

ESSAY

MENS REA AND THE COST OF IGNORANCE

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THIS Essay advances a new understanding of the controversial doctrine of strict criminal liability. While the conventional view holds that strict criminal liability aims at alleviating the administrative burden of proving defendants' mental state, this Essay argues that this doctrine also can induce genuinely ignorant offenders to acquire information. The predominant mens rea standard assures ignorant offenders that they can engage in the prohibited conduct without being penalized. This drawback, however, is mitigated when offenders find that the market imposes too high a cost on ignorance. If ignorance is sufficiently costly, offenders will take steps to become (or remain) informed notwithstanding the adverse incentive created by the mens rea standard. The Essay thus predicts that, other things being equal, strict liability is likely to be especially useful in those elements of a criminal offense for which ignorance is virtually costless. The Essay demonstrates the illuminating power of this explanation by analyzing the application of strict liability to liquor sale to minors, statutory rape, child pornography, regulatory offenses, criminal liability of corporate officers, and mistakes of law and fact. The Essay concludes by exploring whether alternative doctrines may induce offenders to acquire information without producing the harsh and unfair consequences often attributed to strict liability.

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INTRODUCTION

Strict criminal liability—that is, criminal liability without proof of mental state, negligence, or other fault—is highly controversial, surprisingly persistent, and notoriously unpredictable. For decades, criminal law scholars have argued that this doctrine punishes innocent actors and is thus unjust, unconstitutional, and ineffective.¹

¹ See, e.g., Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *Law & Contemp. Probs.* 401, 422 (1958) (positing that strict criminal liability condemns the blameless without any justification); James J. Hippard, Sr., *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 *Hous. L. Rev.* 1039, 1040 (1973) (“Strict liability crimes are . . . unconstitutional anomalies that the Supreme Court should have suppressed long ago.”); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 *Sup. Ct. Rev.* 107, 109 (“[T]o punish

But despite nearly unanimous vilification, strict liability continues to occupy an important place in modern criminal law.² Strict liability is not only normatively questionable; it is also of indeterminate scope. Commentators have thus far failed to explain why it governs only certain elements of specific offenses.³ This disarray leaves troubling uncertainty concerning the reach of many criminal offenses, including statutory rape, child pornography, environmental violations, and some terrorism-related crimes.⁴

This Essay will offer a novel explanation for the role of strict liability in criminal law. This new understanding clarifies the jurisprudence of strict liability and illuminates some pieces of criminal law doctrine that have thus far resisted satisfactory explanations. More importantly, by identifying the tradeoff that often underlies the choice between mens rea and strict liability, this new understanding allows lawmakers to devise less draconian alternatives to strict criminal liability.

The conventional view holds that strict liability is designed to overcome the difficulty of proving defendants' subjective mental states, as required under the predominant mens rea standard.⁵ But if this is the reason, why use strict liability in selected offenses only? The common answer is that strict liability should govern

conduct without reference to the actor's state of mind is both inefficacious and unjust.").

² See John L. Diamond, *The Myth of Mortality and Fault in Criminal Law Doctrine*, 34 *Am. Crim. L. Rev.* 111, 116–17 (1996) (“[M]ost states utilize strict liability punishments and continue to characterize these acts as crimes.”); Alan C. Michaels, *Constitutional Innocence*, 112 *Harv. L. Rev.* 828, 831 (1999) (“Strict liability has endured decades of unremitting academic condemnation.”). But cf. Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 *Buff. Crim. L. Rev.* 859, 861 (1999) (arguing, in the context of mens rea, “that the United States Supreme Court has recently reinvigorated its concern with protecting innocent persons as the bedrock of federal criminal law”).

³ The frustration produced by the indeterminate jurisprudence of strict criminal liability is best captured in the famous quote: “*Mens rea* is an important requirement, but it is not a constitutional requirement, except sometimes.” Packer, *supra* note 1, at 107.

⁴ See, e.g., Randolph N. Jonakait, *The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization*, 56 *Baylor L. Rev.* 861, 862 (2004); Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 *Env'tl. L.* 1165, 1166–69 (1995); Jarrod Forster Reich, Note, “No Provincial or Transient Notion”: The Need for a Mistake of Age Defense in Child Rape Prosecutions, 57 *Vand. L. Rev.* 693, 694–97 (2004).

⁵ See *infra* Section I.A.

“public welfare” offenses—modern regulatory violations carrying relatively light penalties.⁶ This view, however, fails to account for the reality in which strict liability is also used in relatively severe, traditional offenses, such as statutory rape. This account also cannot explain why a single offense requires strict liability for one element but not for others.

The explanation I will offer consists of two components. The first highlights a fundamental drawback of the dominant standard of criminal liability: *mens rea*. By making knowledge of certain facts a precondition for criminal liability, *mens rea* allows offenders to engage in misconduct and evade liability as long as they are genuinely ignorant. Strict liability, in contrast, deters offenders regardless of their state of mind.⁷ This insight, however, only intensifies the mystery surrounding the limited place of strict liability in criminal law. If *mens rea* is so flawed, why is strict liability adopted only with respect to a limited set of offenses?

The second insight supplies the missing piece of the puzzle. The failure of *mens rea*, I argue, is limited by the *market value of information*. *Mens rea* attaches a price tag to information concerning offense elements, but offenders might have a variety of market reasons to acquire such information notwithstanding the disincentive that criminal law provides. Put differently, ignorance is bliss only

⁶ The label “public welfare” offense was introduced in an influential article by Francis B. Sayre entitled *Public Welfare Offenses*, 33 *Colum. L. Rev.* 55, 56 (1933).

⁷ Although quite intuitive, this insight has been oddly overlooked by mainstream criminal law scholarship concerning the choice between *mens rea* and strict liability. This omission is even more puzzling given the acknowledgement of this insight in the related contexts of the willful ignorance doctrine and mistakes of law. See Oliver Wendell Holmes, Jr., *The Common Law* 48 (Cambridge Univ. Press 1909) (1881) (“[T]o admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey”); Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 *Duke L.J.* 341, 385 (1998) (“[T]he inevitable drawback of any rule excusing criminal liability for a lack of knowledge of the law is that such a rule celebrates ignorance of the law while making knowledge of it the best and fastest ticket to a prison cell.”); Jessica A. Kozlov-Davis, *A Hybrid Approach to the Use of Deliberate Ignorance in Conspiracy Cases*, 100 *Mich. L. Rev.* 473, 483 (2001) (arguing that the primary purpose of the willful ignorance doctrine is to “prevent a guilty defendant from escaping punishment by deliberately avoiding knowledge of some key facts”). But see Jeffrey S. Parker, *The Economics of Mens Rea*, 79 *Va. L. Rev.* 741, 777 n.101 (1993) (acknowledging that *mens rea* does not induce actors to obtain information but positing that this function is served by tort law).

when knowledge is not too valuable. When information concerning offense elements is sufficiently valuable, mens rea can be quite effective in preventing misconduct since offenders will become (or remain) informed despite the enhanced risk of criminal penalties associated with losing one's ignorance.⁸ In contrast, when ignorance is *costless* for the typical offender, a mens rea standard is likely to fail. Strict liability is thus more appropriate when the market does not provide offenders with incentives to obtain information.

Focusing on ignorance costs provides a new way of looking at many offenses in which strict liability is prevalent, controversial, and not adequately explained by existing theories.⁹ The Essay will consider the application of strict liability to statutory rape, liquor sale to minors, child pornography, the National Firearms Act, environmental crimes, and the criminal liability of corporate officers. The Essay will also shed new light on criminal law's markedly different treatment of mistakes of law and fact.

This Essay does not challenge the normative justification for the dominance of the mens rea standard in criminal law.¹⁰ Nor does it argue that strict criminal liability *should* become more prevalent.¹¹ Rather, this Essay offers a new understanding of the potential role of strict criminal liability. This understanding, I argue, is crucial for appreciating the real dilemma underlying the choice between mens

⁸ Section II.B will explain that costly ignorance mitigates, but does not eliminate, distortions produced by mens rea.

⁹ While I offer a new way to appreciate the role of strict liability in these offenses, I do not argue that this understanding has directly influenced courts or lawmakers. The implicit role of efficiency considerations in judicial decisionmaking has been studied by others. See, e.g., Richard A. Posner, *Economic Analysis of Law* 249–52 (6th ed. 2003) (exploring the connection between common law and economic logic).

¹⁰ Both Judge Posner and Professor Shavell have offered an economically oriented justification for criminal law's reliance on mens rea. See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 *Colum. L. Rev.* 1193, 1221–23 (1985) (discussing intent); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 *Colum. L. Rev.* 1232, 1247–49, 1255–56 (1985) (discussing intent and mistake of fact).

¹¹ In my prior work, I have argued that strict liability might fail to provide optimal incentives in certain cases. See generally Assaf Hamdani, *Gatekeeper Liability*, 77 *S. Cal. L. Rev.* 53 (2003) (showing that strict liability might adversely affect the market for gatekeeper services); Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 *Cornell L. Rev.* 901 (2002) (arguing that imposing strict liability on ISPs might produce over-deterrence).

rea and strict liability. The conventional view assumes that strict liability sacrifices fundamental moral principles for administrative convenience. But this depiction is often misleading, and can thus produce bad policy. When offenders have market incentives to keep ignorant, the failure of mens rea cannot be rectified by providing law enforcement authorities with adequate resources for proving defendants' knowledge in court. Rather, policymakers should devise doctrines that would induce actors to overcome their ignorance without offending prevailing moral intuitions. This Essay will take up this challenge by identifying several alternatives to strict liability—including the willful ignorance doctrine, criminal negligence, and direct regulation—and assessing their success in overcoming offender ignorance.

The analysis proceeds as follows. Part I will demonstrate that the explanations offered thus far in support of strict criminal liability are either unconvincing or incomplete. Part II will develop the costly ignorance theory. Part III will reexamine the notoriously perplexing jurisprudence of strict criminal liability. Part IV will consider the implications of the analysis.

I. EXISTING EXPLANATIONS

Criminal law theorists have explored the conditions under which holding defendants strictly liable would be fair, just,¹² or constitutional.¹³ Commentators have also struggled to crystallize rules of interpretation to guide courts in determining whether a given statute establishes a strict liability offense.¹⁴ In this Part, however, I discuss

¹² See, e.g., Michael Davis, *Strict Liability: Deserved Punishment for Faultless Conduct*, 33 *Wayne L. Rev.* 1363, 1389–93 (1987) (arguing that retribution justifies strict liability with minor penalties because of the unfair advantage of faultless conduct); Kenneth W. Simons, *When is Strict Criminal Liability Just?*, 87 *J. Crim. L. & Criminology* 1075, 1077–78 (1997) (exploring the conditions under which strict liability may be partially defended on retributive grounds).

¹³ See, e.g., Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 *Mich. L. Rev.* 1269, 1271–72 (1998) (positing that constitutional objections to strict liability overlook institutional and process considerations); Michaels, *supra* note 2, at 837 (offering a theory to distinguish between constitutional and unconstitutional strict liability).

¹⁴ Those considerations include the magnitude of penalties, legislative intent, and whether the offense is derived from the common law. See Note, *Mens Rea in Federal Criminal Law*, 111 *Harv. L. Rev.* 2402, 2402–14 (1998) (reviewing how the Supreme Court has interpreted mens rea requirements in federal criminal statutes).

only attempts to provide affirmative justifications for strict criminal liability. As this discussion demonstrates, none of these explanations can account for the full range of offense elements for which strict liability applies.

Mens rea, strict liability, and negligence are terms of art whose meaning can vary by context.¹⁵ Before getting started, therefore, it is essential to clarify the definitions of these key terms for purposes of this Essay. First, all liability standards refer to the degree to which offenders are informed about the nature of their conduct or the circumstances accompanying it.¹⁶ Second, all standards apply to a particular element of an offense and not to the offense as a whole. For example, strict liability may govern the age-of-the-victim element of statutory rape, but not necessarily other elements of that offense. Finally, I use the terms mens rea, knowledge, and awareness interchangeably. Under mens rea, therefore, defendants must be aware of certain facts in order to be convicted.¹⁷ Under strict liability, defendants are liable regardless of the amount of information they hold or their effort to obtain that information.

A. Difficulty of Proof

The leading explanation focuses on the difficulty of proving mens rea. Under mens rea, the prosecution must prove beyond reasonable doubt that the defendant committed the offense with the requisite mental state. A mens rea standard governing rape, for instance, normally requires the prosecution to prove that the de-

¹⁵ See Model Penal Code § 2.02(2) (1962) (distinguishing purpose, knowledge, recklessness, and negligence); Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 *Stan. L. Rev.* 681, 685–87 (1983) (describing different conceptions of mens rea). For different meanings of negligence, see Kenneth W. Simons, *Rethinking Mental States*, 72 *B.U. L. Rev.* 463, 547 (1992) (noting that negligence might refer to a mental state, unreasonable beliefs, or to the individual's unreasonable conduct); see also Douglas N. Husak, *Varieties of Strict Liability*, 8 *Can. J.L. & Jurisprudence* 189, 190 (1995) (identifying seven different meanings of the term strict liability).

¹⁶ This Essay does not address mental states concerning the future outcome of one's conduct. The crime of felony murder, for example, is beyond the scope of this Essay. Felony murder consists of causing a death during the commission of a felony and imposes strict liability concerning the element of causing death. See Joshua Dressler, *Understanding Criminal Law* 126–27 (2d ed. 1995).

¹⁷ Under negligence, an individual will be held liable only when she fails to exercise the due level of effort to obtain information.

fendant was aware of the victim's lack of consent.¹⁸ Mental states are inherently difficult to prove, especially since the prosecution can often rely only on circumstantial evidence to support its case.

Given the formidable task of proving defendants' knowledge, strict liability offers two important advantages. First, it allows enforcement authorities and courts to perform their tasks more cost-effectively by eliminating the large administrative costs—investigative, prosecutorial, and judicial time and effort—associated with verifying defendants' thoughts.¹⁹ Second, strict liability improves deterrence. Both the subjective nature of mens rea and the heavy standard of proof in criminal trials increase the probability that courts would err in favor of defendants,²⁰ thereby decreasing expected liability costs for would-be offenders.²¹ Strict liability, in contrast, reduces the likelihood of such errors.

Mens rea is undoubtedly more difficult to prove than strict liability. The question, however, is what the offense elements are for which the difficulty-of-proof rationale can explain criminal law's departure from its traditional reliance on mens rea. The difficulty-of-proof rationale best explains the prevalence of strict liability in offenses carrying relatively light penalties²²—such as traffic violations—especially when the expected number of trials is large.²³ In

¹⁸ See, e.g., *Regina v. Morgan*, [1976] A.C. 182 (H.L.). I do not discuss the relationship between strict liability and the requirement of voluntary conduct. For such an analysis, see Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, in *Crime, Culpability and Remedy* 84–104 (Ellen Frankel Paul et al. eds., 1990).

¹⁹ See Alexander, *supra* note 18, at 88; Sayre, *supra* note 6, at 69–70; see also *State v. Buttrey*, 651 P.2d 1075, 1077 (Or. 1982) (“[S]trict liability statutes have been passed because of the difficulty in proving intent, knowledge, recklessness or negligence . . .”).

²⁰ See, e.g., Miles Smith & Anthony Pearson, *The Value of Strict Liability*, 1969 *Crim. L. Rev.* 5, 12–13 (reporting a survey finding that enforcers believe that defendants would easily mislead courts if strict liability were not imposed).

²¹ See Herbert L. Packer, *The Limits of the Criminal Sanction* 64 (1968) (describing elimination of a potential mens rea defense for those contemplating criminal conduct as the utilitarian justification for strict liability); Steven S. Nemerson, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 *Colum. L. Rev.* 1517, 1538 (1975) (suggesting that strict liability does deter those who believe their fault is not provable in court).

²² See Sayre, *supra* note 6, at 70 (“[T]he penalt[ies] for strict liability offenses are] so slight that the courts can afford to disregard the individual in protecting the social interest.”).

²³ See *id.* at 69.

offenses of this type, requiring the prosecution to prove defendants' state of mind would probably paralyze courts while offering defendants little protection.

The difficulty-of-proof rationale, however, is unlikely to explain the persistent appeal of strict liability for offenses carrying more severe sanctions, such as child pornography and statutory rape.²⁴ To be sure, some argue that the difficulty of proving mens rea can account for the prevalence of strict liability for offenses that protect highly important social interests,²⁵ or offenses in which mens rea is exceptionally difficult to prove.²⁶ These explanations, however, seem unconvincing or incomplete. Many traditional mens rea offenses, such as theft, assault, and robbery, protect highly important social interests without resorting to strict liability. And as critics of strict criminal liability argue,²⁷ the claim that it is substantially more challenging to prove defendants' awareness of those offense elements governed by strict liability is often inaccurate.

B. Other Justifications

Another explanation provides that, by holding actors liable even when they lack culpability, strict liability discourages such actors from engaging in the activity underlying the criminal offense.²⁸ This

²⁴ See Catherine L. Carpenter, On Statutory Rape, Strict Liability, and the Public Welfare Offense Model, 53 Am. U. L. Rev. 313, 374–80 (2003) (reviewing the severe direct and indirect penalties imposed on those convicted for statutory rape).

²⁵ See, e.g., *State v. Buttrey*, 651 P.2d 1075, 1079 (Or. 1982) (“The legislature was so concerned with the risk to person and property that it wanted to make certain conduct punishable as a crime, without fault.”); Nemerson, *supra* note 21, at 1557 (arguing that strict liability is justified for offenses that threaten widespread and serious harm).

²⁶ See, e.g., *Ex parte Marley*, 175 P.2d 832, 835 (Cal. 1946) (“There are many acts . . . where the ability of the state to establish the element of criminal intent would be so extremely difficult if not impossible of proof, that in the interest of justice the legislature has provided that the doing of the act constitutes a crime, regardless of knowledge or criminal intent on the part of the defendant.”) (quoting *State v. Weisberg*, 55 N.E.2d 870, 872 (Ohio Ct. App. 1943)).

²⁷ See *infra* note 82.

²⁸ See James B. Brady, Strict Liability Offenses: A Justification, 8 *Crim. L. Bull.* 217, 222–24 (1972) (noting that a person who knows about the existence of strict liability and does not regard himself as capable of meeting the high standard of care imposed might well choose not to enter the field); Posner, *supra* note 10, at 1222 (“[W]e introduce a degree of strict liability into criminal law as into tort law when a change in activity level is an efficient method of avoiding a social cost.”); Richard A. Wasserstrom,

account assumes that actors who are incapable of exercising the due level of care should not engage in certain activities. A person who cannot ensure the correct labeling of drugs, for instance, should not be the manager of a drug-distributing firm.²⁹

This explanation alludes to an advantage of strict liability that has been recognized by economists.³⁰ But criminal lawyers have offered a variety of surprisingly indeterminate criteria to identify activities for which strict liability should apply under this explanation.³¹ Some commentators simply assume that certain underlying activities are undesirable (yet lawful) without offering a theory that could identify such activities.³² Others assume that an activity is either undesirable—and thus should be regulated—or desirable—and thus should not be regulated.³³ This dichotomy, however, is theoretically questionable. If an activity is indeed undesirable, why not prohibit it altogether?³⁴ Moreover, the premise that some ac-

Strict Liability in the Criminal Law, 12 *Stan. L. Rev.* 731, 737 (1960) (“[S]trict liability offenses might have the added effect of keeping a relatively large class of persons from engaging in certain kinds of activity.”).

²⁹ This example draws on the facts of *United States v. Dotterweich*, 320 U.S. 277, 278 (1943) (convicting the president of a corporation for shipping mislabeled drugs).

³⁰ See Steven Shavell, *Economic Analysis of Accident Law* 24 (1987) (describing its control of level of activity as one of the advantages of strict liability over negligence).

³¹ From an economic perspective, we should regulate the level of activities that are relatively dangerous. See A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 *J. Econ. Literature* 45, 59–60 (2000).

³² Some commentators refer to common morality to identify these arguably undesirable activities. See, e.g., Dan M. Kahan, *Is Ignorance of Fact an Excuse Only for the Virtuous?*, 96 *Mich. L. Rev.* 2123, 2126–27 (1998) (arguing that moral norms are the basis for the introduction of strict liability); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 *Cornell L. Rev.* 401, 424 (1993) (arguing that strict liability may be imposed when the defendant’s conduct is “morally questionable”).

³³ See, e.g., Kahan, *supra* note 32, at 2126 (distinguishing between conduct generating licit utility and illicit utility); Posner, *supra* note 10, at 1222 (stating that we do not count the avoidance of the lawful conduct bordering on criminal activity as a social cost, but failing to explain how to ascertain which legal activities count); Wasserstrom, *supra* note 28, at 737–38 (distinguishing between “socially beneficial” and “undesirable” activities); see also Philip E. Johnson, *Strict Liability: The Prevalent View*, in 4 *Encyclopedia of Crime and Justice* 1518, 1520–21 (Sanford H. Kadish ed., 1983) (explaining that strict liability might decrease the level of “productive” business activity without clarifying the distinction between productive and unproductive activities).

³⁴ Moreover, Kahan assumes that any reduction in “licit-utility activity” due to strict liability is undesirable. See Kahan, *supra* note 32, at 2126. Arguably, social utility could be maximized by accepting *some* decrease in “licit-utility” activities in order to prevent harms that would otherwise result from conduct defined as criminal.

tivities are perfectly legal, but undesirable (say on moral grounds) in a way that is clearly visible by courts and lawmakers is bound to produce an impractical approach in a modern, pluralistic society.

Another explanation posits that strict liability is designed to induce potential offenders to exercise *extraordinary care*.³⁵ Although the intuition underlying it is appealing—enhancing the scope of liability normally encourages actors to take greater precautions—this explanation evidently lacks theoretical basis. By definition, the *due* level of care denotes the limit above which additional care is undesirable. It is thus unclear why lawmakers would like to induce offenders to exercise care above that level.³⁶ Moreover, the extraordinary-care justification fails to single out the cases in which actors should exercise extraordinary care (rather than plain due care).³⁷

II. COSTLY IGNORANCE AND STRICT LIABILITY

This Part offers a new explanation for the limited domain of strict criminal liability. I first consider an inevitable shortcoming of mens rea: it allows potential offenders to engage in misconduct as long as they are genuinely unaware of at least one element of the offense. I then turn to explain why, notwithstanding this failure, strict liability remains limited in scope. Specifically, I argue that this failure of mens rea is mitigated by the market value of information. Strict liability thus becomes appealing only when two conditions are met: first, the market renders ignorance costless for potential offenders; second, ignorance is not socially optimal.

A. *The Drawback of Mens Rea*

Mens rea discourages potential offenders from obtaining valuable information concerning offense elements, whereas strict liabil-

³⁵ See Alexander, *supra* note 18, at 88; Wasserstrom, *supra* note 28, at 736.

³⁶ See Paul H. Robinson, *Criminal Law* 254 (1997) (criticizing the goal of extraordinary care as questionable); Simons, *supra* note 12, at 1132–33 (same).

³⁷ A more sophisticated version of this argument has been offered by Professor Mark Kelman, who argues that strict liability broadens the time frame within which actors' conduct is evaluated. This expansion of the time frame induces actors to take precautionary steps previous to their engagement in the conduct underlying the offense. See Mark Kelman, *Strict Liability: An Unorthodox View*, in 4 *Encyclopedia of Crime and Justice* 1512, 1516–17 (Sanford H. Kadish ed., 1983).

ity produces optimal incentives to obtain such information. The intuition is rather straightforward: under *mens rea*, knowledge exposes offenders to a risk of criminal liability. Genuine ignorance, in contrast, allows potential offenders to enjoy the benefits associated with the prohibited conduct without any threat of criminal liability. Ignorance, therefore, is the best strategy under any subjective awareness requirement.

This Section uses a highly stylized example to assess the precise impact of *mens rea* in this context. Consider a typical strict liability offense: the sale of alcohol to a person under the age of twenty-one.³⁸ Assume that, unless they exercise some costly verification effort, sellers do not know the age of prospective customers.³⁹ Sellers thus face two related decisions: first, whether to make the necessary effort to verify a potential customer's age; second, based on whatever information they have, whether to sell an alcoholic beverage to a customer.⁴⁰

Assume that purchasing an alcoholic beverage by a minor produces a social harm of \$10 on average and sellers make a profit of \$2 on each sale. The cost of age verification per customer is fixed at \$0.20, representing, for example, the time spent on requiring customers to present age documentation.⁴¹ Age verification efforts are fully effective; that is, sellers who ask customers for their age will detect all underage customers and will not mistakenly find adult customers to be underage. The probability of any given customer being a minor is 0.05, and all those who sell alcohol to underage customers are detected.⁴² Courts make no errors in determining whether a seller was aware of her customer's young age at the time of a sale. The penalty for selling alcohol to a minor is a fine of

³⁸ For a discussion of this offense, see *infra* Subsection III.A.2.

³⁹ This assumption is discussed in detail below. See *infra* Section II.B.

⁴⁰ For an analogous two-level decisionmaking process for publishers in the libel context, see Oren Bar-Gill & Assaf Hamdani, *Optimal Liability for Libel*, 2 *Contributions to Econ. Analysis & Pol'y* 5 (2003), <http://www.bepress.com/bejeap/contributions/vol2/iss1/art6>.

⁴¹ For simplicity, I assume that the cost of verification is fixed and identical for all potential customers. Realistically, both verification cost and the probability that a potential customer is a minor are likely to decrease with the magnitude of the difference between the customer's age and twenty-one.

⁴² I also assume that sellers are risk neutral. On the implications of risk aversion, see *infra* text accompanying notes 65–67.

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\$10—the social harm associated with the sale of alcohol to a minor.⁴³

In this example, each sale to a minor produces a *net* social harm of \$8.⁴⁴ The *net expected* harm (that is, the net harm of \$8 discounted by 0.05, the probability that the customer is underage) of each sale is thus \$0.40. Because verification prevents the sale of alcohol to minors, its social value per sale is also \$0.40. Since this value exceeds the cost of \$0.20, sellers should verify customers' age.⁴⁵

Table 1 compares the net value of verification for *sellers* under mens rea and strict liability in this example.

Table 1: The Private Value of Age Verification

<i>Standard</i>	<i>Expected Benefit without Verification</i>	<i>Expected Benefit with Verification</i>	<i>Verification Cost</i>	<i>Net Value of Verification</i>
Mens Rea	\$2	\$1.90	\$0.20	(-\$0.30)
Strict Liability	\$1.5	\$1.90	\$0.20	\$0.20

⁴³ Whether the magnitude of criminal sanctions does (and should) equal social harm is a matter of debate. See, e.g., John C. Coffee, Jr., Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. Rev. 193, 225–28 (1991) (arguing that criminal law does not aim at pricing behavior, and thus sanctions should not equal social harm); Parker, *supra* note 7, at 756–57 (suggesting that economic theories of crime fail to recognize that sanctions are upwardly biased).

⁴⁴ The harm from a sale to a minor, \$10, is partially offset by the seller's forgone profit, \$2. The text assumes that a seller's private benefit is included in social welfare. On whether offenders' gains are included in social welfare, see, for example, Jeff L. Lewin & William N. Trumbull, The Social Value of Crime?, 10 Int'l Rev. L. & Econ. 271 (1990).

⁴⁵ I assume that the law should not provide customers with incentives to disclose their age to sellers. This assumption is reasonable for offenses of a paternalistic nature, such as statutory rape and liquor sale to minors. On the role of criminal law in providing incentives for *victims*, see generally Omri Ben-Shahar & Alon Harel, Blaming the Victim: Optimal Incentives for Private Precautions against Crime, 11 J.L. Econ. & Org. 434 (1995).

In this example, sellers who are unaware of a customer's age should make a sale, while sellers who know their customers are underage should refuse to do so.⁴⁶

Sellers have no reason to ask customers about their age under a *mens rea* standard. Obtaining information about customers' age subjects sellers to a risk of criminal liability, whereas ignorance allows them to capture the benefits associated with selling alcohol without the threat of liability.

In our example, sellers who remain ignorant can continue selling alcohol to minors while their ignorance shields them from criminal liability. Sellers' expected profit without verification thus equals \$2. With age verification, sellers will not sell alcohol to minors. The value of age information for sellers, therefore, equals the *forgone* profits from selling alcohol to minors discounted by the probability of a customer being underage, (-\$0.10). Sellers will also have to bear a verification cost of \$0.20 per customer. Accordingly, the net value of information for sellers would be (-\$0.30). Put differently, the value of age verification under *mens rea* is negative.

Unlike *mens rea*, strict liability induces offenders to make the socially desirable level of investment in verification.⁴⁷ Under strict liability, sellers will be liable for every purchase of alcohol by a minor regardless of their knowledge about, or the effort they exercise to verify, their customers' age. Since sellers internalize the social harm resulting from selling alcohol to minors, the value that they attach to age verification will equal its social value.⁴⁸

⁴⁶ This is because the benefit from each sale exceeds the harm associated with a minor's purchase of alcohol, discounted by the probability that a customer is a minor.

⁴⁷ See Steven Shavell, *Liability and the Incentive to Obtain Information about Risk*, 21 J. Legal Stud. 259, 263 (1992) (showing that when the sanction equals social harm the investment in information under strict liability and negligence will be optimal); see also Louis Kaplow & Steven Shavell, *Private versus Socially Optimal Provision of Ex Ante Legal Advice*, 8 J.L. Econ. & Org. 306, 307 (1992) (making a similar argument regarding investment in legal information).

⁴⁸ Professor Jeffrey Parker argues that strict liability is desirable only when the cost of obtaining information is relatively low. See Parker, *supra* note 7, at 792 (arguing that strict liability may be optimal when the "marginal cost of accurate self-characterizing information [is] bounded at a low level"). In other cases, he argues, strict liability would overdeter offenders by inducing them to take socially wasteful steps to obtain information or by discouraging them from engaging in socially desirable activities. I find Parker's argument to be problematic for two principal reasons. First, Parker focuses on the cost of acquiring information but overlooks other factors that may determine whether we should induce offenders to acquire information. See

Using our example for strict liability, without verification, sellers will sell to all customers, resulting in a profit of \$2. Sellers, however, will also face an expected fine of \$0.50 for each transaction. Sellers' net expected benefit would thus equal \$1.50. With age verification, sellers will make fewer sales—resulting in a net expected profit of only \$1.70—but will not be subject to the risk of criminal liability. Taking into account verification cost, the net value of age verification for sellers will thus equal \$0.20.⁴⁹

The distorted incentives under mens rea are not merely a matter of scholarly concern. Sellers who attach negative value to age verification will not inquire about prospective customers' age. This implies that a prohibition on the sale of alcohol to minors accompanied by a mens rea standard would be ineffective: sellers will continue to sell alcohol to underage customers as long as they can preserve their ignorance. Moreover, sellers for whom the value of information is negative might take affirmative steps to preserve their ignorance. To illustrate, assume that most minors are very young looking, and thus a quick look is sufficient to realize that they are underage. One could argue that a mens rea standard will successfully prevent the sale of alcohol to minors under these circumstances. But, expecting their inability to remain ignorant when making a face-to-face sale, sellers might take deliberate steps to distance themselves from the presence of customers. Sellers might thus move their business online, for example, for the sole purpose of being able to conduct sales without knowledge about customers' age.

This Section has relied on several simplifying assumptions, including that both courts and sellers are fully informed and that the expected sanction equals the social harm. Relaxing these assumptions, however, does not undermine the basic claim: mens rea in-

infra note 67 and accompanying text. Second, as Shavell, supra note 47, shows, strict liability generally provides optimal incentives to acquire information. To support his overdeterrence claim, Parker relies on the premise that criminal sanctions are upwardly biased. See Parker, supra note 7, at 756–57. This assumption, however, is empirically questionable.

⁴⁹ The text assumes that sellers accurately perceive the likelihood of a customer being underage. See generally Louis Kaplow, *Optimal Deterrence, Uninformed Individuals, and Acquiring Information about Whether Acts Are Subject to Sanctions*, 6 J.L. Econ. & Org. 93 (1990) (studying optimal sanctions taking into account erroneous perceptions as to the likelihood of acts being illegal).

duces actors to remain ignorant, whereas strict liability induces them to obtain information.⁵⁰ As long as it has some deterrent effect, strict liability outperforms mens rea in inducing would-be offenders to obtain information.

The observation that mens rea rewards ignorance only intensifies the mystery surrounding the selective application of strict liability in criminal law. If mens rea is so flawed, why is strict liability adopted only with respect to a limited set of offenses? The remainder of this Part seeks to supply the missing piece of the puzzle.

B. Introducing the Cost of Ignorance

Mens rea essentially attaches a price tag to knowledge about certain facts. This, however, does not imply that offenders would always choose to preserve their ignorance for the sole purpose of avoiding liability. Rather, offenders might be aware of the relevant offense elements notwithstanding the disincentive that a mens rea norm produces. In economic terms, this will occur when offenders find ignorance to be too costly for reasons not associated with the criminal offense at stake. This Section will first demonstrate that ignorance costs alleviate the distortions created by mens rea. Then, it will sketch the circumstances under which ignorance is likely to be costly.

1. The Impact of Ignorance Costs

The analysis in Section II.A relies on the assumption that offenders are uninformed with respect to customers' age.⁵¹ Under this assumption, the prohibition on the sale of alcohol to minors must achieve two related goals: first, induce sellers to acquire information concerning customers' age; second, prevent sellers who know their customers to be underage from selling alcohol.⁵² Since it is inherently incompatible with the former goal, a mens rea standard will likely fail to prevent the sale of alcohol to minors.

⁵⁰ Relaxing these assumptions implies that strict liability may result in either over-investment or under-investment in information. But this does not undermine the fact that the mens rea requirement discourages investment in information while strict liability encourages it.

⁵¹ See *supra* text accompanying note 39.

⁵² The analysis in Section II.A also relies on the implicit assumption that ignorance is *not* socially optimal. On the importance of this assumption, see *infra* Section III.C.

But the assumption that would-be offenders are uninformed might be inaccurate. Potential offenders may have various reasons for overcoming their ignorance. Such offenders will weigh the cost of ignorance against the cost of acquiring information—including the enhanced risk of a criminal conviction under a mens rea standard. If ignorance is sufficiently costly—that is, if information is sufficiently valuable—offenders will likely make an effort to become aware of the requisite elements of the offense notwithstanding the enhanced risk of criminal liability associated with such awareness. The mens rea standard is more likely to succeed in preventing misconduct under these circumstances.

Consider again the alcohol sale example, and assume that ignorance with respect to customers' age is costly for sellers.⁵³ For example, assume that an advertising agency pays sellers \$0.40 per customer for collecting *accurate* personal data, including age, from each customer. Sellers will weigh this incentive to verify customers' age against the disincentive to acquire information that the mens rea standard produces. Table 2 summarizes the outcome of this tradeoff under a mens rea standard.

Table 2: Costly Ignorance and Age Verification Under Mens Rea

<i>Verification</i>	<i>Profits from Sale</i>	<i>Expected Fine</i>	<i>Verification Costs</i>	<i>Verification Gains</i>	<i>Net Benefit</i>
Yes	(\$0.95 x 2) = \$1.90	None	\$0.20	\$0.40	\$2.10
No	\$2	None	None	None	\$2

Like in the previous Section, sellers who verify customers' age will forgo an expected benefit of \$0.10 per customer under mens rea. At the same time, however, verification will provide sellers with a gain of \$0.40 per customer. Taking into account its cost, veri-

⁵³ The gain from age verification can be of two types. First, as the example illustrates, the information may be beneficial independently of the probability that the customer is underage. Second, the gain from information may depend on the probability that the customer is a minor. This would happen when sellers benefit from age verification only with respect to underage customers, such as when sellers want to identify minors in order to require them to pay with cash.

fication enhances sellers' net benefit by \$0.10 in this example. Sellers will thus ask customers about their age notwithstanding the risk of criminal liability.

This example demonstrates two points. First, when ignorance costs are sufficiently high, offenders may make an effort to acquire the information necessary for conviction even under a mens rea standard. Second, market incentives cannot eliminate the divergence that a knowledge requirement creates between the private and social value of information. Sellers value age verification at \$0.10. The net social value of age verification, however, is \$0.60.⁵⁴ In this example, this disjunction turns out to have no practical implications as sellers face a binary choice: either verify customers' age at the cost of \$0.20 or remain ignorant.

In a more realistic scenario, however, offenders choose among a continuum of verification measures that vary in accuracy. In this case, ignorance costs alleviate—but not eliminate—the distortions produced by mens rea. Put differently, market incentives to acquire information may induce sellers to invest in information even under a mens rea standard, but the level of such investment might be suboptimal. I thus do not posit that high ignorance costs will supply offenders with *optimal* incentives under the mens rea standard. Indeed, mens rea is intrinsically costly as it inevitably distorts offender incentives to acquire information.

I do argue, however, that the magnitude of these costs varies by the degree to which ignorance is costly. Although mens rea distorts offenders' incentives, the practical implications of this distortion might be relatively insignificant when ignorance is sufficiently costly. This will be the case especially when the marginal effectiveness of verification efforts is decreasing.⁵⁵ Thus, although there is some welfare loss associated with the mens rea standard, it is likely to be at least partially offset where ignorance is costly.

⁵⁴ The social value of information in this example equals the gain that sellers derive from acquiring information about customers' age—\$0.40—plus the net decrease in social harm produced by age verification— $\$8 \times 0.05 = \0.40 . The social value of age verification thus equals \$0.80. Since the cost of verification is \$0.20, the net value of verification is \$0.60.

⁵⁵ This assumption is consistent with the classical economic assumption of diminishing marginal returns to effort.

To summarize, when ignorance is costless, targeting only informed offenders would be, at best, ineffective. As the cost of ignorance increases, offenders become more likely to invest in information, thereby decreasing the social costs associated with mens rea. When ignorance is very costly for offenders, the practical effect of the distortions produced by mens rea might be negligible.⁵⁶

2. *When Is Ignorance Costly?*

Can we predict the offense elements for which ignorance is likely to be costly? In this Section, I argue that often we can.

Offenders may be aware of offense elements by coincidence. But they may also have various reasons for obtaining such information. To begin, information about certain facts may provide potential offenders with pecuniary gains. Consider, for example, the facts underlying *United States v. Ahmad*.⁵⁷ In this case, a gas station owner was indicted for discharging large quantities of gasoline into the sewer system in violation of the Clean Water Act. In his defense, the defendant argued that he had believed the material discharged to be water. The court held that the offense required knowledge concerning the nature of the material discharged. The court's conclusion is consistent with the market-for-ignorance analysis. Since gasoline and water have dramatically different values, gas station owners would normally have substantial incentives to learn about the nature of the materials that they discharge. It is thus unlikely that defendants would deliberately decide to maintain their ignorance concerning the nature of the material they discharge for the sole purpose of avoiding criminal liability.

Ignorance is also costly when information can affect personal safety. To illustrate, consider *United States v. Staples*.⁵⁸ In *Staples*, a defendant charged with unlawful possession of an unregistered machine gun claimed that he had not known that his rifle had been modified to become an automatic weapon. The Court held that the government must prove that the defendant knew that his rifle was

⁵⁶ The analysis focuses on a single, typical offender for simplicity. Realistically, it would be more accurate to analyze the distribution of market incentives across the entire population of potential offenders.

⁵⁷ 101 F.3d 386 (5th Cir. 1996).

⁵⁸ 511 U.S. 600 (1994).

capable of firing automatically.⁵⁹ Pulling the trigger of a rifle without knowing whether it is automatic is unsafe and might injure the rifle operator. Thus, a user of a firearm has a strong incentive to learn whether it is automatic.⁶⁰

Finally, common intuition, rather than economic reasoning, suggests that offenders will be aware of many offense elements where ignorance costs are high, perhaps prohibitive. For example, most healthy people are normally aware of their bodily movements without exercising any effort. In fact, a person wishing to become unaware of the nature of her conduct would probably find the cost of doing so prohibitive. It is thus unlikely that individuals would adopt measures to become ignorant of their bodily movements for the sole purpose of avoiding criminal liability under the mens rea standard.

This Section does not purport to identify all the cases in which ignorance is costly.⁶¹ Rather, the analysis in this section develops some intuitions concerning the circumstances under which information might have market value. But for purposes of this Essay, which attempts to explain the appeal of strict liability, it is important to predict when ignorance is likely to be costless. As the next Section will show, this task is often quite straightforward.

C. Optimal Ignorance

Even when ignorance is costless to potential offenders, strict liability may not be desirable if ignorance is socially optimal. A mens rea standard produces two distinct incentives: first, it encourages potential offenders to remain ignorant; second, it discourages those offenders who happen to possess the requisite information from engaging in the prohibited conduct. Thus far, I have assumed

⁵⁹ Id. at 612–13.

⁶⁰ Social norms may also affect ignorance costs. A social norm that attaches significance to certain facts can induce offenders to acquire information about such facts.

⁶¹ The discussion excludes two cases: intentional violations and offenders who gain information by accidental knowledge. Intentional offenders, such as thieves, can be classified as ones for whom ignorance costs are high, as offenders of this type invest in acquiring information to facilitate the successful completion of their crimes. Accidental knowledge refers to cases in which offenders learn about particular facts by chance, without exercising effort to acquire that information. By definition, we cannot identify in advance offenses, or offense elements, about which offenders will obtain information accidentally.

that the first incentive is inadequate. But, in some cases, it may be socially optimal for potential offenders *not* to invest in acquiring information. When acquiring information is too costly, it might be best to restrict criminal liability only to those who happen to be aware of the relevant offense elements.

Consider liability for the use of counterfeit bills.⁶² Under existing technology, requiring all holders of \$1 bills to verify the authenticity of the bills in their possession would likely paralyze commercial life. We therefore prefer people *not* to verify the authenticity of their bills before using them. At the same time, those who happen to know that the money they hold is counterfeit should not use it. A mens rea standard achieves the latter goal without subjecting innocent holders to the threat of criminal sanctions.

In the counterfeit bill context and others where ignorance is optimal, strict liability is unappealing not because it will make offenders overinvest in information,⁶³ but because it offers no visible advantages over mens rea, which this Essay takes to be the default standard of criminal liability.⁶⁴ Moreover, notwithstanding the optimal incentives to invest in information that it provides, strict criminal liability has its own costs.⁶⁵ There is little sense in imposing

⁶² See Model Penal Code § 224.1(c) (1962) (adopting a “knowledge” or “purpose to defraud” requirement to constitute the crime of uttering forged money).

⁶³ Economists have shown that strict liability provides optimal incentives to acquire information. See generally Shavell, *supra* note 47.

⁶⁴ Mens rea might be costly if there are some offenders for whom ignorance is not optimal—because, for example, they have a concrete suspicion about the nature of the money they use.

⁶⁵ Economists recognize two types of costs associated with public enforcement: risk-bearing and imprisonment costs. See generally Louis Kaplow, *A Note on the Optimal Use of Nonmonetary Sanctions*, 42 *J. Pub. Econ.* 245 (1990) (studying the use of nonmonetary sanctions in light of their social cost); A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff between the Probability and the Magnitude of Fines*, 69 *Am. Econ. Rev.* 880 (1979) (modeling the effect of risk aversion on optimal enforcement policy). Adopting a strict liability standard is likely to increase both types of costs, especially when actors who try to acquire information can make mistakes. Strict liability would be significantly less costly if actors could *eliminate* mistakes by exercising proper vigilance. See Louis Kaplow, *The Optimal Probability and Magnitude of Fines for Acts that Definitely Are Undesirable*, 12 *Int’l Rev. L. & Econ.* 3, 6 (1992) (analyzing the case when raising sanctions can achieve full deterrence and thus eliminate the social cost of sanctions). The costs of strict liability, however, do not explain the failure of criminal law to adopt negligence standards. See *infra* text accompanying note 125.

costly liability for a socially desirable behavior—that is, the failure to acquire information.

Consider again liability for using counterfeit bills. Under the assumption that ignorance is optimal, neither strict liability nor mens rea will induce actors to ascertain whether the currency they use is genuine. Both standards will prevent only those who know that the bills they hold are counterfeit from using them. Strict liability, however, casts a wider net than mens rea; it imposes liability even on uninformed defendants. Strict liability thus subjects all those who engage in the regulated activity—users of \$1 bills in our example—to the risk of liability.⁶⁶

Strict liability is costly even when ignorance is not optimal. In many cases, the socially adequate level of verification effort leaves some probability for mistakes. Ideally, policymakers should balance the deterrence gains of strict liability against the sanction and risk-bearing costs associated with this standard. My goal in this Essay, however, is limited to explaining why strict liability is likely undesirable when ignorance *is* optimal. To be sure, determining when ignorance is optimal is a complicated task: the calculus must take into account not only the value of information, but also the cost of acquiring information and the extent to which verification efforts are effective.⁶⁷ These measurement difficulties, however, do not undermine the basic claim that strict liability is undesirable when ignorance is indeed socially optimal.

D. Taking Stock

Before moving on, I would like to summarize the framework developed in this Part. Strict liability is likely useful when two conditions are met: first, when ignorance is costless for the typical offender; second, when ignorance is not socially optimal. When information concerning offense elements has no market value,

⁶⁶ See Coffee, *supra* note 43, at 219–20 (pointing out that the expansion of strict liability offenses in the modern industrial society entangles in the criminal law at least some of those engaged in legitimate professional activities).

⁶⁷ Jeffrey Parker argues that strict liability applies when the cost of acquiring information is low. See Parker, *supra* note 7, at 792. This argument partially captures the intuition that strict liability is unnecessary when ignorance is optimal, but it fails to account for all the considerations that determine when ignorance is optimal. See *supra* note 48.

mens rea will be ineffective as offenders will presumably remain ignorant while proceeding to engage in misconduct. Strict liability, in contrast, will deter offenders even when ignorance is costless. But when ignorance is socially optimal, strict liability is likely undesirable because it carries higher sanction costs without providing any offsetting benefits in terms of overcoming actors' ignorance.

This thesis does not displace competing explanations. Indeed, regardless of ignorance costs, the difficulty-of-proof rationale may explain the abandonment of mens rea for a wide range of regulatory offenses carrying light penalties. Moreover, there may be some overlap between this Essay's thesis and the difficulty-of-proof explanation. Defendants' claims that they are unaware of offense elements for which ignorance is costless are more credible since there is no reason to expect offenders to be aware of such elements.

But the overlap is not perfect. The costly ignorance thesis explains strict liability even when the difficulty-of-proof rationale clearly does not apply. Most notably, this will be the case when acquiring information may be desirable, but defendants' genuine ignorance is beyond doubt. For example, a person who sells alcohol over the Internet may be genuinely unaware of a customer's age. While the difficulty-of-proof rationale cannot explain strict liability here, the thesis offered by this Essay does.

III. THE JURISPRUDENCE OF STRICT LIABILITY

This Part employs the costly ignorance framework to illuminate the role of strict liability in criminal law doctrine. Section A considers offenses that other theories find most challenging to explain, namely, statutory rape, liquor sale to minors, child pornography, and the National Firearms Act. Section B explores the role of strict liability in environmental crimes. Section C analyzes the liability of senior corporate officers. Section D sheds a new light on the puzzling inconsistency in the treatment of mistake of law versus mistake of fact.⁶⁸

⁶⁸ The discussion proceeds along the typical doctrinal debate contrasting strict liability and mens rea. See, e.g., *Morrisette v. United States*, 342 U.S. 246, 263 (1952) (holding that a statute that was silent as to the applicable mental element adopts mens rea rather than strict liability). It is somewhat puzzling, however, that the failure of mens

*A. Victims' Age**1. Statutory Rape*

Statutory rape is perhaps the most controversial example of a strict-liability crime.⁶⁹ In many jurisdictions strict liability applies with respect to victims' age: the prosecution is not required to prove that the defendant knew that the complainant was under the threshold age of consent.⁷⁰ Therefore, a defendant's good-faith mistaken belief concerning the victim's age does not exculpate him from criminal liability for statutory rape.

Statutory rape poses a formidable challenge to the conventional explanations of strict criminal liability, such as those focusing on the difficulty of proving defendants' awareness or the "public welfare" nature of the offense. A strict liability crime even under the common law, statutory rape is not a regulatory violation that could even remotely qualify as a "public welfare" offense.⁷¹ Moreover, the penalties imposed on those convicted can be quite severe.⁷²

Other explanations have proven no more convincing. In an insightful article, Professor Dan Kahan argues that the application of strict liability to victims' age reflects society's moral disapproval of

rea normally results in the adoption of strict liability rather than negligence. One plausible explanation is institutional: courts can infer strict liability when a statute is silent concerning the requisite mental element. Negligence, in contrast, requires explicit statutory language.

⁶⁹ For recent examples of articles criticizing the use of strict liability in statutory rape, see generally Arnold H. Loewy, *Statutory Rape in a Post Lawrence v. Texas World*, 58 SMU L. Rev. 77 (2005); Reich, *supra* note 4. See also Carpenter, *supra* note 24, at 315–16 (noting that, with respect to statutory rape, "the debate on whether to require a criminal mens rea or embrace strict liability continues").

⁷⁰ See *Garnett v. State*, 632 A.2d 797, 803–04 (Md. 1993) (holding that the prohibition on sexual intercourse with underage persons constitutes a strict liability offense); *Commonwealth v. Moore*, 269 N.E.2d 636, 640 (Mass. 1971) (same); Colin Campbell, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 46 A.L.R.5th 499, 508 (1997) (noting that the majority of jurisdictions whose higher courts have considered the issue have declined to allow a reasonable-mistake defense to statutory rape). But see *State v. Guest*, 583 P.2d 836, 838–40 (Alaska 1978) (holding that a mistake of age defense is constitutionally mandated).

⁷¹ For a thorough analysis rejecting the application of the public welfare rationale to statutory rape, see generally Carpenter, *supra* note 24.

⁷² See, e.g., Carpenter, *supra* note 24, at 321 (reviewing the severe direct and indirect penalties imposed on those convicted of statutory rape).

sexual relationships with young women.⁷³ Kahan, however, fails to explain why the outlet for such hostility is limited to the use of strict liability with respect to victims' age. Lawmakers disapproving of sexual relationships with young women could adopt various other measures to discourage this activity. For example, they could modify the age threshold or impose more severe penalties on those convicted of statutory rape. The link between the moral disapproval of the underlying activity and strict liability concerning victims' age thus requires further explanation.

The market for information, however, does explain why strict liability may be useful with respect to victims' age. Since individuals normally derive little benefit from knowing the age of their sexual partners, they presumably would not ask their partners about their age in the absence of some legal inducement to do so.⁷⁴ Thus, making awareness of victims' age a prerequisite for liability would likely fail to prevent many cases of statutory rape.⁷⁵ Strict liability, in contrast, would induce individuals to ascertain their partner's age and discourage those who know that their prospective partner is underage from committing the offense.⁷⁶

Before moving on, I would like to highlight two points. First, while ignorance of victims' age can be costless, not *all* offenders would be uninformed. Some statutory rape offenders might be aware of victims' age even under a mens rea standard. Other than

⁷³ See Kahan, *supra* note 32, at 2123–24. Courts occasionally echo this explanation when holding that strict liability for statutory rape is constitutional, since engaging in sexual activity puts the actor on notice that he or she may be subject to criminal regulation. See, e.g., *Commonwealth v. Robinson*, 438 A.2d 964, 966 (Pa. 1981) (“In an exercise of its police powers, the legislature rationally may require that [the perpetrator] engages in sexual intercourse . . . at his own peril.”).

⁷⁴ Ignorance might be costly in two cases. First, a person might internalize a social norm under which sexual intercourse with partners below the legal consent age is discouraged. Second, individuals might derive some illicit pleasure from knowing that their partner is below the legal age. The question, however, is whether these are the typical offenders that this offense seeks to target.

⁷⁵ Interestingly, Professor Sayre seems to apply this logic, but only in a footnote. See Sayre, *supra* note 6, at 74 n.68 (“Were ignorance as to the girl’s age allowed as a defense, any defendant by keeping in discreet ignorance as to his victim’s age, could evade punishment.”).

⁷⁶ Moreover, age verification is not too costly since offenders meet victims face to face. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 n.2 (1994) (noting in dictum with respect to statutory rape that “the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim’s age”).

the occasional case of prior acquaintance, this will normally happen when the victim is very young looking. But the fact that some offenders might be convicted even under mens rea does not imply that this standard is entirely effective. Rather, it means that a statutory rape offense employing a mens rea standard would protect mostly young-looking victims while abandoning any hope of making offenders ascertain the age of a broader range of underage partners.

Second, I do not suggest that strict liability *should* govern statutory rape. My goal here is merely to illuminate an advantage of adopting strict liability with respect to victims' age. As I will explain in the next Part, this does not necessarily require lawmakers to apply a strict liability standard.

2. *Liquor Sale to Minors*

As in statutory rape, strict liability applies for selling liquor to minors,⁷⁷ and cannot be satisfactorily justified by existing theories.⁷⁸ As with statutory rape, focusing on the market value of information sheds a new light on the role of strict liability in this context.

To be aware of their customers' age, sellers of alcohol often need to expend costly effort. Sellers have no market reasons for doing so, however, as their principal objective is to maximize revenues by completing as many transactions as possible. From a seller's perspective, therefore, the cost of ignorance with respect to customers' age is virtually zero. Limiting liability to those who are aware of customers' young age would thus fail to prevent many sales of al-

⁷⁷ See *Funari v. City of Decatur*, 563 So.2d 54, 55 (Ala. Crim. App. 1990) (holding that no mental element is necessary to convict for selling liquor to minors); *Sanctuary, Inc. v. Smith*, 733 P.2d 839, 840 (Kan. Ct. App. 1987) (same); *City of West Allis v. Megna*, 133 N.W.2d 252, 254 (Wis. 1965) (same); see also Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. Rev. 337, 365 (1989) (observing that the cases on liquor sales to minors “turn out to be the critical decisions that establish strict liability” in the United States). But see, e.g., *State v. Sleeth*, 664 P.2d 883, 888 (Kan. Ct. App. 1983) (holding that knowledge of minority is required for convicting club owners of liquor sale to minors).

⁷⁸ As in statutory rape, several scholars contend that the decision to impose strict liability reflects society's moral disapproval of the underlying activity—the consumption of alcohol. See Singer, *supra* note 77, at 369 (noting that strict liability for liquor offenses was closely linked to the prohibitionist movement). For the reasons I discussed with respect to statutory rape, I find this explanation to be incomplete.

cohol to minors. Strict liability, in contrast, would motivate sellers to ascertain their customers' age.

Unlike statutory rape, selling alcohol requires no physical contact between offenders and would-be victims—that is, sellers can commit the offense while their “victims” are not present. Sellers can thus remain genuinely ignorant even with respect to young-looking customers without incurring significant costs. A mens rea standard would simply make such distancing tactics—selling alcohol online, for example—more worthwhile.

The last point underscores the difference between this Essay's thesis and the difficulty-of-proof rationale. The difficulty-of-proof explanation clearly does not apply to a person who is undoubtedly unaware of customers' age, and thus under that explanation, those who successfully distance themselves from the presence of customers would not be liable.

3. *Child Pornography*

Courts have been somewhat hesitant to endorse the use of strict liability in child pornography offenses. While several courts have held defendants strictly liable with respect to performers' age,⁷⁹ others have expressed concern that strict liability for child pornography would violate the First Amendment.⁸⁰ Addressing the complex relationship between freedom of speech and strict liability is beyond the scope of this Essay. Instead, I will highlight the advantage that strict liability offers for crimes that involve the production and distribution of sexually explicit materials depicting children.

⁷⁹ See, e.g., *Gilmour v. Rogerson*, 117 F.3d 368, 372–73 (8th Cir. 1997) (finding strict liability as to performer's age for producers of pornography); *Hicks v. State*, 561 So.2d 1284, 1284 (Fla. Dist. Ct. App. 1990) (holding that defendant's ignorance of the victim's age was not a viable defense to conviction for use of a child in a sexual performance); *State v. Peterson*, 535 N.W.2d 689, 692 (Minn. Ct. App. 1995) (holding that strict liability imposed on an employer of a minor dancer is constitutional).

⁸⁰ See *X-Citement Video*, 513 U.S. at 78 (interpreting a child pornography statute to require knowledge by distributors in order to avoid a constitutional challenge); *State v. Zarnke*, 589 N.W.2d 370, 376 (Wis. 1999) (holding that “the government must prove some level of scienter as to the performer's minority” to convict for distributing pictures of minors' sexual activity). The constitutional concerns rely on the “chilling effect” of strict liability. See *Smith v. California*, 361 U.S. 147, 150, 155 (1959) (invalidating a strict liability offense of possessing an obscene book on the grounds that strict liability concerning the obscenity element would effectively restrict the possession of non-obscene books).

The Supreme Court's *X-Citement* decision demonstrates the importance of clarifying the precise benefit that strict liability produces. The Court held that a statute criminalizing the distribution of child pornography required the government to prove that distributors knew the performers to be underage. The dissent, however, argued that requiring the prosecution to prove defendants' knowledge would provide children with inadequate protection.⁸¹ Commentators were quick to criticize this reasoning by pointing out that mens rea in child pornography crimes is no more difficult to prove than in any other offense.⁸²

Unlike previous attempts, this Essay's thesis adequately explains why child pornography differs from many other offenses. Critics may be correct in asserting that it is not inherently difficult to prove that a distributor of sexually explicit materials was aware of a performer's young age. But the debate over the difficulty of proving defendants' knowledge becomes irrelevant when actual defendants are likely to be genuinely ignorant as to performers' age. Producers and distributors of sexually explicit materials normally derive no benefit from knowing performers' age.⁸³ Thus, a knowledge requirement would likely be ineffective in eliminating child pornography. Strict liability, in contrast, could sufficiently motivate producers and distributors to ascertain performers' age.

The case law on child pornography demonstrates another aspect of the costly ignorance thesis. As explained earlier,⁸⁴ strict liability is undesirable when acquiring information is too costly. Consistent with this insight, courts have relied on the cost of verifying performers' age to distinguish between producers and distributors of sexually explicit materials. Noting that producers, who have direct

⁸¹ See *X-Citement Video*, 513 U.S. at 85 (Scalia, J., dissenting) ("I am concerned that the Court's suggestion . . . will leave the world's children inadequately protected [K]nowledge of the performers' age by the dealers who specialize in child pornography, and by the purchasers who sustain that market, is obviously hard to prove.").

⁸² John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 Va. L. Rev. 1021, 1088 (1999) (arguing that the *X-Citement Video* case itself illustrates that evidence of mens rea can be simple to gather).

⁸³ Producers and distributors might have an incentive to verify performers' age when viewers are willing to pay a higher price for sexually explicit materials depicting minors. The question, however, is whether the principal aim of the prohibition on child pornography is to target those who hire children only because they are children.

⁸⁴ See *supra* discussion in Section II.C.

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contact with performers, can cheaply verify performers' age, courts endorsed strict liability for *producers*, but refused to apply strict liability to *distributors* of sexually explicit materials.⁸⁵

4. *National Firearms Act*

Consider two Supreme Court cases that are famous for their seemingly inconsistent treatment of strict criminal liability. In *United States v. Freed*, the defendant was indicted for possessing unregistered grenades in violation of the National Firearms Act.⁸⁶ The defendant claimed that he did not know that the grenades in his possession were unregistered. The Court, however, held that strict liability applied—that is, the offense did not require proof of defendants' knowledge concerning the lack of registration.⁸⁷

In *United States v. Staples*, the defendant was indicted under the same statute for unlawful possession of an unregistered machine gun.⁸⁸ In his defense, Staples claimed that he did not know that his rifle had been capable of firing automatically, a feature that made the rifle a "machine gun" under the National Firearms Act. Based on *Freed*, one would expect the Court to hold that this was a strict liability element of the offense. The Court, however, determined that a knowledge requirement applied.⁸⁹

Freed and *Staples* thus provide that strict liability governs one element of the offense—lack of registration—but not others—such as the character of the weapon. The conventional view finds this distinction puzzling.⁹⁰ There is nothing to suggest that defendants'

⁸⁵ See *Gilmour v. Rogerson*, 117 F.3d 368, 372–73 (8th Cir. 1997) ("a prudent photographer or movie producer may readily and independently confirm the age of virtually every young-looking model"); *State v. Peterson*, 535 N.W.2d 689, 691 (Minn. Ct. App. 1995) (relying on the distributing/producing distinction to hold that strict liability imposed on an employer of a minor nude dancer is constitutional); see also *X-Citement Video*, 513 U.S. at 76 n.5 ("[P]roducers are more conveniently able to ascertain the age of performers. It thus makes sense to impose the risk of error on producers.").

⁸⁶ 401 U.S. 601, 601 (1971).

⁸⁷ *Id.* at 609–10.

⁸⁸ 511 U.S. 600, 602–03 (1994).

⁸⁹ *Id.* at 618–19.

⁹⁰ See Christina Egan, *Level of Scienter Required for Child Pornography Distributors: The Supreme Court's Interpretation of "Knowingly"* in 18 U.S.C. § 2252, 86 J. Crim. L. & Criminology 1341, 1371 n.212 (1996) (stating that the Court "seems to be creating distinctions where none exist"); Mandiberg, *supra* note 4, at 1200–04 (noting

knowledge concerning registration status is more difficult to prove than their knowledge concerning the nature of their firearms. Furthermore, since both cases address the same offense, one cannot rely on the severity of the penalty or the “public welfare” nature of the crime in order to justify the distinction.

The difference between the two elements of the offense, I argue, lies in the cost of ignorance. Actors have little market incentive to learn about the registration status of their firearms. Limiting liability to those who know their firearms to be unregistered would thus undermine the goal of this statute, as offenders could costlessly eliminate any risk of criminal liability by remaining ignorant. Strict liability, in contrast, induces owners to take the appropriate measures to verify the registration status of their firearms.

In contrast, whether a firearm is automatic is a matter for which ignorance costs are very high. Pulling the trigger without knowing how many bullets will be fired is unsafe. Owners, therefore, have a strong incentive to inquire about the nature of their firearm, and it is highly unlikely that they would prefer to overlook such a critical fact for the sole purpose of being in a position to deny truthfully any knowledge that might subject them to criminal penalty.

B. Environmental Violations

The use of criminal law to enforce environmental norms is controversial.⁹¹ The dispute is exacerbated by the uncertainty over the level of knowledge required for conviction in many environmental offenses.⁹² A full analysis of the proper standard of culpability in environmental crimes is beyond the scope of this Essay. Rather, I will illustrate the illuminating power of this Essay’s framework by considering the role of strict liability concerning the lack of permits for certain activities.

Many environmental violations depend on the lack of a permit. Examples include the prohibitions under the Resource Conserva-

the difficulty in applying a coherent principle of interpretation created by the apparently inconsistent holdings of these cases).

⁹¹ See generally Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 *Iowa L. Rev.* 115 (1998).

⁹² See generally Mandiberg, *supra* note 4; Andrew J. Turner, *Mens Rea in Environmental Crime Prosecutions: Ignorantia Juris and the White Collar Criminal*, 23 *Colum. J. Envtl. L.* 217 (1998).

tion and Recovery Act on transporting hazardous waste to a facility without a permit and on disposing hazardous waste without a permit.⁹³ Courts generally hold that defendants must know that the materials in their possession are waste.⁹⁴ Courts, however, disagree on the requisite mental state concerning the lack of a permit. While many courts take the view that strict liability applies,⁹⁵ others require the prosecution to prove defendants' knowledge of a lack of having a permit.⁹⁶

Opponents of strict liability in this context contend that it punishes actors who are not culpable and that proving defendants' knowledge with respect to the lack of permits is not exceptionally difficult.⁹⁷ This criticism, however, misses the point. Offenders' cost of ignorance concerning a permit's existence is presumably insignificant. In the absence of some legal inducement, offenders would presumably remain ignorant of the lack of a permit. An offense accompanied by a knowledge requirement concerning this element would therefore be ineffective.⁹⁸

C. Corporate Officers

Two of the Supreme Court decisions upholding strict criminal liability affirmed the convictions of corporate executives for violations committed within the corporate framework. In *United States v. Dotterweich*, the Court affirmed the conviction of a company's

⁹³ 42 U.S.C. § 6928(d)(1)–(2) (2000).

⁹⁴ See, e.g., *United States v. Goldsmith*, 978 F.2d 643, 645–46 (11th Cir. 1992) (concluding that, to be convicted, the defendant need not know the exact identity of the chemicals disposed, nor that the EPA had defined them as “hazardous”; rather, the defendant is required to know only that the chemicals have “the potential to be harmful to others or to the environment” (quoting *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990))).

⁹⁵ See, e.g., *United States v. Kelley Technical Coatings, Inc.*, 157 F.3d 432, 436 (6th Cir. 1998); *United States v. Laughlin*, 10 F.3d 961, 966 (2d Cir. 1993).

⁹⁶ See *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 668 (3d Cir. 1984).

⁹⁷ See Mandiberg, *supra* note 4, at 1227 (“[I]t is not necessarily easy for a defendant to introduce convincing evidence of an honest belief that a permit existed.”).

⁹⁸ The analysis also applies to the precise terms of the permit or the permit requirement itself. See *United States v. Sinskey*, 119 F.3d 712, 715–16 (8th Cir. 1997) (holding that the prosecution need not prove defendants' awareness of the specific requirements of the permit); *United States v. Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1993) (holding that the Clean Water Act does not require that defendants be aware of the permit requirement).

president for introducing misbranded drugs into interstate commerce although the defendant did not know the drugs were mislabeled.⁹⁹ In *United States v. Park*, the Court upheld the strict liability conviction of a president of a retail food chain for violations stemming from rodent infestations in the company's warehouses.¹⁰⁰ These decisions are credited with introducing the so-called "responsible corporate officer" ("RCO") doctrine, which continues to generate substantial confusion and uncertainty concerning the extent to which corporate officers are strictly liable for corporate misconduct.¹⁰¹

Not surprisingly, the conventional explanation for the RCO doctrine invokes the difficulty of proof. Corporate officers are generally not criminally liable for offenses committed within the corporate setting unless they personally participate in or authorize the misconduct.¹⁰² But it is normally quite difficult to prove that senior officers, especially in large organizations, personally authorized criminal acts by their subordinates.¹⁰³ Strict liability, the argument

⁹⁹ 320 U.S. 277, 280–81 (1943).

¹⁰⁰ 421 U.S. 658, 661, 670–73 (1975). For an attempt to discern these cases' holdings, see generally Norman Abrams, Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on *Dotterweich* and *Park*, 28 UCLA L. Rev. 463 (1981); Kathleen F. Brickey, Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View, 35 Vand. L. Rev. 1337 (1982). The "responsible corporate officer" ("RCO") doctrine not only imposes strict liability, but also incorporates some elements of vicarious liability by imputing the acts of employees to officers. See Paul H. Robinson, Imputed Criminal Liability, 93 Yale L.J. 609, 618 n.27, 633–34 (1984) (discussing the imputation of offense elements to officers as a specialized form of vicarious liability). Although it is unclear whether it allows courts to impose strict liability with respect to mens rea offenses, the RCO doctrine makes it easier for the prosecution to attain convictions. See Barbara DiTata, Proof of Knowledge Under RCRA and Use of the Responsible Corporate Officer Doctrine, 7 Fordham Envtl. L.J. 795, 808–09 (1996). See generally Joseph G. Block & Nancy A. Voisin, The Responsible Corporate Officer Doctrine—Can You Go to Jail for What You *Don't* Know?, 22 Envtl. L. 1347 (1992).

¹⁰¹ See, e.g., Jeremy D. Heep, Adapting the Responsible Corporate Officer Doctrine in Light of *United States v. MacDonald & Watson Waste Oil Co.*, 78 Minn. L. Rev. 699, 700 (1994) (noting that "the scope and breadth of the [responsible corporate officer] doctrine remains ambiguous").

¹⁰² See Amiad Kushner, Applying the Responsible Corporate Officer Doctrine Outside the Public Welfare Context, 93 J. Crim. L. & Criminology 681, 684–85 (2003).

¹⁰³ See Jane F. Barrett & Veronica M. Clarke, Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA After *United States v. Dee*, 59 Geo. Wash. L. Rev. 862, 883 (1991) (noting that knowledge is often easier to assign to low-level employees rather than senior executives); Kushner, *supra* note 102, at 686 ("A powerful

goes, is necessary to ensure compliance notwithstanding the difficulty of proof.

The conventional account, however, is incomplete. It assumes that executives know about misconduct committed by their subordinates even though prosecutors find it difficult to prove such knowledge given the complex hierarchical nature of many organizations. But corporate officers are often genuinely unaware of certain corporate activities. Limited time and attention span require senior executives to assign some monitoring responsibilities to their subordinates.¹⁰⁴ Moreover, the requirements for holding officers liable—knowledge and participation—discourage such executives from monitoring regulated activities for which criminal liability is more likely to arise.¹⁰⁵ Officers would personally supervise such activities only when the market produces sufficiently strong reasons for them to do so; they will decline to be involved in activities for which their ignorance is costless.

The RCO doctrine is a crude measure for rectifying the distortion produced by the traditional requirements for holding officers personally liable. The doctrine is therefore likely to apply when criminal law attempts to induce corporate officers to monitor activities characterized by relatively low ignorance costs.

This new understanding also explains why, despite the many attempts to expand its scope,¹⁰⁶ the RCO doctrine continues to apply

executive with vast control over corporate operations can easily create the impression that he did not know the details of illegal activity.”).

¹⁰⁴ For economic models studying the optimal allocation of authority within organizations, see generally Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 *J. Pol. Econ.* 1 (1997); Roy Radner, *Hierarchy: The Economics of Managing*, 30 *J. Econ. Lit.* 1382 (1992).

¹⁰⁵ See Lisa M. Fairfax, *Form Over Substance?: Officer Certification and the Promise of Enhanced Personal Accountability under the Sarbanes-Oxley Act*, 55 *Rutgers L. Rev.* 1, 54 (2002) (arguing that traditional standards of liability for securities fraud cannot lead to a successful prosecution of executives “who take a hands-off approach to their companies”).

¹⁰⁶ Several courts extended the doctrine to relatively severe environmental offenses. See *United States v. Brittain*, 931 F.2d 1413, 1419 (10th Cir. 1991) (holding that although the applicable statute requires willfulness or negligence, these elements would be imputed to responsible corporate officers by virtue of their position); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 670 (3d Cir. 1984) (holding that corporate officers’ knowledge can be inferred solely on the basis of their position). For an overview, see generally Cynthia H. Finn, *The Responsible Corporate Officer*, *Criminal*

only in a limited number of regulatory offenses.¹⁰⁷ This, I argue, reflects the following tension: on one hand, markets provide virtually no reason for senior executives to monitor compliance with many offenses. In other words, the traditional regime of officer liability discourages officers from taking responsibility for compliance with offenses having limited impact on the firm. On the other hand, such ignorance may be optimal—after all, it is far from clear that senior executives should personally supervise all corporate activities. In the absence of a theory concerning the optimal allocation of authority within firms, the uncertainty concerning the reach of the RCO doctrine will likely continue.

D. Mistake of Law

One of the well-established maxims of criminal law provides that ignorance of the law is not an excuse from criminal liability. The wide acceptance of this rule seems at odds with the fundamental principle underlying the nearly universal condemnation of strict criminal liability, namely, that criminal liability should not extend to the morally blameless.¹⁰⁸ After all, denying a mistake of law defense essentially amounts to adopting a strict liability standard with respect to legal facts. Moreover, the conventional justification for this rule explicitly focuses on the perverse incentives to acquire information that this defense would produce.¹⁰⁹ This common reason-

Liability, and Mens Rea: Limitations on the RCO Doctrine, 46 Am. U. L. Rev. 543 (1996).

¹⁰⁷ See Kushner, *supra* note 102, at 682–83.

¹⁰⁸ See Wasserstrom, *supra* note 28, at 735 (positing that the arguments against strict criminal liability should lead to the adoption of a mistake of law defense).

¹⁰⁹ See Holmes, *supra* note 7, at 48 (“[T]o admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey.”); Glanville Williams, *Criminal Law: The General Part* 289 (2d ed. 1961) (explaining that the rule that ignorance of the law is not a defense is aimed at “compelling people to learn the standard of conduct required of them”). But cf. Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 Mich. L. Rev. 127, 129–30 (1997) (stating that the rule attempts to discourage individuals from learning the law’s content for the sole purpose of exploiting loopholes).

The costly ignorance thesis may find it difficult to explain the recent tendency to recognize a mistake of law defense for regulatory offenses. See, e.g., *Liparota v. United States*, 471 U.S. 419, 433 (1985) (interpreting a statute to find that conviction for violation of food-stamp regulations requires knowledge of illegality of conduct). But see Davies, *supra* note 7, at 395 (suggesting that “the courts’ concerns about

ing, however, raises the following puzzle: if criminal law scholars acknowledged this advantage of strict liability concerning law, why did they fail to extend it to mistakes concerning facts?

The inconsistent treatment of mistakes of fact and law can be explained by incorporating the cost of ignorance into the analysis. As explained below,¹¹⁰ most traditional, common law offenses are ones for which actors have market incentives to acquire information. Hence, allowing a mistake of fact defense does not undermine the effectiveness of criminal law prohibitions with respect to such traditional offenses.

With respect to legal rules, however, offenders face different incentives: they have no apparent reason for acquiring information about the precise content of criminal prohibitions. Put differently, the cost of ignorance with respect to the criminal law is virtually zero. A regime under which an honest mistake of law exculpated a defendant from criminal liability would only exacerbate the disincentive to learn about criminal law rules, thereby allowing offenders to commit crimes without being liable.

IV. IMPLICATIONS

Focusing on ignorance costs not only clarifies the perplexing jurisprudence of strict criminal liability; it is also essential for reassessing the proper role of this standard in modern criminal law. This Part redirects attention toward the tradeoff that often underlies the choice between mens rea and strict liability. Providing law enforcement authorities with sufficient resources for proving defendants' knowledge in court would not rectify the failure that strict liability addresses. Rather, policymakers should devise less draconian doctrines to induce offenders to overcome their ignorance.

Section A posits that the current debate over strict criminal liability often fails to appreciate the functional benefits of this standard and is thus misguided. Section B tentatively evaluates several

'overcriminalization' and the federalization of crime" may best explain that tendency).

¹¹⁰ See *infra* note 114. For an attempt to explain the distinction between mistakes of law and fact, see Miriam Gur-Arye, *Reliance on a Lawyer's Mistaken Advice—Should it be an Excuse from Criminal Liability?*, 29 *Am. J. Crim. L.* 455, 463–65 (2002).

alternatives to strict liability, including the willful ignorance doctrine, criminal negligence, and direct regulation.

A. Reframing the Debate

The conventional account assumes that strict criminal liability sacrifices fundamental moral principles for administrative convenience. This depiction relies on the understanding that the main goal of strict criminal liability is to alleviate the difficulty of proving mens rea. But since this understanding is incomplete, the common depiction of the choice facing courts and lawmakers too often masks the real issues at stake, and thus impedes the development of satisfactory substitutes for strict criminal liability.

As discussed earlier,¹¹¹ the debate concerning the need for strict liability in certain offenses focuses on the difficulty of proof. Advocates of strict liability contend that it is necessary to make it more difficult for culpable offenders to skirt liability. Critics, however, rightfully point out that this reasoning applies to any crime, and that it is thus not clear why strict liability should govern certain offense elements and not others. This debate, however, is simply off point. In many cases, the problem with mens rea is not that it overtaxes law enforcement authorities by requiring the prosecution to prove guilt. Rather, mens rea might fail when would-be offenders have no market incentives to acquire information. Further investment in law enforcement therefore would not necessarily address this problem. Instead, policymakers should devise mechanisms that would prevent wrongdoing notwithstanding offender disincentives to acquire information.

This confusion echoes through criminal law. Consider the pervasive public welfare doctrine, which requires courts to discern whether the offense at stake qualifies as a public welfare offense to determine whether it is a strict liability offense.¹¹² What constitutes

¹¹¹ See *supra* text accompanying notes 81–82.

¹¹² See, e.g., *Morissette v. United States*, 342 U.S. 246, 248–63 (1952) (distinguishing common law offenses from public welfare offenses and reaffirming the common law mens rea requirements for common law offenses); *United States v. Balint*, 258 U.S. 250, 252, 254 (1922) (finding the crime of selling an opiate derivative to be a public welfare offense and thus subject to strict liability). Commentators deploy this doctrine to determine whether certain offenses should require strict liability. See, e.g., Carpen-

a “public welfare” offense is a source of substantial confusion. Relevant considerations include, among others, the magnitude of penalties, legislative intent, and whether the offense is derived from the common law.¹¹³ For our purposes, the important point is that the emphasis on the public welfare classification often lacks justification. The public welfare doctrine may be useful insofar as it is a correct application of the difficulty-of-proof rationale to offenses carrying light penalties.¹¹⁴ But in many other cases, this doctrine simply overlooks the real issue at stake, namely, whether offenders are likely to have sufficient market reasons to acquire information concerning offense elements.

B. Evaluating Alternatives

Strict liability outperforms mens rea when offenders have no market incentives to acquire information. This, however, does not necessarily imply that strict liability *should* apply under these circumstances. In this Section, I outline several doctrinal alternatives to strict criminal liability. The purpose of this review is twofold: first, to highlight some of the tacit doctrinal tools through which criminal law provides offenders with incentives to gather information; second, to provide a tentative evaluation of the central strengths and weaknesses of each alternative.¹¹⁵

ter, supra note 24, at 369 (arguing that strict liability should not apply to statutory rape since it is not a public welfare offense).

¹¹³ See Packer, supra note 21, at 130–31; Nemerson, supra note 21, at 1532–34.

¹¹⁴ The cost of ignorance can also explain the distinction between common law and regulatory crimes. The cost of ignorance with respect to typical common-law crimes—such as burglary, assault, and blackmail—is likely to be relatively high. See, e.g., Peter W. Low, *The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability*, 19 Rutgers L.J. 539, 553–54 (1988). Hence, the common law had little need for problematic alternatives, such as strict liability. As criminal law began to expand, it reached activities for which ignorance might be costless. Regulatory offenses—such as those governing food quality, pollution, workers’ safety, and traffic violations—often involve circumstances of which actors have no market reasons to be aware. Effectively controlling these behaviors required criminal law to develop mechanisms to induce actors to obtain information.

¹¹⁵ One could argue that providing incentives to obtain information lies beyond the appropriate domain of criminal law. This Essay takes no position concerning the normative boundaries of the criminal category. It merely shows that when offenders find ignorance to be costless, mens rea will inevitably fail as a means of social control.

1. Willful Ignorance

The first doctrine that comes to mind is willful ignorance. Under this doctrine, the knowledge requirement can be fulfilled by proof of a mere suspicion of the existence of the requisite circumstances. Interestingly, the conventional justification for this doctrine is the need to penalize offenders who deliberately try to avoid knowledge that would lead to their conviction.¹¹⁶ Notwithstanding its underlying rhetoric, however, this doctrine, at least in its present form, falls short of providing a satisfactory solution to the fundamental flaw of *mens rea*.¹¹⁷

The willful ignorance doctrine includes controversial requirements that do not induce offenders to overcome their ignorance.¹¹⁸ First, courts often require the prosecution to prove that defendants not only had some degree of subjective suspicion, but also that they were aware of a *high probability* that the requisite offense element existed.¹¹⁹ The high-probability requirement makes this doctrine ineffective in dealing with actors who strategically distance themselves from information and thus have no awareness of a high probability with respect to specific instances of wrongdoing.¹²⁰ Second, most formulations of the doctrine require that the defendant's avoidance of knowledge was motivated by a desire to prevent the

¹¹⁶ See Posner, *supra* note 9, at 236 (stating that willful ignorance imposes a duty to investigate when information costs are low); Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 *J. Crim. L. & Criminology* 191, 199–200 (1990) (tracing the adoption of the doctrine in the United States to the need to cope with drug traffickers' tactic of deliberate ignorance).

¹¹⁷ For a thorough analysis of the failure of the willful ignorance doctrine, see Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 *S. Cal. L. Rev.* 953, 977–95 (1998).

¹¹⁸ See *id.* at 981 (noting that “the wilful blindness doctrine is beset by controversy at almost every level”).

¹¹⁹ See *United States v. Valle-Valdez*, 554 F.2d 911, 914 (9th Cir. 1977) (“[D]eliberate avoidance of knowledge is culpable only when coupled with a subjective awareness of high probability.”); *United States v. Jewell*, 532 F.2d 697, 700–01 (9th Cir. 1976) (requiring awareness of a high probability of the existence of a particular fact).

¹²⁰ See Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 *Tex. L. Rev.* 1351, 1389 (1992) (providing an example of deliberate ignorance that does not meet the requirement for high-probability awareness); see also Michaels, *supra* note 117, at 982–85 (criticizing the high probability requirement on the grounds that it does not adequately define the culpability equivalent of knowledge).

legal consequences of such knowledge.¹²¹ In other words, the prosecution must present evidence showing that the defendant's ignorance has been deliberate.

The upshot is that, in its present form, willful ignorance can lead to conviction only in a small subset of cases, especially those in which all circumstances indicate the criminal nature of the activity, but the defendant still argues he was not aware of the relevant facts.¹²² Due to its narrow scope, the willful ignorance doctrine provides actors with limited incentives to overcome their ignorance.¹²³

2. Negligence

The nature of criminal negligence, including the extent to which it differs from civil negligence, is controversial.¹²⁴ For the purposes

¹²¹ See, e.g., *United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992) (“A deliberate ignorance instruction . . . is appropriate only when the defendant purposely contrives to avoid learning all the facts, as when a drug courier avoids looking in a secret compartment . . . because he knows full well that he is likely to find drugs there.”); *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990) (stating that the defendant can be convicted only when he “purposely contrived to avoid learning of the illegal conduct”); *State v. Haas*, 675 P.2d 673, 680 (Ariz. 1983) (requiring that the defendant be aware of a high probability of an incriminating fact and “deliberately shut his eyes to avoid learning the truth”); see also *Williams*, supra note 109, at 159 (“[W]ilful blindness . . . requires in effect a finding that the defendant intended to cheat the administration of justice.”).

¹²² See *Charlow*, supra note 120, at 1360 (arguing that a case containing evidence of willful ignorance will usually also contain circumstantial evidence that a reasonable person would have known, allowing a jury to infer that the defendant actually knew).

¹²³ This Section's list of doctrinal alternatives is not conclusive. The recklessness standard, for example, might also induce individuals to obtain information. See *Robbins*, supra note 116, at 233 (arguing that a “recklessness standard would reach most defendants who deliberately remain ignorant”); see also *Michaels*, supra note 117, at 960–62 (devising a new level of culpability, “acceptance,” to fill an alleged gap between knowledge and recklessness).

¹²⁴ See generally *George P. Fletcher, The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. Pa. L. Rev. 401 (1971); *Kenneth W. Simons, Dimensions of Negligence in Criminal and Tort Law*, 3 *Theoretical Inquiries L.* 283 (2002). Attempts to distinguish criminal negligence from civil negligence focus on: (i) whether criminal negligence requires a higher degree of fault than civil negligence, see, e.g., *Wayne R. LaFave & Austin W. Scott, Criminal Law* 235–37 (2d ed. 1986); and (ii) whether criminal negligence should rely more heavily on individualized standards, see, e.g., *H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law* 152–54 (1968). For an economic analysis of the negligence standard with respect to tort liability, see *William M. Landes & Richard A. Posner, The Economic Structure of Tort Law* 65–66 (1987); *Steven Shavell, Strict Liability versus Negligence*, 9 *J. Legal Stud.* 1 (1980).

of this Essay, I assume that criminal negligence functions much like civil negligence; that is, only actors who exercise adequate effort to acquire information are not held liable.¹²⁵

The chief advantage of negligence over strict liability is that it can provide offenders with adequate incentives to acquire information without the sanction costs associated with strict liability, as those who did exercise the socially desirable level of effort would not be liable even when they made a mistake. Since actors who comply with the requirement to engage in verification are not liable, negligence is also less problematic than strict liability from a fairness perspective.

It is thus intriguing why criminal law does not rely more heavily on negligence as a substitute for strict liability. While resolving this puzzle is beyond the scope of this Essay, I would like to offer several tentative explanations. First, the extent to which negligence is a morally acceptable standard of criminal liability is highly controversial.¹²⁶ Second, negligence has costs of its own. It requires courts to set standards of care for defendants to follow and verify whether defendants have indeed complied with such standards.¹²⁷ For example, in statutory rape cases, courts would have to determine whether merely asking a woman for her age qualified as a sufficient level of verification, or whether defendants should consult parents, official documents, and other sources of information. Under strict liability, in contrast, all the prosecution has to prove is that the defendant committed the unlawful behavior.¹²⁸

But lawmakers could tackle the difficulty of proving negligence by shifting the burden of proof to defendants. Under this so-called *non-negligence defense* doctrine,¹²⁹ the prosecution would have to

¹²⁵ See also Simons, *supra* note 124, at 289 (explaining that under the Model Penal Code “a negligent actor is one who *should* be aware of an unjustifiable risk”).

¹²⁶ See, e.g., Husak, *supra* note 15, at 204 (noting that in many cases liability for negligence is essentially equivalent to strict liability); Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 *J. Contemp. Legal Issues* 365, 386 (1994).

¹²⁷ Another advantage of strict liability over negligence is its regulation of the level of activity. See *supra* Section I.B.

¹²⁸ See Levenson, *supra* note 32, at 421 (“Juries may be ill-suited to decide what is reasonable in complex high risk activities.”).

¹²⁹ See *id.* at 405 (arguing for the adoption of a “good faith defense” in strict liability offenses involving imprisonment). See also *United States v. U.S. Dist. Court, Cent. Dist. of Cal.*, 858 F.2d 534, 540–41 (9th Cir. 1988) (holding that the First Amendment

prove neither mens rea nor negligence. Defendants, however, would have the burden of introducing evidence showing they were not negligent.

Incorporating elements of both strict liability and negligence, this rule reduces the likelihood of errors in favor of defendants relative to simple negligence. It also reduces the social cost of sanctions because some non-negligent actors may be acquitted.¹³⁰ To emphasize, the good-faith defense reduces, but does not eliminate, the informational problem and the social cost of sanctions; negligent defendants may still avoid liability and non-negligent defendants may still be convicted.¹³¹ Yet, it shifts the burden of proof to the party that likely has information superior to that held by the prosecution.¹³²

3. *Direct Regulation*

Yet another alternative is creating a new offense (or non-criminal regulation) that would explicitly require actors to acquire information. This new offense would supplement (rather than displace) the existing mens rea offense: uninformed actors would be liable if they failed to meet the requirements to acquire informa-

requires a reasonable mistake of age defense to a charge of child pornography production); *Regina v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 1300-01 (Can.) (holding that when an offense does not require full mens rea, it is a good defense for the defendant to prove he was not negligent).

¹³⁰ Also, when most defendants are likely to be negligent, shifting the burden of proof saves litigation costs relative to simple negligence, as only some of the defendants will find it worthwhile to bear the cost of producing evidence. See Bruce L. Hay, *Allocating the Burden of Proof*, 72 *Ind. L.J.* 651, 675-77 (1997) (arguing that the probability that a party is correct supports a shift in the burden of proof in her favor).

¹³¹ One way to reduce administrative cost and the risk of error is to narrow the scope of the defense. See, e.g., Levenson, *supra* note 32, at 405 (arguing that, in order to avoid turning trials into disputes over intent, defendants should have to prove *beyond a reasonable doubt* that they were not negligent). Another way is to require defendants to prove that the harm would exist even if they were to exercise extraordinary care. See *United States v. New England Grocers Supply Co.*, 488 F. Supp. 230, 235 (D. Mass. 1980) (holding that the defendant has to introduce evidence of her exercise of extraordinary care). Most defendants, however, have failed to meet the extraordinary care requirement. See *United States v. Starr*, 535 F.2d 512, 515-16 (9th Cir. 1976); *United States v. Y. Hata & Co.*, 535 F.2d 508, 511-12 (9th Cir. 1976).

¹³² Shifting the burden of proof in this context need not raise constitutional concerns. See Levenson, *supra* note 32, at 456-61.

tion; informed actors would be liable under the traditional mens rea standard.

This regulation strategy is becoming increasingly popular. Indeed, many existing offenses and regulations are best viewed as tacit attempts to directly regulate offenders' level of effort to gather information. Consider the sale of cigarettes to minors. Instead of merely imposing strict liability or negligence, lawmakers can accompany a mens-rea-based prohibition on the sale of cigarettes to underage persons with a requirement that sellers ask for age-identification documents prior to each sale.¹³³

A more recent example is the requirement that corporate officers certify financial statements. Section 302 of the Sarbanes-Oxley Act requires the CEO and CFO of public companies to certify that the company's periodic reports do not contain material misstatements or omissions and "fairly present" the firm's financial condition and the results of operations.¹³⁴ This certification requirement is designed to overcome the lack of market incentives for senior officers to personally monitor the company's disclosure.

The regulation strategy can also address efforts to strategically insulate would-be offenders from the relevant activity. For example, the government can flatly prohibit the sale of cigarettes online or through vending machines in order to prevent vendors from selling cigarettes to minors while being ignorant of their age.

However, this strategy is not fool-proof—it requires lawmakers to identify in advance what measures are proper for actors to adopt in order to acquire information and adapt such measures to technological changes.¹³⁵ Finally, the regulation alternative loses its effectiveness when actors can find strategies to comply with the new requirements, yet commit misconduct while being genuinely ignorant. This strategy, however, produces more certainty and is less of-

¹³³ See, e.g., Section VIII of Tobacco Control Regulations, City of Lexington, <http://ci.lexington.ma.us/OCD/Health/Documents/tobaccoregs.htm> (last visited August 29, 2005) ("Each retailer shall verify by means of photographic identification containing bearer's date of birth that no person purchasing the product is younger than 18 years of age.").

¹³⁴ 15 U.S.C. § 7241 (Supp. III 2005).

¹³⁵ See generally Steven Shavell, *Liability for Harm versus Regulation of Safety*, 13 *J. Legal Stud.* 357 (1984) (discussing *ex ante* regulation versus *ex post* liability for harm).

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fensive to our moral intuitions than either strict liability or negligence.

CONCLUSION

Criminal law scholarship has thus far failed to explain why the controversial doctrine of strict liability governs only certain elements of selected offenses. This Essay offers a novel theory that explains the persistent appeal of strict liability in criminal law by focusing on the market value of information. This theory clarifies much of the confusing jurisprudence of strict liability and illuminates pieces of criminal law doctrine—such as statutory rape and child pornography—that have thus far resisted satisfactory explanations.

This new understanding of strict liability not only introduces a much-needed degree of coherence into this perplexing body of doctrine, but it also offers valuable insights concerning the proper role of strict liability in criminal law. This Essay neither challenges the normative foundations of mens rea nor advocates a greater reliance on strict criminal liability. Rather, it focuses on a proper assessment of the functional benefit of strict liability as an important step in redirecting attention toward the real tradeoffs facing policymakers. This Essay thus argues that the challenge facing criminal law lies not in providing law enforcement with the resources for proving defendants' knowledge. Rather, policymakers should aspire to devise doctrinal tools that would overcome the drawback of mens rea without undermining the moral foundations of criminal law.