which requires recklessness "[i]f the statute does not prescribe a particular mental state applicable to an element of an offense."<sup>375</sup> Hence, at a minimum, the *Ivy* court should have required recklessness as to the shotgun's length. That would demand that the defendant "consciously disregard[] a substantial and unjustifiable risk" that the weapon was a sawed-off shotgun.<sup>376</sup>

On its own, ignoring a prescribed culpability requirement is extremely problematic. But courts exacerbate that mistake when they also refuse to require any culpability at all. In imposing absolute liability in the face of stated culpability requirements, courts thus evade both section 2.02(3) and section 2.02(4) in ways that undermine the Code's culpability scheme.

#### IV. PROPOSED STATED-CULPABILITY RULES

This Part recommends new rules that better effectuate the Code's norm of requiring culpability for each offense element. The proposed stated-culpability provision, like section 2.02(4), is designed to resolve ambiguity that is created when a single culpability requirement precedes a series of objective elements.

The proposed provision makes significant changes to section 2.02(4) so that it can perform its main function more effectively. The revisions are designed to address section 2.02(4)'s shortcomings, prevent the problems experienced in MPC states, and better enforce section 2.02(1)'s requirement of culpability for each offense element. The following provisions would replace sections 2.02(1) and 2.02(4):

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370. *People v. Ivy*, 479 N.E.2d 399, 402 (Ill. App. Ct. 1985).

371. *See id.* at 400–02.

372. 720 ILL. COMP. STAT. ANN. 5/24-1(a)(7)(ii) (West 2021).

373. *Ivy*, 479 N.E.2d at 403–04.

374. *See id.*

375. 720 ILL. COMP. STAT. ANN. 5/4-3(b).

376. *Id.* 5/4-6.

- (1) To be guilty of an offense, a person must have some level of culpability, as defined in [cross-reference to culpability definitions], as to every objective element of the offense, except as provided in subsection (4).
- (2) When a statute prescribes a culpability requirement without distinguishing between consecutive objective elements, the culpability requirement applies to each such element.

Subsection (1) is similar to section 2.02(1) in generally requiring culpability for each offense element.<sup>377</sup> Subsection (2) helps enforce that requirement by resolving any ambiguity about how a stated culpability requirement applies to a series of objective elements. The proposed rule follows the Code by applying the prescribed culpability level to each such element, but it makes three significant changes to section 2.02(4).<sup>378</sup>

First, the proposed stated-culpability provision applies to “a statute” rather than “the law defining an offense.”<sup>379</sup> As discussed earlier, section 2.02(4) appears to exclude culpability requirements that might apply to grading provisions.<sup>380</sup> Moreover, state courts often refuse on principle to apply stated culpability requirements to offense elements that appear in grading provisions.<sup>381</sup> In fact, some courts go so far as to distinguish offense definitions for aggravated offenses from ordinary offense definitions.<sup>382</sup>

Despite section 2.02(4)'s language, the MPC's drafters never intended to exclude elements that appear in grading provisions, much less exclude elements required for aggravated offenses.<sup>383</sup> Such distinctions are largely fortuitous, as a criminal code may use either an offense definition or a grading provision to require a given element. For example, a criminal code could treat assault and aggravated assault as distinct offenses with separate offense definitions and grading provisions. Alternatively, a criminal code could include just an assault offense, using one subsection to define the basic offense and others to enhance the penalty when aggravating circumstances are present. It is arbitrary to enforce a stated culpability requirement for the first drafting approach but not the second.

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377. See MODEL PENAL CODE § 2.02(1) (AM. L. INST., Proposed Official Draft 1962).

378. *Id.* § 2.02(4).

379. *See id.*

380. *See supra* notes 52–56 and accompanying text.

381. *See supra* Section III.A.

382. *See supra* notes 175–95 and accompanying text.

383. *See* MODEL PENAL CODE & COMMENTS., PART I § 2.02 cmt. 1 at 229–32 (AM. L. INST. 1985).

The proposed stated-culpability provision applies to any statute, thus eliminating any possible distinction between offense definitions and grading provisions. Importantly, proposed subsections (1) and (2) both require culpability for objective elements. To make it even clearer that both provisions apply to grading provisions, “objective elements” should be defined as follows:

“Objective elements” include such conduct, such attendant circumstances, and such a result of conduct as are contained in the definition of an offense, in a provision establishing an offense grade, or in a provision specifying the severity of the punishment for an offense. Objective elements do not include culpability requirements.<sup>384</sup>

Hence, subsection (2) enforces stated culpability requirements regardless of where they appear. Similarly, subsection (1) requires culpability for offense definitions and grading provisions alike.

Second, the proposed stated-culpability provision differs from section 2.02(4) because it applies only to consecutive offense elements.<sup>385</sup> When an offense prescribes a mental state without distinguishing between elements, section 2.02(4) broadly applies the stated culpability requirement to “all the material elements of the offense.”<sup>386</sup> In doing so, the MPC risks bringing section 2.02(4) into conflict with the Code’s default culpability provision, section 2.02(3).<sup>387</sup> The Code particularly struggles when an offense states a culpability requirement in one part of a sentence, and another part requires an objective element without prescribing a new mental state.<sup>388</sup> Similarly, in at least four states with provisions influenced by section 2.02(4), courts have applied stated culpability requirements to offense elements even though they are grammatically distinguished from other offense requirements.<sup>389</sup>

The proposed stated-culpability provision limits its application according to its purpose. Like section 2.02(4), the proposed provision is intended to resolve any ambiguity that may arise when a culpability

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384. This culpability provision is based on one proposed by the Illinois Criminal Code Rewrite and Reform Commission. Paul Robinson was the Commission’s Reporter and principal drafter, Michael Cahill served as Staff Director, and I served as a staff attorney. See PAUL H. ROBINSON & MICHAEL T. CAHILL, FINAL REPORT OF THE ILLINOIS CRIMINAL CODE REWRITE AND REFORM COMMISSION 11 (2003).

385. See MODEL PENAL CODE § 2.02(1) (AM. L. INST., Proposed Official Draft 1962).

386. *Id.*

387. See *supra* notes 119–39 and accompanying text.

388. See *supra* notes 107–18 and accompanying text.

389. See *supra* Section III.B.

requirement precedes a series of offense elements.<sup>390</sup> Hence, proposed subsection (2) applies “[w]hen a statute prescribes a culpability requirement without distinguishing between consecutive objective elements.” In such a situation, the stated culpability level applies “to each such element,” rather than just the first one in the series. For example, if an offense criminalized knowingly causing bodily harm to a person sixty-five or older, the proposed provision would require that the defendant both knowingly cause bodily harm and know the victim’s age.<sup>391</sup>

A stated culpability requirement should not apply, however, to offense elements that are distinguished grammatically by punctuation, syntax, or both. Hence, the proposed provision does not apply if an offense definition states a culpability requirement in one clause, and another clause requires an offense element without prescribing a mental state. Nor does the provision apply when a separate grading provision requires a new element without specifying a culpability level. Rather, in both situations, courts should apply the default culpability level of recklessness. Importantly, proposed subsection (2) applies the stated culpability requirement only to the clause at issue rather than to every element of the offense.<sup>392</sup> As a result, the proposed provision avoids the problems that occur when a court applies a stated culpability requirement to every offense element, including those that are distinguished grammatically.

Third, and most importantly, the proposed provision eliminates section 2.02(4)’s legislative-intent exception. The current exception is redundant at best, given that section 2.02(4) applies only when a statute prescribes a mental state without distinguishing between offense elements.<sup>393</sup> At worst, the exception appears to limit the application of a mental state that precedes a series of consecutive objective elements.<sup>394</sup>

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390. Cf. MODEL PENAL CODE § 2.02(4).

391. Cf. *People v. Burman*, 102 N.Y.S.3d 850, 852–53 (App. Div. 2019) (refusing to require culpability to the offense definition that required intent as to the victim’s age).

392. Similarly, Paul Robinson and Michael Cahill have proposed that a prescribed mental state “apply to the grammatical clause in which it appears unless the context demonstrates that it is intended to apply to other, subsequent clauses.” PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW § 4.2.5, at 179 (2d ed. 2012). Under that approach, a culpability requirement ordinarily applies only to the grammatical clause in which it appears, and section 2.02(3) requires recklessness for other elements. *Id.* at 176–79. My proposal omits such a limitation because I do not think that section 2.02(4)’s breadth is its main flaw. Some courts have applied the provision too broadly, but it is far more common for courts to avoid section 2.02(4) entirely. For that reason, my proposed provision errs on the side of applying stated culpability requirements instead of default culpability requirements. I agree that recklessness should be required, however, if a statute prescribes a culpability requirement in a way that distinguishes some offense elements from others.

393. See *supra* notes 146–48 and accompanying text.

394. See *supra* Section II.C.

In real-world cases, courts in MPC jurisdictions have relied on vague considerations of legislative intent both to evade stated culpability requirements and to justify the imposition of absolute liability.<sup>395</sup> Despite section 2.02(4), courts often refuse to apply a stated culpability requirement even when it immediately precedes a series of consecutive objective elements.<sup>396</sup> Stated-culpability provisions are designed to resolve that precise kind of ambiguity.

As shown by the case law in MPC states, legislative-intent exceptions are highly vulnerable to judicial manipulation.<sup>397</sup> Moreover, courts do not seem to be constrained by the exception's requirement of a plain purpose to limit the scope of a prescribed mental state.<sup>398</sup> The best solution is to simply eliminate the exception. If a statute prescribes a mental state for a series of objective elements, the legislature should not be surprised if a court requires that culpability level for each element in the series. After all, courts are traditionally required to construe criminal statutes strictly in favor of defendants.<sup>399</sup> If a different result is intended, a separate provision can clarify that the stated culpability requirement does not apply to every element in the series.

By eliminating section 2.02(4)'s legislative-intent exception, the proposed provision clarifies the role of stated culpability requirements in the MPC's culpability scheme. Importantly, the provision is designed to prevent absolute liability rather than to authorize it. The stated-culpability provision works in conjunction with the following proposed default culpability provision:

- (3) When no culpability requirement is prescribed with regard to an objective element, a requirement of recklessness is applicable, except as provided in subsection (4).<sup>400</sup>

Significantly, the stated-culpability provision appears before the default culpability provision.<sup>401</sup> By reversing the order of the two provisions, the proposed culpability section clarifies how the two provisions work together to require culpability for each offense element. A court should first identify an offense's stated culpability requirements,

395. *See supra* Section III.C.

396. *See supra* Section III.C.

397. *See supra* Section III.C.

398. *See* MODEL PENAL CODE § 2.02(4) (AM. L. INST., Proposed Official Draft 1962) (providing an exception when "a contrary purpose plainly appears").

399. *See* 3 SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 59:3 (8th ed. 2021).

400. This provision is nearly identical to one I recently proposed in another article. *See* England, *supra* note 54, at 84–86.

401. *See id.*

using subsection (2) to resolve any ambiguities about their proper scope. If a statute does not prescribe a culpability requirement for an element, subsection (3) provides an extra line of defense by imposing the default culpability level of recklessness. As a practical matter, then, a court should normally choose between any prescribed mental state and the default level of recklessness when determining the culpability required for an offense element. Thus, recklessness should be required if a statute indicates grammatically that a culpability requirement applies to some objective elements but not others.

Finally, absolute liability is appropriate only under proposed subsection (4). This final proposed provision limits the circumstances under which absolute liability may be imposed:

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

Subsection (4) makes significant changes to the MPC’s absolute-liability provision, section 2.05.<sup>402</sup> Most importantly, subsection (4) generally prohibits absolute liability in the absence of an explicit statement that no culpability is required. Hence, courts thus may not rely on vague evidence of legislative intent to evade both stated and default culpability requirements, as they often do under current law. Instead, a statute must explicitly impose absolute liability by using phrases like “absolute liability,” “strict liability,” and “in fact.” With such a requirement, it would be much more challenging for courts to completely ignore criminal codes’ culpability provisions.

In sum, the proposed culpability rules better effectuate the Code’s requirement of culpability for each offense element. The proposed stated-culpability provision applies to offense definitions and grading provisions

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402. See *id.* at 86–88.

alike, and absolute liability cannot be imposed in the absence of an explicit statutory statement.

#### CONCLUSION

For more than half a century, the MPC has been a prevailing force in American criminal law. The MPC's most lasting contribution is its approach to culpability requirements, which has influenced criminal codes in twenty-five states.<sup>403</sup> In requiring culpability for each offense element, the Code's drafters took strong measures to prevent the imposition of absolute liability.<sup>404</sup> The MPC's stated-culpability provision, section 2.02(4), plays a central role in the Code's celebrated culpability scheme by clarifying that a prescribed mental state generally applies to each element.<sup>405</sup> Section 2.02(4) has been particularly influential in MPC jurisdictions, with nineteen states including similar provisions in their criminal codes.<sup>406</sup>

Section 2.02(4) has been largely ineffective, however, in enforcing stated culpability requirements and preventing the imposition of absolute liability. In fact, courts with stated-culpability provisions impose absolute liability just as often as states without them.<sup>407</sup> The biggest problem is the provision itself. Section 2.02(4) is unclear about when and how it applies, and state courts thus have circumvented the provision time after time.<sup>408</sup>

This Article has recommended new rules that clarify the role of prescribed mental states in the Code's culpability scheme. The proposed provisions also improve the MPC by enforcing culpability requirements stated in grading provisions, eliminating section 2.02(4)'s flawed legislative-intent exception, and limiting the imposition of absolute liability.<sup>409</sup> The proposed provisions better enforce the Code's norm of requiring culpability for each element. In doing so, the proposals better ensure that criminal liability and punishment always correspond to a defendant's blameworthiness, bringing criminal codes closer to the drafters' vision for American criminal law.

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403. *Id.* at 48, 81–83.

404. *Id.* at 54 (stating that “[t]he Code’s drafters addressed their aversion to absolute liability most clearly in the commentary for section 2.05”).

405. *See* MODEL PENAL CODE § 2.02(4) (AM. L. INST., Proposed Official Draft 1962).

406. *See* statutes cited *supra* note 160.

407. *See supra* Section III.

408. *See supra* Section III.

409. *See generally supra* Section IV.