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Culpability Evaluations in the State Supreme Courts from 1977 to 1999: A "Model" Assessment

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CULPABILITY EVALUATIONS IN THE STATE SUPREME COURTS FROM 1977 TO 1999: A "MODEL" ASSESSMENT

by

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I. INTRODUCTION

A. Overview

The purpose of this article is to assess the performance of state supreme courts over the last 23 years (1977 to 1999) with regard to culpability evaluations. Part One of this article defines "culpability evaluation," summarizes state legislatures' culpability evaluation performances, and, in light of that definition and summary, establishes the criteria for and organization of the assessment.[1] Part Two of the article begins by explaining how cases were identified and qualified for inclusion in the study, and performs the assessment -- evaluating 174 decisions from state supreme courts in 46 jurisdictions.[2] Part Three of the article provides perspectives based on the assessment by identifying significant findings and implications for substantive criminal law and related fields.[3]

B. Defining "Culpability Evaluation" and Summarizing State Legislatures' Culpability Evaluation Performances

Ideally, every state legislature, in enacting a new crime or in re-enacting or modifying an existing crime, would first identify the "objective elements" of the crime, and then carefully assess and assign a culpable mental state that it deems appropriate to each "objective" element.[4] This deliberative policy identification, assessment, and prioritization process is what this article characterizes as a culpability evaluation.[5] If the text of the crime as enacted clearly reflected the culpability evaluation decision(s) of the legislature, reasonably competent law students, practicing lawyers, trial and intermediate appellate judges, and the subject of this study, state supreme courts, would never have to make an independent culpability evaluation.[6] These legally trained persons and entities would simply identify the appropriate

culpable mental state assigned to each objective element and apply that concept to the accused's state of mind at the time of the occurrence of the facts constituting each such objective element of the crime(s) charged.[7]

Unfortunately, the available evidence suggests that state legislatures, historically and in enacting today's complex penal codes, replete with hundreds and perhaps even thousands of crimes (as well as hundreds of additional crimes enacted in other statutes), almost never completely perform a culpability evaluation for each of the objective elements of any new, reenacted, or modified crime.[8] A state legislature may not systematically undertake culpability evaluations because it never adopted a set of specifically defined and hierarchically related culpability concepts.[9] A majority of the state codes suffer from this deficiency.[10]

In lieu of complete culpability evaluations for each crime, a state legislature could attempt to enact -- or could delegate to an administrative agency the authority to enact -- comprehensive culpability evaluation guidelines.[11] Existing evidence supports the conclusion that no state legislature has adopted such a scheme.[12] Instead, various states have enacted a hodgepodge of culpability identification gap-filling guidelines, most of which mimic Model Penal Code provisions.[13]

A minority of states have enacted a statutory guideline, the operation of which is triggered in fact by the legislature's failure to undertake or complete a culpability evaluation for each objective element of each new crime. This approach nevertheless directs lawyers to assume that, for every objective element, the legislature partially evaluated culpability and that it determined that some unspecified level of culpability was appropriate, unless it expressly indicated no culpability is required for at least one objective element of the crime.[14] A smaller minority of states have enacted another guideline that requires the criminal law bar and judges to pretend (assume) that when the legislature fails to include a culpability concept in the definition of a crime, the legislature had, nevertheless, performed a culpability evaluation and concluded that a single culpability concept was the appropriate culpable mental state for every objective element of

that crime.[15] Yet another minority of states have enacted a guideline that requires the criminal law bar and judges to pretend (assume) that when the legislature includes a single culpability concept in a crime, most frequently at the beginning of the set of objective elements, it had, in fact, determined that this was the appropriate culpable mental state for every objective element of that crime.[16] Finally, a majority of state legislatures have adopted penal code "defense" provisions, most notably certain so-called "mistake-of-fact" provisions, the very existence and "defense" characterization of which are misleading. A legislature which enacts such a provision is, by implication, directing the criminal law bar and judges to ignore the rarely completed culpability evaluation, and instead pretend (assume) that the legislature really decided that a lesser level of culpability was appropriate.[17]

Hence most of the states' legislatures have failed to perform or complete culpability evaluations for most objective elements of crimes, and the substitute guidelines that are law in a minority of states are, in fact, admissions that no such evaluations were specifically made. Therefore, the task of making culpability evaluations ultimately, but haphazardly, falls to the states' supreme courts.[18]

A key premise of this article is that a fair assessment of the performance of state supreme court judges with regard to culpability evaluations must begin by differentiating among the states based upon the relative quality of statutory guidance available to each court on this crucial substantive criminal law issue. In light of the above discussion defining culpability evaluation and legislative action with regard thereto, this article categorizes states based on relative improvement in their statutory culpability evaluation scheme: first are those states with a set of hierarchical culpability concepts, which are specifically defined in relation to types of objective elements, provided that the legislature did not negate that improvement by enacting a conflicting "mistake-of-fact" provision. Second are those states with a mistake-of-fact statute that expressly subordinates that doctrine to culpability analysis.[19] In an earlier article, the author found that half the states' legislatures arguably satisfied one of these two standards.[20]

C. The Assessment Model

In light of the discussion in the preceding sub-section, state supreme courts' culpability evaluations will be assessed based on the following criteria. A state supreme court's culpability evaluation decision should focus first on identifying the objective elements of the crime and possibly categorizing them by type.[21] A state supreme court's culpability evaluation decision should focus next on the definitions and hierarchical relationship of the culpable mental state options that exist in the jurisdiction.[22] The third step in a state supreme court's culpability evaluation should be to determine if the legislature made a culpability evaluation, i.e. whether the legislature had expressly decided what culpable mental state level (as identified in step two), if any, was the appropriate culpable mental state for the crime as a whole, or for each objective element, or, more specifically, for the objective element the culpability of which is in dispute in the case.[23]

Next, a state supreme court's culpability evaluation could take two alternative paths, depending on the outcome of the first part of step three. First, if the court concludes that there is adequate evidence that the legislature expressly decided upon an appropriate culpable mental state for the objective element(s) under scrutiny, then the court should move all the way to the last step (step four in this case), and evaluate the appellate record to determine if there was evidence based on which a reasonable trier of fact could conclude that the prosecution proved beyond a reasonable doubt that the defendant had that culpable mental state with regard to the objective element(s) under scrutiny.[24] If, however, at the end of the first sub-step of step three, the state supreme court concludes the legislature did not expressly decide an appropriate culpable mental state for the objective element(s) in question, the court should use express penal code guidelines and general rules of statutory construction to determine the appropriate culpable mental state for those objective element(s).[25]

If the court is able to satisfy itself through study of these guidelines and rules of construction that the legislature, at least by implication, identified an appropriate mental state for the objective element(s)

under scrutiny, then the court should move to the final step (step four here), and evaluate the appellate record to determine if there was evidence sufficient to justify a reasonable trier of fact's concluding that the prosecution proved beyond a reasonable doubt that the defendant had that culpable mental state with regard to the objective element(s) under scrutiny.[26] If the legislative sources fail to yield a basis for concluding that the legislature has decided an appropriate culpable mental state, the state supreme court should, in step four, expressly employ principle, precedent, and policy analysis to determine the appropriate culpable mental state.[27] Upon completion of this analysis and the selection of the appropriate culpability level, a state supreme court should then proceed in step five to examine the appellate record to determine if it includes evidence based on which a reasonable trier of fact could conclude that the prosecution proved beyond a reasonable doubt that the defendant had this appropriate culpable mental state.[28] Finally, a state supreme court decision should demonstrate that the court understood that culpability evaluations can be distorted and confused when independent reliance is placed upon the "mistake-of-fact" doctrine.[29] Hence the presence of six, and in most other instances five, interrelated -- and for the most part sequential -- factors are used in this article to evaluate each qualifying state supreme court decision.[30] In the next section of the article, each of the 174 state supreme court decisions was evaluated based on an application of this assessment model.

II. ASSESSMENT OF THE CULPABILITY EVALUATIONS OF THE STATE SUPREME COURTS: 1977 TO 1999

A. Qualifying Cases for Inclusion in this Study

This sub-section of the article first identifies the criteria used to qualify cases for inclusion within this study. To qualify for inclusion within this study, a state supreme court case had to involve a culpability evaluation that mattered -- the accused in the case must have claimed expressly, or by implication, that if the culpable mental state was of a particular level, he was innocent.[31] In addition, to qualify as a decision

within the study, the state supreme court decision had to have been made between 1977 and 1999.[32]

A variety of searches were conducted in each state to identify its supreme court's culpability evaluation decisions.[33] The next sub-section of this part assesses the culpability evaluation decisions of the state supreme courts with arguably a statutory advancement in their culpability provisions that could facilitate identification of the appropriate culpable mental state.[34] These jurisdictions are characterized in this study as category 1 decisions.

This will be followed by a sub-section that evaluates the state supreme court decisions from the 25 states that arguably made no such statutory advancement.[35] These jurisdictions are characterized in this study as category 2 decisions. A third sub-section will then compare and contrast the findings from these two sets of jurisdictions.[36]

B. Assessment of the Culpability Evaluations of Category 1 (Improved Statutory Culpability Schemes) State Supreme Courts: 1977 to 1999

The total number of category 1 decisions examined in this sub-section is 87, from 23 of the 25 jurisdictions, and the average point score for category 1 decisions was 2.14 points (maximum possible point score per case was five or six given the assessment model).[37] Seven decisions, constituting approximately eight percent of category 1 cases, received a point score between 4 and 6 points.[38] Forty-four decisions, constituting approximately 51 percent of category 1 cases, received a point-per-case score between 2 and 3.5 points.[39] Thirty-six decisions, constituting approximately 41 percent of category 1 cases received a point-per-case score between 0 and 1.5 points.[40]

Seventeen percent of the category 1 jurisdictions' decisions made express reference to, and recognized the significance of, identifying the objective element(s) of the crime as a prelude to ascertaining the culpable mental state for each of those elements, or at least those objective elements the culpability of which was debated by the prosecution and defense.[41] Thirty-four percent of the category 1 jurisdictions'

decisions made express reference to culpability concept(s) definition(s), and some also made reference to the concepts' hierarchical interrelationship.[42] Seventy percent of the category 1 jurisdictions' decisions expressly examined statutory culpability ascertaining guidelines, legislative history, and other legislative sources from that jurisdiction to determine what, if any, culpability level the legislature intended to assign to an objective element(s) of the crime.[43] Fifty-four percent of the category 1 jurisdictions' decisions made a precedent-principal-policy analysis to identify the appropriate culpable mental state.[44] Thirty-two percent of the category 1 jurisdictions' decisions, once the state supreme court determined the appropriate culpable mental state, made an express evaluation of whether the record provided evidence sufficient to convince a reasonable trier of fact of guilt beyond a reasonable doubt.[45]

Finally, five percent of the category 1 jurisdictions' decisions expressly, or by implication, recognized that the mistake-of-fact doctrine is not a viable independent defense doctrine.[46] There was implicit recognition of the lack of utility of the doctrine when state supreme courts asserted that an instruction on mistake-of-fact related to culpability was superfluous.[47] However, even some of these state supreme courts with improved statutory culpability provisions took the erroneous contra position, insisting that a mistake-of-fact instruction was required even when the trial judge had properly instructed the jury on the appropriate or requisite culpability for the objective element of the crime the culpability of which was in dispute.[48]

C. Assessment of the Culpability Evaluations of Category 2 (Unimproved Statutory Culpability Schemes) State Supreme Courts: 1977 to 1999

The total number of category 2 decisions evaluated in this sub-section was 87 from 23 of the 25 jurisdictions, and the average point score for category 2 decisions was 1.67 of a possible average point score of 5 or 6.[49] Four decisions, constituting five percent of category 2 cases, received a point-per-case score between 4 and 6 points.[50] Thirty-two decisions, constituting 36 percent of the category 2 cases,

received a point-per-case score between 2 and 3.5 points.[51] Fifty-one decisions, constituting 59 percent of category 2 cases, received a point-per-case score between 0 and 1.5 points.[52]

Nineteen percent of category 2 jurisdictions' decisions made express reference to the objective element(s) of the crime for which the defense and prosecution were arguing about the attendant culpability and/or whether the accused had that culpability at the time of the crime.[53] Forty-seven percent of category 2 jurisdictions' decisions made express reference to culpability definitions, and some of these decisions made reference to their hierarchical interrelationship, where the statutes or the common law of the states created such a hierarchical relationship.[54] Forty-five percent of category 2 jurisdictions' decisions expressly examined statutory culpability ascertaining guidelines, legislative history, and other legislative sources from that jurisdiction to determine what, if any, culpability level the legislature intended to assign to the objective elements of the crime.[55] Fifty-eight percent of category 2 jurisdictions' decisions made an express precedent-principle-policy analysis to identify the appropriate culpable mental state.[56] Thirty-four percent of category 2 jurisdictions' decisions made an express evaluation of whether the trial record provided evidence sufficient to convince a reasonable trier of fact beyond a reasonable doubt that the accused possessed the culpable mental state identified by the court as appropriate for the crime or the element of the crime focused upon in the litigation.[57]

Finally, only three percent of category 2 jurisdictions' decisions expressly, or by implication, recognized that the mistake-of-fact doctrine was not a viable independent doctrine.[58] Implicit recognition included a state supreme court's acknowledgement that an instruction on mistake of fact related to culpability is superfluous.[59]

D. Comparing and Contrasting Culpability Evaluation Performance of Category 1 State Supreme Courts with the Performance of Category 2 State Supreme Courts

The total number of category 1 decisions was 87 from 23 of the 25 jurisdictions, and the average point score for category 1 decisions was 2.14 of a possible maximum average point score of 5 to 6 points. In contrast, the total number of category 2 decisions was 87 from 23 of the 25 jurisdictions, and the average point score for category 2 decisions was 1.66.[60] Hence, category 1 state supreme courts, as expected, performed somewhat better culpability evaluations than did the supreme courts of the category 2 states.

Nineteen percent of category 1 jurisdictions' decisions made express reference to and recognized the significance of identifying the objective element(s) of the crime as a prelude to ascertaining the culpable mental state for each of those elements -- or at least those objective elements for which the culpability was debated by the prosecution and the defense. Similarly, 19 percent of category 2 jurisdictions' decisions also made such express reference.[61] Thirty-two percent of category 1 jurisdictions' decisions made express reference to culpability concept(s) definition(s), and some also made reference to the concepts' hierarchical interrelationship, while 47 percent of category 2 jurisdictions' decisions made such express reference.[62] Sixty-seven percent of category 1 jurisdictions' decisions expressly examined statutory culpability ascertaining guidelines, legislative history, and other legislative sources from that jurisdiction to determine what, if any, culpability level the legislature intended to assign to the objective elements of the crime, while 45 percent of category 2 jurisdictions' decisions made such express reference.[63]

Fifty-one percent of category 1 jurisdictions' decisions made an express precedent-principle-policy analysis to identify the appropriate culpable mental state, while 58 percent of category 2 jurisdictions' decisions made such an express analysis.[64] Thirty-two percent of category 1 jurisdictions' decisions, once the state supreme court determined the appropriate or requisite culpable mental state, made an express evaluation of whether the record provided evidence sufficient to convince a reasonable trier of fact of guilt beyond a reasonable doubt, while 34 percent of category 2 jurisdictions' decisions also made such an

express sufficiency-of-the-evidence evaluation.[65] Finally, five percent of category 1 jurisdictions' decisions expressly or by implication recognized that the mistake-of-fact doctrine is not a viable independent defense doctrine, while three percent of category 2 jurisdictions' decisions expressly or by implication recognized this key conceptual culpability evaluation point.[66] Hence, the somewhat better culpability evaluation performance of category 1 states seems principally attributable to their more frequent focus on legislative guidelines, and on the depth of their analysis of culpability evaluations, because approximately the same percentage of the two sets of jurisdictions seemed to have at least touched upon four of the six points in the culpability evaluation assessment model.[67]

III. Findings and Implications Based Upon the Results of the Assessment of Culpability Evaluations of the State Supreme Courts from 1977 to 1999

A. Findings

Overwhelmingly, during the period of 1977 to 1999, state supreme courts failed to perform step one of a quality culpability evaluation -- the identification of the objective elements of the crime; categorizing those elements as conduct, circumstance, or result elements; and identifying the specific objective element for which lawyers in the case were contesting the appropriate culpable mental state.[68] This failure was outcome-determinative in several decisions.[69] Many of these outcomes were very disturbing because state supreme courts were, in effect, holding that at least one objective element, significant to justifying felony criminalization, was a strict-liability element.[70]

The failure to focus first on the identification of objective elements also resulted in significant conceptual problems, even if they were not outcome-determinative. For example, state supreme courts concluded that their legislatures intended to impose strict liability, without evaluating whether that intent included all objective elements of the crime, or only a single objective element of the crime.[71] Second, state supreme courts, even with revised culpability statutes, referred to a culpable mental state as if it were only one additional element of a crime, instead of multiple elements, the exact number dependent

upon how many objective elements to which a culpability level must be assigned.[72] The Texas Court of Criminal Appeals, however, went too far in the other direction. In several cases, that court ruled in several cases that not only must the appropriate culpability be assigned to the most significant objective element(s) warranting criminalization, but that there were crimes for which the culpability assignment should be limited in the jury instruction to only that objective element.[73]

In states that continued to use common-law culpability concepts, it was no more likely that objective elements would be clearly identified and categorized prior to culpability analysis.[74] Controversy over the appropriate culpable mental state most frequently occurs in state supreme court decisions with regard to circumstantial elements of the crime.[75]

Only about four of every ten state supreme court culpability evaluation decisions in this study made express reference to culpability concept(s) definition(s), and even fewer made reference to the concepts' hierarchical interrelationship.[76] Ironically, a smaller percentage of states with culpability concept definition advancements made reference to these concepts than did states without such modernization.[77] Hence, in category 1 states, statutory advancement in the definition of culpability definitions was no guarantee that the parties or the state supreme court would use them.[78] This failure to make such reference was outcome-determinative in certain category 1 decisions. One state supreme court, for example, made no reference to its penal code's four levels of culpability, including criminal negligence, and ruled that no level of culpability had to be proven with regard to an objective element of a crime, which was crucial to justifying criminalization.[79] Another state supreme court held that, at most, negligence was the appropriate culpable mental state that the state must prove for the lack of consent of the victim in a rape prosecution, despite the facts that this objective element was crucial to justifying felony criminalization, and that the crime's definition contained a subjective culpability requirement.[80] This state's highest appellate court erroneously relied on its view of the facts of the case in relation to culpability standards to conclude there was no basis for the accused to believe that the victim had consented to his

sexual contact, and therefore the consent element must be held to be objective only, and not dependent on the defendant's state of mind.[81]

Category 1 state supreme courts' references to statutory culpability improvements did not guarantee that these courts would correctly apply such provisions. For example, state supreme courts, after referring to a specific culpability concept and its specific statutory definition, failed to correctly apply it to the objective elements of the crime and the facts in the appellate record.[82] One state supreme court, where the state legislature had adopted Model Penal Code culpability definitions and hierarchical interrelationship, made inherently contradictory statements about the appropriate culpable mental state.[83] Another state supreme court, which had several culpability level options, nevertheless, viewed its culpability evaluation task as all or nothing, i.e., either its state legislature intended the prosecution to prove knowledge with regard to a specific objective element of the crime, or the legislature intended that this element be a strict-liability element.[84]

On occasion, state supreme courts did expressly recognize that the revised codes' new culpability concepts eliminated the use of such traditional common-law culpability concepts as general intent and specific intent.[85] Certain supreme courts, however, when they omitted reference to some significant aspect of statutory culpability advancement, compounded the flawed reasoning by expressly making reference to, and using, common-law culpability definitions, or other concepts abandoned by the legislature of that jurisdiction.[86] Even more egregiously, state supreme courts, after making express reference to modern culpability concepts, proceeded to decide the case by resorting to common-law culpability concepts.[87] It should be noted, however, that in some of these states, the state legislatures retained or reintroduced the confusing common-law culpability concepts in the penal code.[88] Retention of common-law culpability concepts by the legislature also created the risk of significant conceptual confusion by a state supreme court with regard to the relationship between such a concept and the hierarchical culpability concepts.[89]

A state supreme court that recognized that some level of culpability was warranted for a crime failed to identify what level of culpability was appropriate.[90] Even more significant to this study is the finding that state supreme courts in states where the legislature had adopted Model Penal Code culpability definitions and its hierarchical interrelationship failed to explain, even if it selected one of the culpability levels, why that level was the appropriate culpable mental state.[91] One state supreme court demonstrated the danger in failing to articulate a reason for choosing a culpability level by subsequently choosing, as the appropriate culpable mental state, another level of culpability for the same objective element of the same crime without recognizing the conflict.[92]

In states in which the legislatures failed to enact a hierarchy of specifically defined culpability concepts (principally category 2 states), common-law culpability confusion continued in state supreme court decisions.[93] In some cases, that continuing confusion was outcome-determinative.[94] In other states, where culpability evaluations continued to include reference to common-law culpability concepts, state supreme courts attempted to define and refine those concepts, asserted that there was no inherent difference between the concepts, assumed that such concepts were self-defining, or gave them conflicting definitions.[95] For example, when a state legislature failed to enact multiple levels of culpability, a state supreme court viewed its task as "all or nothing," i.e., either the state legislature intended the prosecution to prove knowledge with regard to the crime or a specific objective element, or the legislature intended this to be a strict-liability crime or element.[96] Other such state supreme courts borrowed more specific definitions by referring to Model Penal Code culpability concepts.[97] Sometimes such a state supreme court would attempt to equate common-law culpability concepts to Model Penal Code culpability concepts.[98] This attempt to equate culpability schemes and concepts which, in truth, have no comparability, was done without reference to legislative guidelines or policy factors.[99]

This study's findings with regard to state supreme courts' interpretations of culpability definitions and their infrequent reference to the hierarchical relationship among these concepts suggest the following

general legislative drafting guidelines. First, state legislatures should avoid the inclusion of multiple and ill-defined culpability concepts in the definition of a single crime and should avoid defining such concepts in more than one way.[100] Second, state legislatures should generally avoid the inclusion of multiple -- even well-defined and hierarchically related -- culpability concepts in a single crime, unless they have expressly decided that different culpability concepts were appropriate for different objective elements of that crime.[101]

Many of the express and implied rules of statutory construction currently employed by state supreme courts to identify the appropriate culpable mental state should be abandoned.[102] Most pervasively, omissions by state legislatures of culpable mental states must be acknowledged in most instances as just that -- a failure to conduct a culpability evaluation for the crime or for one or more objective elements of the crime. State supreme courts reached conflicting conclusions as to what such an omission signaled with regard to the appropriate culpable mental state, if any, for the crime and/or for a given element of a crime under culpability evaluation scrutiny.[103] These conflicting decisions are evidence that omission of a culpable mental state should create no presumption that knowledge, recklessness, or negligence is the appropriate culpable mental state. It is also not warranted, in most instances, to construe legislative omission of a culpable mental state as a legislative policy decision that strict liability was appropriate, particularly for an objective element crucial to criminalization or to a significant grading increase.[104] It is not even warranted to infer a legislative decision to impose strict liability solely because a culpability concept is omitted from a misdemeanor -- at least one that carries a potential term of imprisonment.[105]

Also of little merit is the rule of construction that the culpability level, which was not identified for at least one element of a given crime, should be the same as the level previously assigned by the legislature to either antecedent versions of the same crime, or to other definitions of the same crime.[106] This rule has little merit, unless the objective elements of the antecedent crime were identical, or the

different objective element(s) of the different versions of the same or similar crime played the same role in justifying criminalization (and its scope) as that played by the element under evaluation in the current case.[107] There is not much merit, for the same reason, in a related rule of construction, that the culpability that is in question for a crime of a certain grade should be at least as high as the culpability level for the same type of crime(s) with lesser penalties.[108]

When it is applied to an objective element of a crime, the traditional rule of construction that persons are presumed to know the law is equally suspect.[109] Also of little merit is the borrowing of an assigned culpability concept from other state legislatures or from federal court interpretations of the same or similar crime, unless such a prior policy decision from another jurisdiction was expressly adopted by the state legislature during its culpability evaluation.[110]

Hence, state supreme courts, despite their own protestations to the contrary, and while purporting to interpret legislative guidelines, often evaluate and decide what culpable mental state is appropriate.[111] State supreme courts expressly, or by implication, recognize this reality.[112] One state supreme court, for example, employed improved statutory guidelines for identifying the culpable mental state to interpret crimes enacted by the legislature long before the guidelines were enacted.[113]

Other evidence that state supreme courts make appropriate culpable mental state evaluations can be seen in decisions by these courts with improved statutory guidelines for identifying the appropriate culpable mental state. In these decisions, the courts failed to use those advancements to aid in resolving the issue of the appropriate culpability.[114] One state supreme court, for example, made no reference to its legislature's specific culpable mental state culpability guidelines and instead used its culpability analysis to define a specific circumstantial element of a crime, rather than identifying the appropriate culpable mental state for that element.[115] Another state supreme court expressly held that the adoption by the legislature of Model Penal Code emulating guidelines for ascertaining the appropriate culpable mental state, including focusing the inquiry individually on each objective element, simply restated the common law of that

state.[116]

It is not clear if improved statutory guidelines to resolve appropriate culpability debates will be used by the courts when those guidelines conflict with prior judicial policy on the appropriate culpability level.[117] Another state supreme court, where the state legislature had adopted Model Penal Code culpability definitions and hierarchical interrelationship, as well as culpability identifying guidelines, ignored those advancements and confirmed the conviction of an accused who was arguably innocent.[118] Another state supreme court, where the legislature had adopted a Model Penal Code guideline for identifying the culpable mental state, failed to recognize that the provision should be applied in light of the reality that a different culpable mental state may be appropriate for different objective elements in the same crime.[119] Hence, a statutory guideline restricting strict liability to instances in which a legislature clearly manifests intent to do so, must be read in light of the fact that the legislature may have intended strict liability for only one of several objective elements.[120]

Without such statutory guidelines, state supreme courts also broadly construed their authority to interpret legislative history to make a culpability evaluation.[121] One state supreme court decided that its legislature intended strict liability for an element of the crime (the age of the victim) that justified felony criminalization.[122] The court erred in relying on the inclusion of a culpable mental state in other subsections of a series of child pornography crimes to conclude that the absence of the same culpability concept in the subsection which was the basis of the conviction of the accused in this case meant that the legislature intended strict liability with regard to the age of the victim for that charge.[123] Other state supreme courts assigned culpability by relying on their own prior authority to assert that the legislature acquiesced to such decisions when it reenacted the crime but continued to omit express culpability concepts.[124]

Finally, states with or without new guidelines are divided on the issue of whether culpability guidelines should apply to crimes defined outside of the penal code.[125] These conflicting decisions make it

clear that, with regard to such crimes, courts make appropriate culpable mental state evaluations. Of course, if culpability evaluations were done for each element of each new crime, no matter in which statutory scheme the crime was deemed properly located, this issue would not arise.

Over half of the state supreme court culpability evaluation cases examined in this study resorted to policy factors to determine the appropriate culpable mental state.[126] This fact is significant because it further documents that, given inconsistent legislative attention to this issue, state supreme courts very often have no choice but to undertake culpability evaluations in order to determine the appropriate culpable mental state for a specific crime or for a given element of a specific crime.[127] One state supreme court resorted to its own policy analysis to conclude that no or very little culpability was required with regard to the only objective element which justified criminalization as a felony, despite the fact that its legislature had apparently proscribed a subjective culpable mental state for all circumstantial elements that followed the culpability concept of "intentionally" in the definition of the crime.[128]

Despite this widespread resort to policy -- and frequently to multiple policy factors -- these courts identified comparatively few policy principles that could serve as good guidance to future lawyers faced with the task of making a culpability evaluation.[129] The useful policy guidelines these courts did suggest are restated in the following paragraph.

Some of these courts recognized that, when their legislatures failed to provide adequate evidence of the appropriate culpable mental state for a crime or an element of a given crime, resorting to identifying the reasons for the criminalization was warranted.[130] These courts sometimes searched for evidence of legislative reasons for the criminalization, but more often ended up relying on their own analysis to identify the likely rationale for the crime. Only the Texas Court of Criminal Appeals, however, consistently recognized that courts could always use the particular configuration of the objective elements of a crime as guidance in determining which element(s) was the basis for justifying criminalization or the particular severity of the grading of a crime.[131] Decisions from that court, therefore, suggest the first workable

policy guideline for courts and other lawyers to employ in determining the appropriate culpable mental state: when an objective element represents the reason for criminalization, a person should not be threatened with imprisonment unless the state is required to prove that the accused has some subjective level of culpability with regard to that element(s).[132] For example, some level of culpability is appropriate for any circumstantial element of a crime when the reason for criminalization or a significant crime grade increase is based on the occurrence of that circumstantial element, even a circumstantial element with legal connotations.[133]

A second related policy guideline is also suggested by some of these state courts. Some level of subjective culpability is appropriate to avoid the harsh outcome of potentially depriving a person of their liberty, when the existence of the same objective element plays the same role in justifying a non-subjective fault civil sanction.[134]

Conversely, decisions in this study identify as a policy guideline favoring a finding that low or no culpability is appropriate for a circumstantial element of a crime, that the purpose of the criminalization is to maximize protection of a category of especially vulnerable victims, when that victim's vulnerability is easily observable by potential offenders and constitutes the circumstantial element of the crime.[135] One state supreme court also suggested that low or no culpability is also appropriate to maximize protection of government law enforcement officials when those officials' performance of their duties is a circumstantial element of the crime.[136] Another state supreme court held that low or no culpability is appropriate when the only persons whose conduct is criminalized are government or other officials with a fiduciary relationship to the public or a segment of the public.[137] Finally, state supreme courts in this study have held that low or no culpability is appropriate to maximize the protection of the public.[138]

Cases in this study suggest that reconciliation of the low or no culpability favoring policies with the policies favoring some level of culpability should turn first to any applicable constitutional (federal or state) constraints on criminalization of the specific objective element(s) without culpability.[139] Second,

reconciliation of these competing policies should be based upon giving supremacy to the policy that an "innocent" person should never be threatened with or deprived of her liberty.[140] Similarly, a person guilty of one crime should not suffer significant additional deprivation of his liberty because of the existence or occurrence of an additional objective element of which he is innocent.[141]

When state supreme courts continued to use the mistake-of-fact doctrine as a separate defense doctrine, the result was conceptual confusion in their culpability evaluations, some of which contributed to affirmance of improper convictions of arguably innocent persons.[142] These decisions were from category 1 and 2 state supreme courts.[143] One of these courts required that the mistake be reasonable, even when, by its own admission, the requisite culpability for the objective element at issue was at least knowingly.[144] Another state supreme court went even further by upholding the constitutionality of shifting the burden of production to the accused to introduce evidence that he reasonably believed in the non-existence of a critical circumstantial element of a felony.[145] However, a state supreme court, where the legislature had preserved a badly flawed provision limiting the use of the mistake-of-fact doctrine as a defense to only reasonable mistakes, but where the legislature had also enacted culpability improvements, was able to ignore the former provision and focus on improved culpability definitions and guidelines.[146]

B. Implications

In this sub-section, the broader implications of and the reasons for the failure of the state legislatures and supreme courts to consistently perform quality culpability evaluations are examined. First, the article has already identified several instances when state supreme courts failed to employ legislatively adopted, albeit imperfect, guidelines for identifying the appropriate culpable mental state.[147] Such failures may have even broader implications. For example, one state supreme court, where the legislature had adopted such guidelines, ignored the significance of these implications and retained the "Pinkerton" doctrine, thereby reducing to only negligence the culpability for those co-conspirators not actually

participating in the crime for all serious crimes committed during the course of and in furtherance of the conspiracy.[148]

Errors of similar magnitude can occur, however, when these courts rely on a guideline which is a mechanical, universal rule that identifies a single level of culpability as presumptively requisite for all elements of all crimes because such reliance increases the likelihood that the court will not undertake the legislatively omitted culpability evaluation.[149] The Ohio Supreme Court, for example, relied on such a guideline to mechanically find that the prosecution need only prove that the accused recklessly possessed child pornography when, traditionally, the overwhelming legislative and policy position required the state to prove "knowing" possession.[150]

Decisions examined in this study illustrate the danger of the legislature's stringing together apparently alternative conduct or result objective elements in defining a crime, without enacting specific distinguishing definitions of these concepts and without giving individual consideration to the appropriate culpable mental state for each alternative.[151] Decisions examined in this study also illustrate the danger of a state legislature's enacting a crime that includes an objective element the definition of which might require a legal reference. The legislature's failing to make a culpability evaluation with regard to that element leaves its supreme court with the very difficult task of trying to ascertain what and how to assign an appropriate culpability to such an objective element.[152] Hence, state legislatures could better assist courts and the bar if they drafted a narrative culpability attachment subsection for each new or reenacted crime, in which they specifically state which culpability concept should be attached to each objective element of the crime.

State supreme courts failed to perform culpability evaluations in the sequential steps outlined in this article's assessment model, and this resulted in a variety of poor culpability decisions during the period from 1977 to 1999.[153] For example, only rarely did a state supreme court consistently recognize that objective elements could be categorized and that, thereafter, the primary task of culpability evaluation was

to then assign the appropriate culpable mental state to each such identified objective element.[154] With regard to the second sequential step, state supreme courts encountered such difficult culpability definition problems with certain crimes, that these courts decided either to eliminate or substantially rewrite these crimes.[155]

Other state supreme courts continued to use mistake of fact as an independent doctrine and thereby interjected confusion into their culpability evaluations.[156] This error can produce related conceptual culpability evaluation errors. For example, one state supreme court accepted an accused's erroneous characterization of his theory of defense as mistake of law when, in substance, the accused was only arguing that he lacked the appropriate culpable mental state.[157]

Non-adoption, omission of reference to, and misuse of imperfect and misguided legislative provisions as well as common-law culpability identification doctrines were not the primary reasons that state supreme courts had so much difficulty in making quality culpability evaluations. The primary reason was that only rarely did a state supreme court during the period from 1977 to 1999 expressly recognize that some level of culpability is appropriate to assign to the objective element(s) which is crucial to justifying the criminalization or significant increase in the grading of a crime.[158] Courts reasoned that the general penal goal of avoiding punishment of the innocent would be violated by a failure to assign some culpability level to the objective element crucial to justifying criminalization.[159] Inferentially, these courts also recognized the related principle that requiring some level of culpability for other innocuous objective elements, or for objective elements of the same crime which would only warrant criminalization of a lesser crime, does not obviate the policy need to require culpability for the objective element that is the justification for criminalization or for a significant increase in the grading of the crime.[160] This crucial point, however, was not consistently recognized by even these state supreme courts.[161]

Other state supreme courts recognized the related principle that sometimes the constitutionality of a criminalization decision required the court to read into a crime a culpable mental state with regard to the

objective element at the core of criminalization.[162] Other state supreme courts, on the other hand, let convictions stand for crimes that are potentially punishable by jail terms by expressly or unwittingly holding that the crucial criminalization justifying the objective element of the crime was a strict-liability element, or by holding that at least no more than negligence had to be proven to with respect to that objective element.[163] The Colorado Supreme Court, where the legislature had adopted revised culpability concepts, apparently interpreted these changes to justify less culpability for a specific objective element of several common-law crimes, even though that objective element was crucial to the justification of serious criminalization.[164] Some of these holdings were outcome-determinative.[165] The decisions and discussion in this sub-section support a recommendation that state legislators responsible for drafting criminal legislation should assign culpability levels appropriate to the role that a given objective element plays with regard to justifying criminalization or increasing the grade of a crime.

Poor culpability evaluations create the risk that other related doctrines cannot or will not be properly interpreted by these same courts. A crucial example of this interrelationship is based upon the reality that culpability evaluations are a condition precedent to proper lesser-included-offense analysis.[166] This is because the most narrow and accurate definition of a lesser-included offense is that it has the identical objective and accompanying culpability elements as the greater crime, except it has either at least one fewer objective and/or accompanying culpability element(s), or a lower level of culpability for at least one of the shared objective elements, or it has both of these features.[167] Lesser-included-offense analysis, therefore, requires a close comparison of the objective elements of the two crimes and the culpable mental states that were deemed appropriate to assign to each such objective element of each crime.[168]

In turn, lesser-included-offense evaluations are constitutionally mandated under the Double Jeopardy Clauses of the federal Constitution and of most state constitutions. This is because conviction of one of the crimes bars simultaneous conviction of the other, and conviction or acquittal of the greater or lesser crime bars subsequent prosecution of the other crime.[169] This constitutional mandate is particularly

appropriate when the only difference between the two crimes is that the lesser crime has no or a lower level of culpability for at least one of the shared objective elements, or the greater crime has a second culpability requirement for a shared objective element.[170]

Therefore, a state supreme court that fails to carefully evaluate the appropriate culpable mental state for each objective element of both crimes, cannot possibly resolve the lesser-included-offense issue correctly. The state supreme courts in this study failed to recognize that a requested instruction by an accused on a lesser-included offense that varies from the greater crime only with respect to a higher culpability level for one objective element of the crime is always appropriate and must be given.[171] Failure to adopt modern culpability concepts and their hierarchical relationship made it impossible for these state supreme courts to consistently perform lesser-included-offense analysis properly.[172] A final related point should be made: in one of the state supreme court decisions that was evaluated in the course of preparing this study, the court failed to appreciate that, because two closely related crimes did not, in fact, have the same objective elements, it was therefore possible for the legislature to assign different culpability levels. The result is that an accused will be subjected to one level of culpability for the objective elements of one crime, and to another level of culpability for the distinguishing objective element of the other crime.[173]

Poor culpability evaluations, which in turn produce poor lesser-included-offense evaluations, significantly increase the difficulty of the prosecutor's daily task of drafting an accurate and informative charging instrument. This study, however, has identified state supreme court decisions that held that even if the state must prove a specific level of culpability for the objective elements of a crime, that specific culpability need not be alleged in the charging instrument.[174] Similarly, one state supreme court, during the period of this study, decided that with regard to the charging instrument, incest was a crime of general -- and not specific -- intent and hence, no specific culpability level need be alleged.[175]

Such poor culpability evaluations also significantly increase the risk of erroneous or misleading jury instructions. A substantial majority of the state supreme court decisions reviewed in this study failed to

even review the trial record to identify the culpability instruction given by the trial judge with regard to the objective element the culpability of which was at issue on appeal.[176] Even when such instruction was reviewed, its significance was sometimes ignored.[177] The California Supreme Court, which did review the instruction, committed a flagrant (and perhaps unconstitutional) policy error when it held that a culpability instruction need only be given when the accused raises a "mental state defense."[178] In another recent case, this court also sanctioned a jury instruction that reduced the express culpability concept of knowledge that was stated in the statute to criminal negligence, a mental state that was not stated in the definition of the crime.[179] Ironically, another state supreme court in this study allowed a defense attorney's statement of the culpability level to serve as the jury's instruction on the culpable mental state, so as to make the trial judge's failure to instruct on the culpable mental state harmless error.[180]

Finally, poor culpability evaluations risk poor analysis of related evidentiary issues. For example, one state supreme court's failure to properly identify the objective elements of the crime charged -- and the appropriate culpability for each of those objective elements -- resulted in a significant error in an analysis of the admissibility of "similar crime" evidence to prove culpability for the charged crime under the state's equivalent to Federal Rule of Evidence 404(b).[181] The state supreme courts in this study also failed to adhere to the constitutionally mandated rule that the state must bear the burden of persuasion with regard to the identified culpable mental state.[182]

IV. CONCLUSION

An earlier article by the author and empirical research conducted in conjunction with this article have provided evidence to support the conclusion that state legislatures should, but do not, systematically conduct culpability evaluations in which they would use a policy analysis to assign an appropriate culpable mental state to each objective element of every new, reenacted, or modified crime.[183] Despite their protestations, this article has presented evidence that the result of this legislative failure is that state supreme courts have no choice but to perform culpability evaluations.[184]

This article has established that state supreme courts, from 1977 to 1999, when given the intermittent opportunity to make culpability evaluations, have overall failed to perform this task in the sequence and with the depth that is ideally required.[185] While states with arguably improved statutory culpability schemes performed culpability evaluations better than states without such improvement, both groups of state supreme courts performed at a level of less than 50 percent efficiency, and it is not apparent that the difference between the two groups of states was significant.[186]

There is evidence that the most significant reason for this failure with regard to performing quality culpability evaluations is that fewer than 20 percent of all the state supreme courts examined in the study performed the critical first step of such an evaluation: express reference to and recognition of the significance of identifying the objective element(s) of the crime as a prelude to ascertaining the appropriate culpable mental state for each of those elements, or at least for those objective elements culpability of which was debated by the prosecution and the defense.[187] This failure has several significant consequences.[188] First, state supreme courts often failed to individually evaluate and assign a culpability level to each objective element of a crime, and conversely one such court limited jury instructions on appropriate culpability to only those objective elements that justified criminalization.[189] Second, this failure to identify objective elements, to which culpability would then be assigned, determined the outcomes of appeals, including decisions in which state supreme courts held that elements crucial to the criminalization of or to the grading of felony crimes were strict-liability elements.[190] Most importantly, only a few of these courts during the period from 1977 to 1999 expressly recognized that determining which, if any, culpable mental state was the appropriate level of culpability for a particular objective element, required the evaluation to focus upon the degree to which that objective element was crucial to justifying the criminalization of the offense, or to significantly increasing the grade of the crime.[191]

A second reason for this less-than-outstanding performance with regard to culpability evaluations is that only approximately four of every ten state supreme court cases analyzed in this study performed

step two of a quality culpability evaluation: making express reference to the definitions of culpability concepts.[192] Advancement in the definition of culpability definitions was no guarantee that the parties or the state supreme court would use or correctly interpret them.[193] Furthermore, it did not insure that ill-defined common-law culpability concepts would not be employed.[194] Similarly, these modern definitions were no guarantee that, when a state supreme court selected one of the culpability levels, it would explain that selection or hold to that selection in subsequent cases.[195]

In states in which the legislatures failed to enact a hierarchy of specifically defined culpability concepts (principally category 2 states), common-law culpability confusion continued in state supreme court decisions and was sometimes outcome-determinative.[196] Such state supreme courts sometimes resorted to the alternative of borrowing or attempting to equate their concepts with more specific definitions of culpability by referring to Model Penal Code culpability concepts.[197]

A third reason for this less-than-stellar performance with regard to culpability evaluations -- and a reason that goes beyond the numerical performance of these courts -- is that, while over half of these state supreme court decisions relied upon statutory culpability guidelines or other legislative sources, this reliance was often placed on guidelines, rules, and sources that are not effective tools for assisting in identifying the appropriate culpability for a crime or, more significantly, for a particular objective element of a given crime.[198] Most critically, when the legislature omitted culpability concepts for a given crime or for elements of that crime, these courts employed guidelines that conflict with the reality that, often, the legislature had simply failed to make a culpability evaluation.[199]

A fourth reason for this relatively poor performance of culpability evaluations by state supreme courts is the inability of these courts to articulate good policy guidelines for determining the appropriate culpable mental state for a given crime.[200] The policies that were identified generally remained remarkably similar during the entire quarter century, and almost all of the policies that provided some good guidance were with regard to the issue of whether some or no subjective level of culpability was

warranted.[201] Hence, little policy guidance can be gleaned from these decisions with regard to the more subtle question of choosing among culpability concepts or level options once it is determined that some level of culpability is appropriate.[202]

Fifth, only about one third of these state supreme courts' culpability evaluation decisions performed step five in a quality culpability evaluation by making an express evaluation of whether the appellate record provided evidence sufficient to convince a reasonable trier of fact of guilt beyond a reasonable doubt with regard to the culpable mental state that is appropriate for the particular crime or element of that crime.[203] Finally, only a small percentage of these state supreme court decisions expressly -- or by implication -- recognized that the mistake-of-fact doctrine is subsumed in a quality culpability evaluation and therefore is normally not a viable independent defense doctrine.[204] However, use of the doctrine continued to produce improper -- and even unconstitutional -- culpability evaluations by these state supreme courts.[205]

The state legislatures' and state supreme courts' failures documented in this study occurred despite the fact that there is some basis to argue that such culpability evaluations are constitutionally mandated.[206] This article has also presented evidence that poor culpability evaluations have resulted in arguably innocent persons being convicted of serious felonies and in the upholding of these convictions on appeal.[207]

State legislatures should avoid randomly including multiple and undefined or ill-defined alternative objective elements and culpability concepts in the constructions of the elements of the same crime and should avoid defining such concepts in more than one way.[208] State legislatures should also generally avoid including multiple definitions -- even if they are well defined -- and hierarchically related culpability concepts in a single crime, unless it is expressly intended that different culpability concepts be deemed appropriate for different objective elements of that crime.[209] State legislatures could better assist courts and the bar by drafting for each new or reenacted crime narrative culpability subsections, in which the

lawmakers specifically state which culpability concept should be attached to each objective element of that crime.[210] State legislatures and state supreme courts should also make culpability evaluations of the same detail when they are enacting or interpreting crimes that are outside of the state penal code.[211]

State supreme courts would improve their culpability evaluations if they employed the assessment model proposed in Part One of this article.[212] For example, these courts should carefully review the culpability instruction given by trial judges, encourage trial judges to forego giving a separate mistake-of-fact instruction, and should urge trial judges to focus upon giving an instruction that specifically assigns an appropriate or requisite culpable mental state to each objective element of the crime(s) charged.[213] State supreme courts would also improve their culpability evaluations if they focused upon the purpose for criminalization or for significant increases in the grading of a crime, and which objective elements embody that purpose.[214] For the policy reasons identified in this article, it is appropriate, except in rare situations, to assign a subjective level of culpability to such elements when the accused, if convicted, faces a substantial deprivation of his or her liberty.[215] State supreme courts should take these steps to reduce significant omissions in their culpability evaluations and thereby minimize potential constitutional violations that include the affirming of convictions of possibly innocent persons.

ENDNOTES

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[1] *See infra* notes 4-30 and accompanying text.

[2] *See infra* notes 31-67 and accompanying text.

[3] *See infra* notes 68-182 and accompanying text.

[4] The Model Penal Code essentially agrees that this is the essence of the drafting task with regard to attaching culpability to each objective element, and that the proper drafting approach is that an independent evaluation should be made of which level of culpability is appropriate for each objective element. *See* MODEL PENAL CODE and Commentaries § 2.02, Comment 1 (Official Draft and Revised Comments 1985) [hereinafter "Commentaries"]. The Code, however, fails to provide systematic guidance to drafters regarding how to evaluate which culpability level, if any, is appropriate for a specific objective element. *See* Dannye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing The Mistake of Fact Doctrine*, 27 SW. L. REV. 229, 258-62 (1997).

The Model Penal Code also defines each level of culpability with regard to three categories of objective elements of a crime: conduct, circumstance, and result. MODEL PENAL CODE § 2.02 and Comments 2-4. The Code, however, provides only a specific definition of "conduct" in section 1.13(5). *Id.* at § 1.13(5).

While the Model Penal Code identifies these three categories of "objective" elements of crimes, other primary and secondary authorities have used and some continue to use "conduct" to encompass acts, circumstances, and result elements. *See, e.g.*, Bruno v. State, 845 S.W.2d 910, 912 (Tex. Crim. App. 1993) (stating that the offense of the unauthorized use of a motor vehicle has two conduct elements, one of which was identified as the attendant circumstance of "without the effective consent of the owner").

Among the most well-recognized commentaries agreeing with the basic premise of individually evaluating the appropriate culpability level for each objective element of a crime is Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1982). Other commentators have disagreed that the attachment of mens rea as an additional element(s) to the objective elements of a crime is "ideal." *See, e.g.*, LADY BARBARA WOOTTON, CRIME AND CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST 51-53 (1963).

To provide an example of what a properly-enacted crime would look like after the attachment of an appropriate culpable mental state to each objective element, one can examine the crime of "Unauthorized Use of a Motor Vehicle." The crime consists of an act element, "Use," and two circumstantial elements, "unauthorized" and "motor vehicle." Hence, the legislature must determine whether it has or should specifically define each of these objective elements, and then it must make three culpability evaluations. Employing an array of legislative, precedential, and other policies, *see infra* notes 43-44 and 55-56 and accompanying text, let us assume for purposes of this preliminary discussion that the legislature decided that the appropriate culpable mental states are respectively "purpose," "knowledge," and "recklessness." Hence, the prosecution must prove six elements beyond a reasonable doubt, and the crime looks like the following:

"Use" ----------"Purposefully"

"Unauthorized"---------"Knowingly"

"Motor Vehicle"--------"Recklessly"

For the actual analysis of one state's supreme court regarding the appropriate culpable mental states for the elements of this crime, see *infra* note 56 and accompanying text. *See also infra* notes 70-71, 130-33, 156-63 and accompanying text (discussing how the role of a given objective element in justifying criminalization and/or the grade of crime should be a major consideration in helping to determine the appropriate culpable mental state).

For an empirically-based conclusion that community standards with regard to culpability evaluations should be researched to determine if they exist and if they exist used by legislatures in determining the appropriate culpable mental state for the elements of crimes, see PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME 11, 86-96 (1995). Other commentators have expressly and by implication concluded, if not comprehensively documented, that historically and currently legislatures fall far short with regard to culpability evaluations. *See* Susan L. Pilcher, *Ignorance, Discretion, and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 15, and 29-30 (1995). Because the historical and current reality of our criminal law jurisprudence is perceived as falling so far short on this issue, other commentators believe that the culpability consequence of a mistake are determined by or should be determined by case specifics. *See, e.g.*, Norman J. Finkel & Jennifer Groscup, *When Mistakes Happen: Common Sense Rules of Culpability*, 3 PSYCHOL. PUB. POL'Y & L. 65, 66 (1997); Pilcher, *supra*, at 37. For a commentator's view that even if a culpable mental state was attached to each objective element the evaluation is too atomistic because it fails to reflect the subtlety of our moral judgments, see Kenneth W. Simons, *When is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1135 (1997). Simons uses historical common law murder sub-categories as his primary example. In fact, intent to do serious bodily injury murder, depraved heart murder, and felony murder, represent a historical (and current) policy controversy over whether the appropriate culpable mental state for the objective result element - the death of another human being -- should minimally be "knowledge" or "belief," or perhaps some lesser level of culpability in limited circumstances, for this most heinous(seriously-graded) form of homicide.

[5] Again because the historical and current reality of our criminal law jurisprudence is perceived as falling so far short of this ideal, a commentator has suggested that when the legislature has not chosen an appropriate culpable mental state, the legal system should create a mechanism for consideration of the specific community's view of the appropriate culpable mental state in the form of jury deliberations on this issue. Pilcher, *supra* note 4, at 50-53. Other recent commentators' works can also be characterized as focusing upon at least an aspect of the range of culpability evaluations. Simons, *supra* note 4.

[6] For a commentator's view that attempts to fine-tune culpability attachments with regard to each individual objective element or rewriting objective elements might prove cumbersome and fail to garner sufficient political support, see Pilcher, *supra* note 4, at 29 n.231. Regarding recommendations in this article to enhance the likelihood that the text of the crime as drafted clearly reflects the culpability evaluations of the legislature, see *infra* notes 208-11 and accompanying text.

[7] Criminal juries would also have an easier task because the judge's instructions would specify each objective element, the definition of the culpability concept(s), and which concept must be proven beyond a reasonable doubt with regard to each objective element of the crime. *See infra* notes 169-71 and

accompanying text. With regard to the implications for jury instructions of the results of this study, *see id.*

[8] For over thirty years, commentators have made reference to "overcriminalization" in modern penal codes. In 1967, Professor Kadish made qualitative analyses of the penal codes of that era to conclude that consensual sex among adults, consensual gambling and drug use among adults, pubic intoxication, and police enforcement enhancement crimes such as disorderly conduct and vagrancy should be decriminalized or reduced in scope. Sanford Kadish, *The Crisis of Overcriminalization*, *in* 374 ANNALS AM. ACAD. POL. & SOC. SCI. 173 (1967). Professor Kadish also noted the proliferation of crimes outside of the penal code. *Id.* at 158-59. *See also* John C. Coffee Jr., *Does "Unlawful" Mean "Criminal?": Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 (1991). Coffee made reference to an estimate that there are over 300,000 federal regulations that may be enforced criminally. The authority cited, however, to support this assertion was only the estimate of a commentator at a conference. No reference was made to the authority relied upon by that commentator (reference is made to commentator's practice experience regarding white-collar crimes) for this estimate.

The lack of hard data with regard to the degree to which modern state penal codes reflected both the quantitative and qualitative concerns with regard to overcriminalization prompted the author to survey state legislative service agencies. These agencies assist state legislatures in the drafting of statutes, including the drafting of criminal statutes. Twenty-seven states responded to the survey. Each agency was asked if it or any other state agency had ever made a count of the number of crimes currently in the penal code, as well as the number of crimes located outside of the penal code. Eight states (Arkansas, Iowa, Kansas, Louisiana, Maine, Mississippi, New Mexico, and Wisconsin) responded that such an assessment had been made or was currently in the process of being made (Maine and Mississippi). A few states responded that some attempt was made to identify the number of crimes outside of the penal code. Wisconsin, for example, reported that an effort to determine the number of felonies outside the penal code resulted in a determination that approximately 200 felonies were criminalized outside the penal code, in contrast to 270 felonies in the code. The number of crimes identified in the penal codes ranged from 203 (Arkansas) to 1050 (Iowa). Some of these counts were conducted by the legislative service agency surveyed but more were conducted by state agencies charged with implementing some type of sentencing reform (Arkansas and Louisiana).

With regard to the qualitative aspect of the overcriminalization debate, the survey asked each agency to identify the five most recent new crimes enacted into the penal code, the date of the enactment, and whether the agency had drafting responsibility for the crimes. The response to this question provided data on what was being newly criminalized (the 1996-1998 state legislative sessions were principally referred to with most respondents making reference to 1998 or 1997 sessions) as well as whether there were five or more new crimes created in the last state legislative session. In almost all of the states, at least five new crimes were enacted in the last legislative session. In the substantial majority of states, the agency contacted claimed to have been the principal drafter for most of the new crimes identified.

The survey also defined culpability evaluations (the same definition employed in this article, *see supra* notes 4-5 and accompanying text) for the agencies and then asked them to comment upon whether culpability evaluations had been undertaken for the five most recent new crimes added to the penal code. This inquiry provided the respondents with a specific focus in answering whether culpability evaluations were undertaken as a matter of practice in the particular state. About half of the responding states reported culpability evaluations were done for all or most of the new crimes (a few respondents indicated that sometimes considerable time was spent making a culpability evaluation for one or two but not the

other newly-enacted crimes), about half reported that such an evaluation was not done, and a few responded they did not know the answer to this question. Among those listed as responding "No," some respondents asserted that there was no formal and/or routine evaluation of the appropriate culpable mental state made for each of the identified new crimes. At least one of these respondents, however, commented that when a specific crime's culpability was evaluated, most often it was done for the crime as a whole.

If an agency responded affirmatively to this question, the next question asked if the culpability evaluation was undertaken for the crime as a whole or for each objective element of the crime. Approximately sixty percent of these states responded that the culpability evaluation was undertaken for the crime as a whole.

Lambert v. California, one of the best known substantive criminal law cases with a constitutional dimension, is illustrative of the historical failure of legislatures to make crucial appropriate culpable mental state evaluations. *See* Lambert v. California, 355 U.S. 225 (1957). Lambert was convicted under a Los Angeles city ordinance that criminalized the failure to comply with a requirement that persons with felony convictions register with the city upon taking up residence in the city. *Id.* at 226-27. Lambert claimed she did not know of the duty to register. *Id.* Justice Douglas, for a majority of the United States Supreme Court, decided that the federal constitution limited criminalization to those ex-felons the state could prove "knew" of their duty to register, thereby creating a seeming exception to the criminal law principle that ignorance of the law, particularly of the specific criminalizing statute, is no excuse. *Id.* at 228. In fact, however, the Los Angeles city council had enacted a crime with one status element with a legal reference, ex-felon, and a circumstantial objective element with a legal reference, "registration-failure to," and then failed to consider assignment of an appropriate culpable mental state to either of those elements. *Id.* Since "registration-failure to" was the sole element justifying criminalization (since living in Los Angeles constitutes, at most, risk-taking by the new resident, even or perhaps even more so an ex-felon), failure to assign even criminal negligence as the appropriate culpability made the statute threaten the deprivation of liberty based solely on status, a type of criminalization the Supreme Court had already struck down. *See* Lanzetta v. New Jersey, 306 U.S. 451 (1939). Justice Douglas's sweeping lack of notice analysis was entirely unnecessary to cure this failure. *Lambert*, 355 U.S. at 228. All that was needed was the reading into the statute of at least negligence as the appropriate culpable mental state for the "registration-failure to" objective element. *Id.* The state could then prove that the accused should have known, from any source (not just from knowledge of the specific ordinance) of a substantial risk that she was required to register upon moving to any new locale. *Id.* at 229.

For commentators' culpability evaluations and discussions of same, see *supra* note 4. For a commentator's conclusion that legislatures often fail (perhaps intentionally) to make or complete culpability evaluations, see Pilcher, *supra* note 4, at 48.

[9] The task of deciding upon an appropriate culpable mental state for each element of an enacted crime is far more formidable when the legislature must proceed on an ad hoc, proposed crime (and its array of objective elements) by proposed crime basis with regard to identifying and defining culpability level alternatives. *See* Commentaries, *supra* note 4, at 230 n.3, and Holley, *supra* note 4, at 231. Second, and a corollary to the first point, is that the significance of undertaking a culpability evaluation is less clear when culpability concepts are not readily distinguishable. This lack of definitional clarity helps explain why legislators and courts historically string culpability concepts in a single crime -- without specific definition or recognition that the concepts may overlap or some might even subsume others.

[10] *See* Holley, *supra* note 4, at 236-38.

[11] For commentator's identification of such recommendations as special courts, joint legislative committees, or preparation of a "checklist" of critical issues for legislative drafters, see Pilcher, *supra* note 4, at 49. Arguably, drafters of culpability evaluation guidelines might view the relatively recent development of federal and state sentencing guidelines as models. *But see* Paul Robinson, *Symposium: The Federal Sentencing Guidelines: Ten Years Later, An Introduction and Comments*, 91 NW. U. L. REV. 1231, 1241 (1997). Robinson points out that the drafters of the federal sentencing guidelines failed to undertake systematic policy analyses and evaluations to substantively determine appropriate sentencing guidelines. *Id.* Instead, they chose to simply mathematically average historical practice as the bases for the guidelines. *Id.* Arguably, systematic culpability evaluations should proceed, and arguably reduce, the difficulty of drafting sentencing guidelines, because conceptually fewer crimes would overlap, and the specific culpability of the accused would have been much more accurately determined at the guilt and innocence phase of the trial, hence, sentencing could more justly and accurately focus upon the specific offense committed. *Id.* at 1243.

[12] The final question asked state legislative service agencies in the survey discussed, *supra* note 8, sought information about the agencies' opinion concerning the feasibility of such guidelines with regard to culpability evaluations. Most of the respondents indicated that the legislature was unlikely to authorize another agency to enact such guidelines. Some even asserted that they thought such delegation would be inappropriate. More importantly, almost all of the agencies indirectly indicated that no such guidelines were in place. Earlier, several of the agencies in responding to specific inquiries about culpability evaluations had indicated that systematic culpability evaluations were not performed for the new crimes identified in their responses. *See supra* note 8.

[13] *See* Holley, *supra* note 4, at 241-47.

[14] *Id.* at 244-45.

[15] *Id.* at 243-44.

[16] *Id.* at 242-43.

[17] *Id.* at 247-49. The article concluded that the task of identifying the appropriate culpable mental state for a charged crime is primarily a legislative responsibility, and that state legislatures have severely complicated their task by intertwining this issue with the traditional treatment of the "mistake of fact" doctrine as an independent defense. *Id.* That article concluded that the doctrine's treatment as such a defense was an anachronism, and should be abolished. Holley, *supra* note 4, at 253-56. The article found that few state legislatures had taken the step of abolishing the mistake of fact doctrine. *Id.* at 247-48 and 252.

The article found that twenty-eight state legislatures currently had mistake-of-fact provisions and seven of them had confusingly restricted the doctrine to reasonable mistakes. *Id.* at 247-48 nn.58-59, 61-62. It is this provision which is tantamount to a legislature asserting the appropriate culpable mental state is some level of negligence. *Id.* For a recent interesting study which at some points assumed that the reasonability of a mistake was per se relevant to an inquiry as to whether the accused was culpable, see Finkel, *supra* note 4, at 72.

[18] Courts are loath to admit they are, in fact, making culpability evaluations as opposed to the more narrow and traditional judicial function of ascertaining legislative intent with regard to the requisite culpable mental state. But since, as documented above, state legislatures have simply not made culpability evaluations for

many objective elements of new or reenacted crimes, searching for such intent is often pretense. *See supra* note 8 and accompanying text. *See also* Pilcher, *supra* note 4, at 48. Perhaps, as will be discussed *infra* notes 109-25, the state supreme courts expressly or by implication perceive it as necessary pretense to avoid at least the specific defendant in the case on appeal raising the claim of judicial criminalization after the fact (at least where the appropriate culpable mental state decision of these courts injures the interests of the defendant) -- the judicial analogue to legislative action which is expressly prohibited by ex post facto provisions in the national and state constitutions.

The haphazard nature of state supreme court culpability evaluations is documented by this study's finding that in only one state, Texas, were there more then approximately ten culpability evaluation decisions by a state supreme court during the 23-year period, 1977 to 1999, examined in this study. *See infra* note 33. Texas cases also provide another indicator of the haphazard nature of state supreme court culpability evaluations. During the period under study, the Texas intermediate appellate courts rendered over a thousand decisions which potentially qualified as culpability evaluation decisions, but less than 10 percent of such cases were reviewed on the merits by the Texas Court of Criminal Appeals. For the federal parallel with regard to recent United States Supreme Court culpability evaluations, see Pilcher, *supra* note 4, at 4.

[19] *See supra* notes 8-17 and accompanying text.

[20] Holley, *supra* note 4, at 249-53. The article identified the following 25 states as arguably qualifying under this criteria: Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Missouri, Montana, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Utah, and Wisconsin. *Id.*

Of course, this meant that the article concluded that the other half of the states' legislatures had failed to take a significant step to enhance the identification of the appropriate/requisite culpable mental state when the legislature itself failed to undertake or clearly complete this task. *Id.* These states include: Alaska, Colorado, Florida, Georgia, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia, Washington, West Virginia, and Wyoming. *Id.* While Alaska, Colorado, Pennsylvania, Texas, and Washington had adopted hierarchical culpability definitions, their state legislatures had also retained a "mistake-of-fact" separate defense doctrine which created the possibility that the criminal law bar and judges would ignore the rarely completed culpability evaluation, and instead assume that the legislature really decided that negligence was the appropriate culpability. *Id.*

[21] *See supra* note 8 and accompanying text; *see infra* notes 41, 53, and 68-75 and accompanying text.

[22] *See supra* notes 9-10 and accompanying text; *see infra* notes 42, 54, and 76-101 and accompanying text.

[23] *See supra* notes 4-7 and accompanying text. This inquiry may be even more specifically focused on the objective element(s) for which the prosecution and defense have claimed different levels of culpability as the appropriate and/or requisite level of culpability. *Id.* This sub-step requires an examination of the definition of the crime and the legislative history of the newly enacted or reenacted crime, and its related and predecessor crimes, if any. *Id.*

[24] *See supra* note 7 and accompanying text; *see infra* notes 45 and 57 and accompanying text; *See, e.g.*, State v. Silveira, 503 A.2d 599, 603-04 (Conn. 1986). *See also* Bryan v. State, 745 P.2d 905 (Wyo. 1987)

(illustrating that these steps in the analysis can be applied even when the accused has pled guilty.).

[25] *See supra* notes 13-18 and accompanying text; *see infra* notes 43, 55, and 102-25 and accompanying text.

[26] *See supra* note 4 and accompanying text; *see infra* notes 45 and 57 and accompanying text.

[27] *See supra* notes 5, 11-12 and accompanying text; *see infra* notes 44, 56, 126-41 and accompanying text. In light of the discussion, *supra* note 8, with regard to the lack of evidence the legislatures systematically make culpability evaluations, most of the state supreme court decisions arguably could and should include all of these identified steps.

[28] *See supra* notes 7 and accompanying text; *see infra* notes 45 and 57 and accompanying text.

[29] *See supra* note 17 and accompanying text; *see infra* notes 46-47, 58-59, 142-46, 156-57 and accompanying text.

[30] In this study, no points, a half point, or a full point were awarded, depending upon whether the court undertook, or undertook in depth, regardless of order, each of the maximum of five sequential analytic steps in identifying the appropriate culpable mental state. A maximum of another point was awarded to decisions which demonstrated that the court understood the lack of independent utility of the mistake-of-fact doctrine in culpability evaluation analysis. Hence, each opinion could receive a maximum of six points, and a minimum of zero points. When a court concluded that an objective element had no accompanying culpability, i.e. was a strict liability element (or crime), there was no basis for evaluating the record to determine if the prosecution had proven culpability beyond a reasonable doubt. The procedural posture of the appellate record in a few cases impacted the possible point total. For example, when the case came to the state supreme court as a result of a pre-trial procedural decision, there was less need and sometimes no ability to review the factual record to ascertain guilt. *See, e.g.*, State v. Brown, 422 S.E.2d 489 (W.Va. 1992) (involving the pre-trial dismissal of charges based on alleged defect in the charging instrument). Finally, with regard to the method of evaluation, each of the 174 cases were evaluated individually before points were totaled by categories.

[31] As indicated earlier, *supra* note 18, when state supreme court justices debate the culpable mental state, they are in fact deciding upon the appropriate culpable mental state for at least one element of the crime. *See infra* notes 111-25 and accompanying text. This debate can have a number of variations. In common-law terms, the most frequent debate would involve the prosecution arguing the crime or element required proof of only general intent, while the defense argued that the state must prove specific intent. *See supra* note 9. A preliminary difficulty with resolving this debate was the lack of consistent definition of these common-law culpability concepts. *Id.*

In Model Penal Code culpability terms, the debate at the top of the culpability hierarchy could involve the prosecutor arguing that the appropriate culpable mental state was knowledge, while the defense argues it was purpose. The debate at the bottom of the culpability hierarchy would involve the prosecutor arguing that there was no culpability requirement for the crime or the objective element of the crime focused upon in the debate, while the defense would argue that at least some form of negligence must be proven by the state. The debate could, of course, focus upon any point in the culpability hierarchy between these two extremes. *See, e.g.*, Santillanes v. State, 849 P.2d 358 (N.M. 1993) (stating that negligence used in the child abuse statute requires proof of criminal, and not just ordinary, civil negligence). In *State v. Bogle*, 376 S.E.2d 745 (N.C. 1989), the defense argued knowledge while the prosecution

argued "willful ignorance." The court decided that willful ignorance was not the appropriate culpable mental state instruction, but without recognizing that this culpability concept is most often closest to the Model Penal Code's "recklessly" culpability level. *Id*.

The debate could also focus upon points beyond the attachment of one of the culpability levels to an objective element of the crime. Common-law specific intent, for example, was interpreted in cases in this study and by some commentators as requiring the state to prove that the accused had the conscious objective of obtaining some result that was not itself an objective element of the crime. *See, e.g.*, State v. Stroh, 588 P.2d 1182 (Wash. 1979). Sometimes the accused would concede no culpable mental state level need be proven for the crime or element in question, but he must be allowed to raise a defense or at least an affirmative defense based on his lack of culpability. *Id.*

[32] The period from 1977 to 1999 was chosen for this study because of currency and because most of the penal code revisions, which reflect the culpability approach of the Model Penal Code, were enacted by or shortly after 1977. Hence, cases decided in this period in such states for the most part should reflect the work of state supreme courts employing these statutory changes. For the actual years of the revisions of state penal codes, see Holley, *supra* note 4, at 229-30 n.2, and the authority cited therein.

[33] These state supreme court decisions were identified by searching each state's case law database with WESTLAW "Key Number" searches and "natural language" combined with state culpability statutory law searches. With regard to the key number searches, Criminal Law was the topic. Keys #33 ("Mistake of Fact"), #19 ("Criminal intent and malice" -- which subsumed keys #20 ("intent generally") and #21 (acts prohibited by statute)), #23 ("negligence"), #24 (presumption from unintended act), #25 ("unintended consequences of act"), and #32 ("Mistake of Law"). The "natural language" searches involved use of the phrases "mistake of fact," "mistake of law," "penal," and "criminal code," "culpable mental state," "specific intent," "general intent," and the appropriate abbreviations and numbers for a state's culpability statutes.

Only in Texas did the searches yield more than 10 cases that qualified for this study. Texas, the clear-cut dominant state with regard to culpability evaluations by state appellate courts (over a thousand cases were found using just one search inquiry), clearly had over 10 such decisions by its highest state court with criminal jurisdiction, the Texas Court of Criminal Appeals. The author decided to include the 10 most recent Texas Court of Criminal Appeals decisions. All of the culpability evaluation decisions discovered via the searches for the period for the rest of the 49 states were included in the study.

Cases discovered in these searches that involved an express or implied debate by the parties and/or the courts about the appropriate culpable mental state for the crime or an element of the crime, and in which the accused was arguably claiming that if the culpable mental state was of a particular level he was innocent, were included in this study, with the following exception. Those cases in which the claim of lack of the culpable mental state was based upon voluntary or involuntary intoxication were excluded from the study because the author felt that reliance on intoxication triggered a policy debate about the level of "badness" and the social stigma society attached to becoming intoxicated, and hence was likely to taint the requisite culpable mental state evaluation by the courts. Second, state supreme court decisions identified in the above searches, which expressly characterized at least one of the accused theories of defense as mistake of fact, but in which there was no debate about the appropriate level of culpability are discussed *infra* note 42, but are not formally included in the study. Finally, the author decided to exclude *State v. Sexton*, 733 A.2d 1125 (N.J. 1999). *Sexton* qualified, and would have received a high point score on the assessment model. The New Jersey Supreme Court in *Sexton*, however, made several references to and appeared to place some conceptual reliance upon this author's article on culpability provisions in state legislatures. *See generally* Holley, *supra* note 4. While such use is the ultimate goal of that and this

article, I felt inclusion of the decision would distort the assessment comparison and some of the findings and implications drawn from the assessment.

Somewhat of a surprise to the author was that four jurisdictions did not have any state supreme court decisions discovered by the above search methods in the twenty-two year period from 1977 to 1999: Delaware, Kentucky, Mississippi, and Virginia. Also surprising was the number of states that had no decisions in this period under the specific West Digest Key, Criminal Law, Key #33 (Mistake of Fact): Alabama, Alaska, Delaware, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, Wisconsin, and Wyoming.

[34] *See infra* notes 37-48 and accompanying text; *see supra* notes 19-20 for a discussion of why states were characterized as "legislatively improved statutory culpability evaluation states." Not all such state supreme courts made culpability decisions in the period from 1977 to 199. The jurisdictions arguably with improved culpability provisions with no such decisions were Delaware and Kentucky.

[35] *See infra* notes 49-59 and accompanying text; *see supra* notes 19-20 for a discussion of why states were characterized as "unimproved statutory culpability evaluation states." Not all such state supreme courts made culpability decisions during the period of this study, 1977 to 1999. The jurisdictions arguably without improved culpability provisions with no such decisions were Mississippi and Virginia.

[36] *See infra* notes 60-67 and accompanying text.

[37] Phillips v. State, 728 So.2d 681 (Ala. Crim. App. 1998) (2 points); State v. Jennings, 722 P.2d 258 (Ariz. 1986) (1 point); State v. Williams, 698 P.2d 732 (Ariz. 1985) (1.5 points); Spitz v. Municipal Ct., 621 P.2d 911 (Ariz. 1980) (3 points); State v. Morse, 617 P.2d 1141 (Ariz. 1980) (1 point); Robinson v. State, 737 S.W.2d 153(Ark. 1987) (0 points); People v. Hering, 976 P.2d 210 (Cal. 1999) (2 points); People v. Sargent, 970 P.2d 409 (Cal. 1999) (2.5 points); People v. Beardslee, 806 P.2d 1311 (Cal. 1991) (1 point); State v. Swain, 718 A.2d 1 (Conn. 1998) (2.5 points); State v. Smith, 554 A.2d 713 (Conn. 1988) (5 points); State v. Silveira, 503 A.2d 599 (Conn. 1986) (1.5 points); State v. Tedesco, 397 A.2d 1352 (Conn.1978) (1.5 points); State v. Pinero, 778 P.2d 704 (Haw. 1989) (3.5 points); State v. Torres, 660 P.2d 522 (Haw. 1983) (2 points); State v. Rushing, 612 P.2d 103 (Haw. 1980) (2 points); State v. Fox, 866 P.2d 181 (Idaho 1993) (3 points); State v. Missamore, 803 P.2d 528 (Idaho 1990) (0 points); State v. Stiffler, 788 P.2d 220 (Idaho 1990) (4.5 points); People v. Anderson, 591 N.E.2d 461 (Ill. 1992) (2 points); People v. Frieberg, 589 N.E.2d 508 (Ill. 1992) (3 points); People v. Crane, 585 N.E.2d 99 (Ill. 1991) (1 point); People v. Gean, 573 N.E.2d 818 (Ill. 1991) (3.5 points); People v. Sevilla, 547 N.E.2d 117 (Ill. 1989) (5 points); People v. Brown, 457 N.E.2d 6 (Ill. 1983) (1 point); People v. Whitlow, 433 N.E.2d 629 (Ill. 1982) (2.5 points); People v. Valley Steel Prods. Co., 375 N.E. 2d 1297 (Ill. 1978) (2 points); State v. Neuzil, 589 N.W.2d 708 (Iowa 1999) (2 points); State v. Buchanan, 549 N.W.2d 291 (Iowa 1996) (4 points); State v. Freeman, 450 N.W.2d 826 (Iowa 1990) (1 point); Saadiq v. State, 387 N.W.2d 315 (Iowa 1986) (1.5 points); Eggman v. Scurr, 311 N.W.2d 77 (Iowa 1981) (2 points); State v. Conner, 292 N.W.2d 682 (Iowa 1980) (2.5 points); State v. Freeman, 267 N.W.2d 69 (Iowa 1978) (0 points); State v. Lewis, 953 P.2d 1016 (Kan. 1998) (2.5 points); State v. Hickles, 929 P.2d 141 (Kan. 1996) (1.5 points); State v. Mountjoy, 891 P.2d 376 (Kan. 1995) (3 points); State v. Robinson, 718 P.2d 1313 (Kan. 1986) (1.5 points); State v. Cantrell, 673 P.2d 1147 (Kan. 1983) (1.5 points); State v. Seamen's Club, 691 A.2d 1248 (Me. 1997) (2 points); State v. Fowler, 676 A.2d 43 (Me. 1996) (1 point); State v. Dana, 517 A.2d 719 (Me. 1986) (2 points); State v. Morey, 427 A.2d 479 (Me. 1981) (4 points); State v. Davis, 398 A.2d 1218 (Me. 1979) (1.5 points); State v. Carson, 941 S.W.2d 518 (Mo. 1997) (2.5 points); State v. Jones, 865 S.W.2d

658 (Mo. 1993) (2 points); State v. Munson, 714 S.W.2d 515 (Mo. 1986) (2 points); State v. Beishir, 646 S.W.2d 74 (Mo. 1983) (4 points); State v. Green, 629 S.W.2d 326 (Mo. 1982) (2 points); State v. Huebner, 827 P.2d 1260 (Mont. 1992) (.5 points); State v. Blalock, 756 P.2d 454 (Mont. 1988) (0 points); State v. Brown, 755 P.2d 1364 (Mont. 1988) (2.5 points); State v. Haines, 709 A.2d 762 (N.H. 1998) (1.5 points); State v. Bergen, 677 A.2d 145 (N.H. 1996) (3 points); State v. Goodwin, 671 A.2d 554 (N.H. 1996) (3 points); State v. Stratton, 567 A.2d 986 (N.H. 1989) (2 points); People v. Ryan, 626 N.E.2d 51 (N.Y. 1993) (4 points); People v. McNamara, 585 N.E.2d 788 (N.Y. 1991) (3.5 points); People v. Coe, 522 N.E.2d 1039 (N.Y. 1988) (2.5 points); State v. McDowell, 312 N.W.2d 301 (N.D. 1981) (1.5 points); State v. Goetz, 312 N.W.2d 1 (N.D. 1981) (2 points); State v. Schlosser, 681 N.E.2d 911 (Ohio 1997) (2.5 points); State v. McGee, 680 N.E.2d 975 (Ohio 1997) (1.5 points); State v. Warner, 564 N.E.2d 18 (Ohio 1990) (1.5 points); State v. Young, 525 N.E.2d 1363 (Ohio 1988) (2.5 points); State v. Wenger, 390 N.E.2d 801 (Ohio 1979) (.5 points); Willams v. State, 565 P.2d 46 (Okla. Crim. App. 1977) (2 points); State v. Guthrie, 741 P.2d 509 (Or. 1987) (1.5 points); State v. Chang Hwan Cho, 681 P.2d 1152 (Or. 1984) (3 points); State v. Langan, 652 P.2d 800 (Or. 1982) (2.5 points); State v. Buttrey, 651 P.2d 1075 (Or. 1982) (3 points); State v. Blanton, 588 P.2d 28 (Or. 1978) (2 points); State v. Schmiedt, 525 N.W.2d 253 (S.D. 1994) (1 point); State v. Olsen, 462 N.W.2d 474 (S.D. 1990) (2 points); State v. Rash, 294 N.W.2d 416 (S.D. 1980) (1 point); State v. Nagel, 279 N.W.2d 911 (S.D. 1979) (1.5 points); State v. Carson, 950 S.W.2d 951 (Tenn. 1997) (2.5 points); State v. Wilson, 924 S.W.2d 648 (Tenn. 1996) (2.5 points); State v. Larsen, 865 P.2d 1355 (Utah 1993) (2 points); State v. Hopkins, 782 P.2d 475 (Utah 1989) (1 point); State v. Calamity, 735 P.2d 39 (Utah 1987) (1 point); State v. Fontana, 680 P.2d 1042 (Utah 1984) (3.5 points); State v. Elton, 680 P.2d 727 (Utah 1984) (3.5 points); State v. Lakey, 659 P.2d 1061 (Utah 1983) (3 points); State v. Kemp, 318 N.W.2d 13 (Wis. 1982) (2 points); State v. Stepniewski, 314 N.W. 2d 98 (Wis. 1982) (1.5 points); State v. Collova, 255 N.W.2d 581 (Wis. 1977) (2.5 points). With regard to the Assessment Model's total points possibilities, see *supra* note 30 and accompanying text. *See supra* notes 33-34 (indicating that Alabama, Kentucky, and Delaware did not have any state supreme court decisions that qualified for inclusion in this study after the search techniques described therein were employed, and identified cases were evaluated against the criteria described therein).

[38] State v. Smith, 554 A.2d 713 (Conn. 1988) (5 points); State v. Stiffler, 788 P.2d 220 (Idaho 1990) (4.5 points); People v. Sevilla, 547 N.E.2d 117 (Ill. 1989) (5 points); State v. Buchanan, 549 N.W.2d 291 (Iowa 1996) (4 points); State v. Morey, 427 A.2d 479 (Me. 1981) (4 points); State v. Beishir, 646 S.W.2d 74 (Mo. 1983) (4 points); People v. Ryan, 626 N.E.2d 51 (N.Y. 1993) (4 points).

[39] Phillips v. State, 728 So.2d 681 (Ala. Crim. App. 1998) (2 points); Spitz v. Municipal Ct., 621 P.2d 911 (Ariz. 1986) (3 points); People v. Hering, 976 P.2d 210 (Cal. 1999) (2 points); People v. Sargent, 970 P.2d 409 (Cal. 1999) (2.5 points); State v. Swain, 718 A.2d 1 (Conn. 1998) (2.5 points); State v. Pinero, 778 P.2d 704 (Haw. 1989) (3.5 points); State v. Fox, 866 P.2d 181 (Idaho 1993) (3 points); People v. Frieberg, 589 N.E.2d 508 (Ill. 1992) (3 points); People v. Gean, 573 N.E.2d 818 (Ill. 1991) (3.5 points); People v. Whitlow, 433 N.E.2d 629 (Ill. 1982) (2.5 points); State v. Neuzil, 589 N.W.2d 708 (Iowa 1999) (2 points); Eggman v. Scurr, 311 N.W.2d 77 (Iowa 1981) (2 points); State v. Conner, 292 N.W.2d 682 (Iowa 1980) (2.5 points); State v. Lewis, 953 P.2d 1016 (Kan. 1998) (2.5 points); State v. Mountjoy, 891 P.2d 376 (Kan. 1995) (3 points); State v. Seamen's Club, 691 A.2d 1248 (Me. 1997) (2 points); State v. Dana, 517 A.2d 719 (Me. 1986) (2 points); State v. Carson, 941 S.W.2d 518 (Mo. 1997) (2.5 points); State v. Jones, 865 S.W.2d 658 (Mo. 1993) (2 points); State v. Munson, 714 S.W.2d 515 (Mo. 1986) (2 points); State v. Green, 629 S.W.2d 326 (Mo. 1982) (2 points); State v. Brown, 755 P.2d 1364 (Mont. 1988) (2.5 points); State v. Bergen, 677 A.2d 145 (N.H. 1996) (3 points); State v. Goodwin, 671 A.2d 554 (N.H. 1996) (3 points); State v. Stratton, 567 A.2d 986 (N.H. 1989) (2 points); People v. McNamara, 585 N.E.2d 788 (N.Y. 1991) (3.5 points); People v. Coe, 522 N.E.2d 1039 (N.Y. 1988) (2.5 points); State v. Goetz, 312

N.W.2d 1 (N.D. 1981) (2 points); State v. Schlosser, 681 N.E.2d 911 (Ohio 1997) (2.5 points); State v. Young, 525 N.E.2d 1363 (Ohio 1988) (2.5 points); Willams v. State, 565 P.2d 46 (Okla. Crim. App. 1977) (2 points); State v. Chang Hwan Cho, 681 P.2d 1152 (Or. 1984) (3 points); State v. Langan, 652 P.2d 800 (Or. 1982) (2.5 points); State v. Buttrey, 651 P.2d 1075 (Or. 1982) (3 points); State v. Blanton, 588 P.2d 28 (Or. 1978) (2 points); State v. Olsen, 462 N.W.2d 474 (S.D. 1990) (2 points); State v. Carson, 950 S.W.2d 951 (Tenn. 1997) (2.5 points); State v. Wilson, 924 S.W.2d 648 (Tenn. 1996) (2.5 points); State v. Larsen, 865 P.2d 1355 (Utah 1993) (2 points); State v. Fontana, 680 P.2d 1042 (Utah 1984) (3.5 points); State v. Elton, 680 P.2d 727 (Utah 1984) (3.5 points); State v. Lakey, 659 P.2d 1061 (Utah 1983) (3 points); State v. Kemp, 318 N.W.2d 13 (Wis. 1982) (2 points); State v. Collova, 255 N.W.2d 581 (Wis. 1977) (2.5 points).

[40] State v. Jennings, 722 P.2d 258 (Ariz. 1986) (1 point); State v. Williams, 698 P.2d 732 (Ariz. 1985) (1.5 points); State v. Morse, 617 P.2d 1141 (Ariz. 1980) (1 point); Robinson v. State, 737 S.W.2d 153 (Ark. 1987) (0 points); People v. Beardslee, 806 P.2d 1311 (Cal. 1991) (1 point); State v. Silveira, 503 A.2d 599 (Conn. 1986) (1.5 points); State v. Tedesco, 397 A.2d 1352 (Conn.1978) (1.5 points); State v. Torres, 660 P.2d 522 (Haw. 1983) (2 points); State v. Rushing, 612 P.2d 103 (Haw. 1980) (2 points); State v. Missamore, 803 P.2d 528 (Idaho 1990) (0 points); People v. Anderson, 591 N.E.2d 461 (Ill. 1992) (2 points); People v. Crane, 585 N.E.2d 99 (Ill. 1991) (1 point); People v. Brown, 457 N.E.2d 6 (Ill. 1983) (1 point); People v. Valley Steel Prods. Co., 375 N.E. 2d 1297 (Ill. 1978) (2 points); State v. Freeman, 450 N.W.2d 826 (Iowa 1990) (1 point); Saadiq v. State, 387 N.W.2d 315 (Iowa 1986) (1.5 points); State v. Freeman, 267 N.W.2d 69 (Iowa 1978) (0 points); State v. Hickles, 929 P.2d 141 (Kan. 1996) (1.5 points); State v. Robinson, 718 P.2d 1313 (Kan. 1986) (1.5 points); State v. Cantrell, 673 P.2d 1147 (Kan. 1983) (1.5 points); State v. Fowler, 676 A.2d 43 (Me. 1996) (1 point); State v. Davis, 398 A.2d 1218 (Me. 1979) (1.5 points); State v. Huebner, 827 P.2d 1260 (Mont. 1992) (.5 point); State v. Blalock, 756 P.2d 454 (Mont. 1988) (0 points); State v. Haines, 709 A.2d 762 (N.H. 1998) (1.5 points); State v. McDowell, 312 N.W.2d 301 (N.D. 1981) (1.5 points); State v. McGee, 680 N.E.2d 975 (Ohio 1997) (1.5 points); State v. Warner, 564 N.E.2d 18 (Ohio 1990) (1.5 points); State v. Wenger, 390 N.E.2d 801 (Ohio 1979) (.5 point); State v. Guthrie, 741 P.2d 509 (Or. 1987) (1.5 points); State v. Schmiedt, 525 N.W.2d 253 (S.D. 1994) (1 point); State v. Rash, 294 N.W.2d 416 (S.D. 1980) (1 point); State v. Nagel, 279 N.W.2d 911 (S.D. 1979) (1.5 points); State v. Hopkins, 782 P.2d 475 (Utah 1989) (1 point); State v. Calamity, 735 P.2d 39 (Utah 1987) (1 point); State v. Stepniewski, 314 N.W. 2d 98 (Wis. 1982) (1.5 points).

[41] State v. Stiffler, 788 P.2d 220, 221 (Idaho 1990) (focusing issue directly on the circumstantial element of the age of the victim and the requisite culpable mental state, if any, for that element of the crime of statutory rape); People v. Gean, 573 N.E.2d 818, 822 (Ill. 1991) (making an express reference to possession as key element of two crimes charged, and to why "knowledge" was the appropriate and hence requisite culpable mental state for felony possession crimes); People v. Sevilla, 547 N.E.2d 117, 122 (Ill. 1989) (relating the definition of "knowledge" to identified conduct, circumstance, and result objective elements); State v. Robinson, 718 P.2d 1313, 1316 (Kan. 1986) (focusing on culpability for the circumstantial element of a "minor"); State v. Morey, 427 A.2d 479, 483-84 (Me. 1981) (undertaking an extensive policy evaluation specifically focused on the circumstantial element of "prison official" in a crime of assault of a prison official, including citation to but distinguishing United States Supreme Court's decision in *United States v. Feola*, 420 U.S. 671 (1975)); State v. Munson, 714 S.W.2d 515, 524 (Mo. 1986) (interpreting drug paraphernalia sale statute to require three different culpability levels to simultaneously be proven by the prosecution with regard to the possession objective element); State v. Beishir, 646 S.W.2d 74, 77-78 (Mo. 1983); People v. Ryan, 626 N.E.2d 51, 54 (N.Y. 1993) (identifying issue as whether "knowing" requisite culpable mental state expressed in definition of crime applied to circumstantial element of weight of the controlled substance possessed); State v. Langan, 652 P.2d 800,

804 (Or. 1982) (focusing on circumstantial element of "unlawful" with regard to the crime of promoting unlawful gambling, and then on the requisite culpable mental state for that objective element); State v. Blanton, 588 P.2d 28, 29 (Or. 1978) (focusing on circumstantial element of age of buyer of contraband drug, an objective element that aggravated crime grade, and made reference to Oregon statute that required as norm culpable mental state for each material element of the crime); State v. Wilson, 924 S.W.2d 648, 651 (Tenn. 1996) (focusing on result element of assault and whether the state had proved at least the accused was aware that conduct would put a reasonable victim in fear of imminent bodily injury); State v. Hopkins, 782 P.2d 475, 478 (Utah 1989) (focusing upon culpability for the circumstantial element of the consent of the victim to a charge of aggravated sexual assault); State v. Elton, 680 P.2d 727, 728 (Utah 1984) (citing a Utah statutory requisite culpability guideline, UTAH CODE ANN. § 76-2-101(1), which prior to 1983 expressly provided that the requisite culpability must be proven as to each element of the crime); State v. Lakey, 659 P.2d 1061, 1063 (Utah 1983) (focusing on requisite culpability level for element "by deception" which is a conduct/circumstance element of the crime of theft by deception); State v. Kemp, 318 N.W.2d 13, 18 (Wis. 1982) (focusing upon circumstantial element of suspension or revocation of driver's license and sought to determine the appropriate and/or requisite culpable mental state for that element; and determined that appropriate culpability level was negligence).

[42] People v. Hering, 976 P.2d 210, 212-13 (Cal. 1999) (stating "general intent" is the intent to do only the proscribed act and accused need not know that act is criminal while "specific intent" crimes include reference to intent to a future act or achieve a future consequence and suggesting that the origins of distinction between "general" and "specific" intent was a judicially-created response to accused who raised defense of voluntarily intoxication); People v. Sargent, 970 P.2d 409, 414 (Cal. 1999) (distinguishing "general" and "specific" intent and noting that neither definition recognized expressly that objective elements include circumstantial and result elements); State v. Swain, 718 A.2d 1, 10 (Conn. 1998) (making reference to earlier decision which held that an express "intent" requirement in a crime implied no "knowledge" culpability was required because two concepts were distinctly defined in the penal code); State v. Silveira, 503 A.2d 599, 603 (Conn. 1986) (making express reference to definition of "recklessness" but failed to make express reference to definition of "intention," despite fact that it made express reference to this culpability concept as part of the definition of one way to prove first degree manslaughter); State v. Pinero, 778 P.2d 704, 713 (Haw. 1989) (identifying four culpability definitions and making reference to their hierarchical relationship); State v. Fox, 866 P.2d 181, 183 (Idaho 1993) (defining distinction between retained common law culpability concepts of "general" and "specific" intent); State v. Stiffler, 788 P.2d 220, 221 (Idaho 1990) (making same references as in *State v. Fox,* 866 P.2d 181 (Idaho 1993)); People v. Frieberg, 589 N.E.2d 508, 517 (Ill. 1992) (making reference, in light of defendant's theory of case on appeal, to culpability concepts' hierarchical nature, and to specific definition of "intent" and "knowledge" in relation to objective element categories); People v. Gean, 573 N.E.2d 818, 822 (Ill. 1991) (making reference to "knowledge" and its statutory definition in context of trying to decide between recklessness and knowledge); People v. Whitlow, 433 N.E.2d 629, 634 (Ill. 1982) (recognizing hierarchical nature of culpability levels of knowledge and next lower level of recklessness); State v. Buchanan, 549 N.W.2d 291, 293 (Iowa 1996) (making reference to language distinction between "general" and "specific" intent); Eggman v. Scurr, 311 N.W.2d 77, 78-80 (Iowa 1981) (making same distinction as in *State v. Buchanan*, 549 N.W.2d 291 (Iowa 1996)); State v. Conner, 292 N.W.2d 682, 684 (Iowa 1980) (identifying the difference between recklessness and criminal negligence in contrast to tort negligence); State v. Lewis, 953 P.2d 1016, 1026 (Kan. 1998) (discussing possible dual definition of "knowledge," making reference to "knowledge" encompassing concept of "deliberate ignorance," and expressly defining and adopting this second concept as a component of the definition of "knowledge"); State v. Hickles, 929 P.2d 141, 150 (Kan. 1996) (identifying culpability levels of intentional and recklessness from statute, and making reference to other culpability concepts encompassed within those two terms); State v. Mountjoy, 891 P.2d

376, 381 (Kan. 1995) (drawing same conclusion as in *State v. Hickles*, 929 P.2d 141 (Kan. 1996)); State v. Green, 629 S.W.2d 326, 328 n.3 (Mo. 1982) (making reference to definitions of "purposely," "knowingly," and "recklessly"); State v. Brown, 755 P.2d 1364, 1368 (Mont. 1988) (making reference to three Montana culpable mental states); State v. Bergen, 677 A.2d 145, 147 (N.H. 1996) (making reference to definition of "knowingly" as it applies to conduct and circumstance type elements); State v. Goetz, 312 N.W.2d 1, 11 (N.D. 1981) (making reference to definitions of and relationship between "willfully," "purposefully," and "knowingly," but continuing to limit the application of these culpability improvements to crimes defined in the revised penal code); State v. Warner, 564 N.E.2d 18, 48 (Ohio 1990) (making reference to statutory definition of "recklessness" as it applied to each category type of objective element and this crime was unauthorized act by an officer of a savings and loan association); State v. Young, 525 N.E.2d 1363, 1369 (Ohio 1988) (defining recklessness in relation to all three categories of objective elements; but this discussion of "recklessness" was followed by an extremely confusing and conceptually erroneous discussion of the culpability concepts and hierarchical relationship among "scienter," "knowingly," "purpose," and "innocent motive"); State v. Buttrey, 651 P.2d 1075, 1077 (Or. 1982); State v. Schmiedt, 525 N.W.2d 253, 256 (S.D. 1994) (attempting to distinguish definition of general intent from specific intent, but alluding to one of the traditional common law statements that left the distinction shrouded in mystery); State v. Olsen, 462 N.W.2d 474, 476-77 (S.D. 1990) (making reference to general definition of reckless in context of deciding requisite culpability for "reckless killing," and recognizing that, because the definition of recklessness in the South Dakota Criminal Code required awareness of risk, it clearly required more culpability than traditional criminal negligence); State v. Rash, 294 N.W.2d 416, 417 (S.D. 1980) (attempting to distinguish between general and specific intent by reference to one of the traditional common law definitions of the two concepts); State v. Carson, 950 S.W.2d 951, 954 (Tenn. 1997) (making reference to the statutory definition of "intent" as it was defined in relationship only to conduct and result objective elements of a crime); State v. Wilson, 924 S.W.2d 648, 650 (Tenn. 1996) (citing to definition of "intent" as it was defined in relationship only to conduct and result objective elements of a crime, and to "knowingly" as it is defined in relationship to conduct and result objective elements of a crime); State v. Larsen, 865 P.2d 1355, 1358 (Utah 1993) (restating statutory definition of "willfully"); State v. Calamity, 735 P.2d 39, 43 (Utah 1987) (noting that "general" and "specific" intent culpability concepts were eliminated by revised criminal code's new culpability concepts and noting that the trial court expressly defined culpability concepts of "intentionally" and 'knowingly," but giving no indication that these definitions were specifically linked to each objective element of the crime of rape); State v. Lakey, 659 P.2d 1061, 1062 (Utah 1983) (referring to definition of intent as requiring conscious objective not to perform a future promise, and to "knowledge" as awareness to a reasonable certainty that future promise will not be performed). For an example of why other cases were not included in this count, see State v. Morse, 617 P.2d 1141 (Ariz. 1980) (referring to four model penal code culpability definitions in sequence, but without definitions, and with court promptly misapplying one of the concepts in relation to the objective elements of the crime).

[43] Phillips v. State, 728 So.2d 681 (Ala. Crim. App. 1998) (citing to, but failing to follow, the express legislative guideline which provided that when a statute defines a crime, unless there is a clear indication to impose strict liability, it is a crime of mental culpability and also citing to the legislative guideline that even if no culpable mental state is included in the definition of a crime, an appropriate culpable mental state may nevertheless be required for some or all of the material elements if the proscribed conduct necessarily involves such a culpable mental state); State v. Williams, 698 P.2d 732, 733 (Ariz. 1985) (referring to the guideline that when no express culpable mental state was included in the definition of a crime, the legislature created a presumption that its intention was to create strict liability); People v. Hering, 976 P.2d 210, 213 (Cal. 1999) (asserting that legislative intent to require specific as opposed to general intent can be inferred from use of such language as "with the intent" or for the purpose of"); People v. Sargent, 970

P.2d 409, 414, 419 (Cal. 1999) (making reference to legislative provision that all crimes consist of union of act and some level of culpable mental state); State v. Swain, 718 A.2d 1, 6, 8-9 (Conn. 1998) (noting policy goal statements of state legislatures with regard to criminalizing driving while intoxicated); State v. Pinero, 778 P.2d 704, 715 (Haw. 1989) (making reference to statute that at least recklessness must nevertheless be proven and also making reference to the presumption against strict liability in the Hawaii penal code); State v. Torres, 660 P.2d 522, 524 (Haw. 1983) (referring to guideline that when no culpability level expressly stated in crime, culpability is still the norm and the requisite culpability is recklessness); State v. Rushing, 612 P.2d 103, 106 (Haw. 1980) (making same reference as in *State v. Torres*, 660 P.2d 522 (Haw. 1983)); State v. Fox, 866 P.2d 181, 183 (Idaho 1993) (making reference to Idaho's mistake-of-fact culpability guideline, and to provision that every crime or public offense must include a union or joint operation of act and intent); State v. Stiffler, 788 P.2d 220, 221 (Idaho 1990) (making reference to Idaho's mistake-of-fact culpability guideline, and to provision that every crime or public offense must include a union or joint operation of act and intent); People v. Frieberg, 589 N.E.2d 508, 517-18 (Ill. 1992); People v. Anderson, 591 N.E.2d 461, 465 (Ill. 1992) (making reference to guideline that, if no culpable mental state is stated in the definition of a crime, at least recklessness still must be proven and also making reference to guideline that strict (absolute) liability is an exception to norm which presumptively required some level of culpability for all crimes); People v. Crane, 585 N.E.2d 99, 102 (Ill. 1991) (making reference to mistake-of-fact statutory provision which recognized that the doctrine was primarily a basis for arguing that the accused lacked the requisite culpable mental state); People v. Gean, 573 N.E.2d 818, 820-22 (Ill. 1991) (making reference to a guideline which limited strict liability to only those crimes which can be punished by fine of $500 or less, unless clear legislative intent to create strict liability crime (or element) appeared and also making reference to guideline that, if no culpable mental state appears in the definition of the crime, the presumption is nevertheless that at least recklessness still must be proved); People v. Sevilla, 547 N.E.2d 117, 118-19, 121-22 (Ill. 1989) (making reference to same guideline limiting strict liability as in *People v. Gean*, 573 N.E.2d 818 (Ill. 1991), as well as to same Commentary to that provision and relying upon same guideline as in *Gean* with regard to making recklessness the presumptive culpability when no culpability concept appears in crime); People v. Whitlow, 433 N.E.2d 629, 633 (Ill. 1982) (making reference to same guideline limiting strict liability as in *People v. Gean*, 573 N.E.2d 818 (Ill. 1991) and relying upon same guideline as in *Gean* with regard to making recklessness the presumptive culpability, when no culpability concept appears in crime); People v. Valley Steel Prods. Co., 375 N.E.2d 1297, 1304 (Ill. 1978) (making reference to same guideline limiting strict liability as in *People v. Gean*, 573 N.E.2d 818 (Ill. 1991) and also relying upon general statutory guideline that presumptively all crimes require conduct and a culpable mental state); State v. Neuzil, 589 N.W.2d 708, 711 (Iowa 1999) (noting that if the legislature wanted to require intent culpability for result element of "stalking," it knew how to do so, but failed to do so and also making reference to model act as the source used in drafting this Iowa stalking statute); State v. Buchanan, 549 N.W.2d 291, 293 (Iowa 1996) (recognizing generally that ascertaining the requisite culpable mental state was a matter of ascertaining legislative intent); Saadiq v. State, 387 N.W.2d 315, 323 (Iowa 1986) (making reference to (but erroneously placing reliance upon) guideline which provided that all persons are presumed to know the law, as part of the basis for rejecting accused claim that he must know he had previously committed a felony to be convicted later of the crime of being a felon in possession of a firearm); State v. Conner, 292 N.W.2d 682, 683 (Iowa 1980) (making reference to general rule of statutory construction that related crimes enacted during same legislative session should be examined to determine common scheme and then harmonize specific crime's requisite culpability with that scheme). In *State v. Lewis*, 953 P.2d 1016 (Kan. 1998), the court cited with approval to the strict construction of criminal code provisions to the benefit of the accused, but also asserting that the principle should be subordinated to accomplishing the overall purpose of the legislation. *Id.* at 1022-23. It made reference to penal code guideline that some level of culpability is required for all crimes, unless otherwise provided, and that intent and recklessness were the

culpability options. *Id.* at 1020. The court cited to penal code guideline that "intent" was the requisite culpability level, unless recklessness was expressly provided for in the definition of the crime. *Id.* at 1026. It relied on the fact that an earlier version of the same crime, because of attendant procedural safeguards, clearly manifested a legislative intent to require proof of subjective culpability with regard to the crucial circumstantial element of driving while a "habitual offender." *Id.* at 1025. The court also placed reliance on the legislative history of the revised penal code with regard to limiting strict liability to crimes where the penalty is relatively mild, and legislative intent to dispense with culpability was clearly manifested. *Id*. *See also* State v. Hickles, 929 P.2d 141, 149 (Kan. 1996) (making reference to guideline providing that prosecution burden is to establish intent, unless crime expressly provides that the act was criminal if done recklessly); State v. Mountjoy, 891 P.2d 376, 381 (Kan. 1995) (making reference to same guideline as in *State v. Hickles*, 929 P.2d 141, 149 (Kan. 1996) and also relying upon a guideline for proposition that if a crime was a misdemeanor or a traffic violation the legislature can make it a strict liability crime if it clearly indicates a decision to do so); In *State v. Robinson*, 718 P.2d 1313 (Kan. 1986), the court made reference to the guideline which provided that criminal intent for a crime does not mean that state had to prove that accused knew age of a minor, even though age was a material element of the crime and also making reference to same strict liability guideline discussed in *State v. Mountjoy*, 891 P.2d 376, 381 (Kan. 1995). *Id.* at 1316. Later, the court made reference to the legislative history, wherein legislature rejected "defense" of reasonable belief that person to whom liquor was sold was not a minor. *Id.* *See also* State v. Cantrell, 673 P.2d 1147, 1153 (Kan. 1983) (identifying earlier Kansas culpability level of willfulness (instead of current intentional and wantonness and instead of current recklessness), and making reference to guideline providing that prosecution burden is to establish willfulness, unless crime expressly provided that the act is criminal if done wantonly); State v. Seamen's Club, 691 A.2d 1248, 1251 (Me. 1997) (making reference to guideline that even if no culpable mental state is expressly stated in definition of crime, one is presumptively required in context of possession of "short" lobsters Class D crime but eventually concluding that the circumstantial element of the size of the lobsters was a strict liability element); State v. Fowler, 676 A.2d 43, 45 (Me. 1996) (making reference to same guideline as in *State v. Seamen's Club*, 691 A.2d 1248, 1251 (Me. 1997)); State v. Dana, 517 A.2d 719, 719-20 (Me. 1986) (making reference to same guideline as in *State v. Seamen's Club*, 691 A.2d 1248 (Me. 1997), noting that it normally applied to crimes defined outside of the penal code and also relying upon historical rule of statutory construction that criminal provisions are to be strictly construed); State v. Morey, 427 A.2d 479, 482-83 (Me. 1981) (relying upon its conclusion that crime incorporated by reference a culpable mental state, and upon guideline it interpreted to mean that the culpable mental state inserted in the crime presumptively applied to every objective element of crime but also placing reliance on same guideline as in *State v. Seamen's Club*, 691 A.2d 1248 (Me. 1997)); State v. Davis, 398 A.2d 1218, 1219 (Me. 1979) (creating a presumption, as in *State v. Seamen's Club*, 691 A.2d 1248 (Me. 1997), that some level of culpability is required even if none is stated, and holding that this guideline applied to traffic offense defined outside the penal code); State v. Carson, 941 S.W.2d 518, 522 (Mo. 1997) (assessing the significance of the Missouri legislature's repeal of the culpability ascertaining guideline stating if no requisite culpability is stated, presumptively the prosecution must still prove at least recklessness); State v. Jones, 865 S.W.2d 658, 661 (Mo. 1993) (making reference to repeal of the same guideline as in *State v. Carson*, 941 S.W.2d 518 (Mo. 1997) and also to guideline that strict liability is not presumed from failure of legislature to include a culpable mental state); State v. Munson, 714 S.W.2d 515, 522 (Mo. 1986) (holding that requisite culpability guidelines do not apply to crimes defined outside of code, when enacted after code and with specific culpability identified). In *State v. Beishir*, 646 S.W.2d 74 (Mo. 1983), the court made express reference to guideline, at this point still part of the code, that at least recklessness must be proven, even when no culpability is expressly stated for the crime. *Id.* at 77. It also relied upon guideline that legislature must clearly indicate intention to abandon mens rea. *Id.* Finally, the court made reference to specific guideline that with regard to circumstantial element -- age of the victim under fourteen -- that it is no

defense that the defendant believed the child to be fourteen years or older. *Id.* at 79. In *State v. Green*, 629 S.W.2d 326 (Mo. 1982), the court made express reference to guideline which created presumption that penal code provisions apply to crimes outside of the code, including the obtaining or attempting to obtain by fraud a controlled substance. *Id.* at 328. It also made express reference to guideline, in effect in 1982, that when no culpability is stated, at least recklessness must nevertheless presumptively be proven by the prosecution. *Id.* Finally, the court made express reference to guideline identifying criteria to be used to determine unusual situations where strict liability decision was made by the legislature. *Id. See also* State v. Huebner, 827 P.2d 1260 (Mont. 1992) (making reference to guideline sanctioning possibility of strict liability for crimes for which punishment was limited to fine of $500 or less, or those where legislature has clearly manifested intent to eliminate any level of culpability and ignoring the significant jail penalty that could be imposed for a waste of game misdemeanor, concluding that legislature so intended); State v. Brown, 755 P.2d 1364, 1367-68 (Mont. 1988) (making reference to guideline that norm is that some level of culpability must by proven by the prosecution with respect to each element of the crime); State v. Haines, 709 A.2d 762, 766-67 (N.H. 1998) (finding that the legislative purpose was to broadly deter use of body armor, even if the accused did not use the body armor to facilitate the commission of the felony and therefore knowledge was appropriate culpable mental state with regard to this circumstantial element); State v. Bergen, 677 A.2d 145, 147 (N.H. 1996) (making reference to culpable mental state level decided upon for same crime by another state which was expressly referred to by the Commission revising the New Hampshire Criminal Code). In *People v. Ryan*, 626 N.E.2d 51 (N.Y. 1993), the court asserted the general rule of construction of criminal culpability that legislative intent to impose strict liability with regard to an element of crime should only be concluded when such intent is clearly indicated. *Id.* at 54. Next, it made reference to the guideline that a crime is a crime of mental culpability when a mental state is required with respect to every material ("objective") element of the crime. *Id.* The court relied on the guideline that when only one culpability concept appeared in the statute defining the offense, it is presumed to apply to every element of the offense, unless an intent to limit its application clearly appears. *Id. See also* People v. McNamara, 585 N.E.2d 788, 792 (N.Y. 1991) (implying rule of construction that the culpability required for proposed and predecessor crimes should be used to ascertain requisite culpability for crime charged in case); State v. McDowell, 312 N.W.2d 301, 303 (N.D. 1981) (making reference to guideline that even when no culpability concept is stated in a crime, the prosecution must still prove "willfully," but then ruling that it was inapplicable to crimes defined outside of penal code and relying on the legislature's deletion of "knowing" from the crime in 1961 to conclude that the intent of the legislature was to make "uttering" a check with insufficient funds a strict liability misdemeanor); State v. Goetz, 312 N.W.2d 1, 11 (N.D. 1981) (making reference to same guideline as in *State v. McDowell*, 312 N.W.2d 301 (N.D. 1981) but again rejecting its application to crime charged); State v. Schlosser, 681 N.E.2d 911, 913-14 (Ohio 1997) (making reference to the guideline that in the absence of any degree of culpability in crime and when there is no clear indication of legislative intent to impose strict liability, presumptively "recklessness" must be proven by the prosecution and relying on federal interpretations of federal RICO statute and superficial reading of state legislative history (sponsor characterized state RICO statute as state of the art and toughest) to conclude that legislature intended to impose strict liability for the state RICO crime); State v. McGee, 680 N.E.2d 975, 977 (Ohio 1997) (making a reference to the same guideline -- presumption of "recklessness" as in *State v. Schlosser*, 681 N.E.2d 911 (Ohio 1997), and applying it to endangering children crime, also relying on implied rule of construction that used to determine the appropriate culpability for crime charged, the previously determined culpable mental state for other subsections of the same crime -- here endangering children); State v. Warner, 564 N.E.2d 18, 48 (Ohio 1990) (making reference to common law guideline that where no culpability is asserted in crime, legislature presumptively intended no more than general intent and also making express reference to same guideline -- presumption of "recklessness" as in *State v. Schlosser*, 681 N.E.2d 911 (Ohio 1997)); State v. Young, 525 N.E.2d 1363, 1368 (Ohio 1988) (making reference to and relying upon same guideline -- presumption

of "recklessness" as in *State v. Schlosser*, 681 N.E.2d 911 (Ohio 1997)); State v. Guthrie, 741 P.2d 509, 510 (Or. 1987) (making reference to guideline that strict liability is intended by legislature only if charge is a "violation," the most minor crime category, and that violation was defined without inclusion of a culpable mental state; or a de facto violation, in that it is a crime defined outside of the Criminal Code and legislature intended to impose strict liability for the offense); State v. Chang Hwan Cho, 681 P.2d 1152, 1154-55 (Or. 1984) (making reference to same guideline as in *State v. Guthrie*, 741 P.2d 509 (Or. 1987) and making reference to the second guideline that when no culpability is stated in crime, at least negligence must be proven); State v. Langan, 652 P.2d 800, 804 (Or. 1982) (making reference to the statutory guideline that if one culpable mental state is stated in a crime it presumptively applies to all "material" elements of that crime that necessarily requires a culpable mental state and finding for circumstantial element of "unlawful" prosecution must prove accused "knowingly," that is, the accused was aware of facts that made the gambling unlawful, but not the law condemning the facts). In *State v. Buttrey*, 651 P.2d 1075 (Or. 1982), the court made reference to the general criminal code goal of limiting condemnation of conduct as criminal without fault and also made reference to the guideline that even if no culpability is stated, one is required, and state must prove at least negligence. *Id.* at 1077-78. The court made express reference to the guideline that legislature must clearly indicate decision to impose strict liability for a crime defined outside of the criminal code, or for a material element of such a crime. *Id.* at 1079. Finally, the court placed reliance on specific legislative history of the driving while license is suspended crime. *Id.* at 1079-80. In *State v. Blanton*, 588 P.2d 28 (Or. 1978), the court made reference to the guideline that presumptively a culpable mental state must be proven for each material element of the crime and also made reference to the Commentary of the Criminal Law Revision Commission for support of the guideline that each element of crimes outside of Criminal Code presumptively must be accompanied by a culpable mental state, unless legislative intent to impose strict liability for an element, or elements, or crime as a whole is clear. *Id.* at 29. It referred to confusing guideline language that culpability is required for each material element of each crime that necessarily requires a culpable mental state and found that the qualifying phrase interjected element of circularity into the provision, which it broke by interpreting the qualifying phrase as referring to only procedural requirements such as the statute of limitations or jurisdiction. *Id.* *See also* State v. Schmiedt, 525 N.W.2d 253, 256 (S.D. 1994) (defining aggravated assault to refer to result element, or attempting same result element, or attempting with conduct of physical menace with a deadly weapon to put someone in fear with regard to the same result and relying on its earlier decision which held that these versions of aggravated assault require only proof of general intent); State v. Nagel, 279 N.W.2d 911, 915 (S.D. 1979) (making reference to another crime in same state securities law which had express culpability requirement to infer that the securities crime with which accused was charged, which had no express culpability, signaled legislative intent to impose strict liability); State v. Carson, 950 S.W.2d 951, 953 (Tenn. 1997) (making reference to Tennessee Sentencing Commission, which was responsible for penal code revision, as authority for assertion that its revised provision on liability for criminal conduct of another was simply a restatement of the principles of Tennessee common law of parties and also making reference to the guideline of the "Sentencing Reform Act" (revised penal code) that statute should be interpreted according to its fair import, including reference to judicial decisions and common law interpretations); State v. Larsen, 865 P.2d 1355, 1359 (Utah 1993) (relying on purpose section of Uniform Securities Law to identify inference that to interpret it uniformly with other states enacting the same uniform law and finding, as have courts from those states, that no "scienter" culpability is required as an element of the securities crime charged in the case); State v. Calamity, 735 P.2d 39, 43 (Utah 1987) (making reference to guideline that when no culpable mental state is stated, and no strict liability implied, the state must prove at least recklessness). In *State v. Fontana*, 680 P.2d 1042 (Utah 1984), the court first made reference to guideline that, to be convicted of any crime, defendant must have acted intentionally, knowingly, recklessly, or with criminal negligence with regard to each element of the offense, unless the prohibited act is based upon strict liability. *Id.* at 1045. It noted

that in 1983 the legislature had deleted the words with respect to each element of the offense and made express reference to guideline that when no culpability concept is expressly stated, intentionally, knowingly, or recklessness shall suffice. *Id.* at 1045 n.2. It then asserted that its task was to determine which of these three concepts is the appropriate/requisite culpable mental state for the crime of depraved indifference murder. *Id.* at 1045-46. The court ruled out recklessness as the correct culpable mental state because the legislature had amended the depraved heart murder provision to delete that concept from the definition. *Id.* at 1046. In *State v. Elton*, 680 P.2d 727 (Utah 1984), the court made reference to guideline that to be convicted of any crime, defendant must have acted intentionally, knowingly, recklessly, or with criminal negligence with regard to each element of the offense, unless the prohibited act is based upon strict liability and asserted that a crime is a strict liability crime only if the statute specifically so provides. *Id.* at 729. The court made reference to guideline that, where crime definition omits reference to a culpability concept, intent, knowledge, or recklessness, shall suffice. *Id.* It made reference to guideline that requisite culpability must be proven with regard to each element of an offense. *Id.* The court applied the latter guideline to the circumstantial element of the age of the victim (sixteen or less) in the crime of unlawful sexual intercourse. *Id.* at 729-30. *See also* State v. Stepniewski, 314 N.W. 2d 98, 101 (Wis. 1982) (making reference to another crime with similar crime definition language, but concluding that, because disjunctive word "or" was deleted from crime charged, the culpability concept of "intentionally" did not attach to the conduct element of "neglects or fails to obey trade violation regulations"); State v. Collova, 255 N.W.2d 581, 584n.2 (Wis. 1977) (making reference to guidelines in the criminal code, but apparently concluded that such guidelines could not be used when the crime, the culpability of which was under analysis, was in a statute outside the criminal code).

[44] In *Phillips v. State*, 728 So.2d 681 (Ala. Crim. App. 1998), the court made reference to justification for strict liability that proving culpability would make crime difficult to prove. It also referred to the policy consideration that strict liability is more appropriate when the crime is not severely punished or significantly stigmatizes the accused, and also made reference to the policy that it is more appropriate to impose strict liability for a crime when the crime does not have its origins in the common law. *Id.* The court also made reference to a synthesis of "strict liability" crime types and policy justifications by two commentators. *Id.* Finally, the court made reference to interpretations by federal courts of migratory bird crime which the court found analogous to state crime under review and asserted that these federal decisions universally held the migratory bird crime to be a strict liability crime. *Id. See also* State v. Jennings, 722 P.2d 258, 261-62 (Ariz. 1986) (placing reliance on specific prior precedent and principle that strict liability is the exception to be found only where legislative intent is clear); State v. Williams, 698 P.2d 732, 734 (Ariz. 1985) (holding that "knowledge" is the appropriate culpable mental state for the circumstantial element of having a suspended license, and reasoning that, without requiring this level of culpability, citizens could be convicted of a crime and deprived of their liberty based on mistaken identity or unwittingly voiding his or her automobile insurance); Spitz v. Municipal Ct., 621 P.2d 911, 913 (Ariz. 1980) (placing reliance upon policy that low or no culpability is appropriate to maximize protection of children); People v. Hering, 976 P.2d 210, 213 (Cal. 1999) (relying on court-made doctrine that there is no significant difference between definitions of "specific" and "general" intent unless the defendant argues specific "mental defenses" such as voluntary intoxication, mental disease, or mental impairment); People v. Sargent, 970 P.2d 409, 415 (Cal. 1999) (asserting policy that courts should use interpretations of separate crimes designed to protect children and elderly to aid in the other's interpretation). In *State v. Swain*, 718 A.2d 1 (Conn. 1998), the court made reference to states which, with regard to similar misdemeanor (and a few felony) crimes of driving with a suspended license, held that subjective levels of culpability were or were not required with regard to the circumstantial element of "suspended license." *Id.* at 6. It also made reference to authority of legislature to dispense with mens rea, and the qualifying principle that some level of culpability is presumed with regard to crimes which originated in the common law as well as to the policy that

regulatory crimes may have that purpose frustrated if the state must prove a subjective level of culpability, and made approving reference to the policy that culpability can be eliminated even for a crime that is graded to require imprisonment and whether the punishment serves as an effective means of regulation. *Id.* at 7-8. The court made reference to legislative goal of deterring "carnage" on state highways and finally made reference to its prior decisions finding strict liability appropriate to protect public's health or financial welfare. *Id.* at 8. *See also* State v. Tedesco, 397 A.2d 1352, 1358 (Conn. 1978) (making reference to principle that penal laws are to be strictly construed as support for finding that the appropriate culpability must be intent to deceive when the term "falsely swearing" was used in the crime); State v. Torres, 660 P.2d 522, 524 (Haw. 1983) (making express reference to *Morissette v. United States*, 342 U.S. 246 (1952), for principle that requirement of a culpable mental state is deeply rooted and remains the rule rather than the exception); State v. Rushing, 612 P.2d 103, 106 (Haw. 1980) (making reference to Model Penal Code commentary, and reliance upon it in Hawaii Penal Code's commentary for proposition that culpability is norm); State v. Fox, 866 P.2d 181, 182 (Idaho 1993) (relying on its own precedent analyzing the appropriate culpable mental state). In *State v. Stiffler*, 788 P.2d 220 (Idaho 1990), the court focused upon the policy that in determining the appropriate culpable mental state, the purposes underlying the crime (here, statutory rape) should be examined and found that two of three purposes it identified for the crime suggested one level of culpability, while a third suggested a lower level of culpability. *Id.* at 222-23. It decided that the appropriate level is that suggested by the third purpose. *Id.* The court identified a policy of comparing crime in question to other similar crimes as to whether each crime had an express culpability proviso. *Id.* at 223-24. *See also* People v. Anderson, 591 N.E.2d 461, 465 (Ill. 1992) (placing reliance on policy that imprisonment should, in most instances, only be a permissible penalty based upon a finding that the accused was at fault); People v. Gean, 573 N.E.2d 818, 821 (Ill. 1991) (making reference to precedent and policy that severity of punishment is an important factor in determining if legislature intended strict liability crime or element). In *People v. Sevilla*, 547 N.E.2d 117 (Ill. 1989), the court relied on policies underlying the criminalization -- the evils to be remedied and purposes to be achieved. *Id.* at 119. It articulated a policy that when conduct is sanctioned by both criminal and civil liability, the criminal sanction implies the need to prove culpability to avoid the harsh outcome of potentially depriving a person of liberty for same conduct that could receive only a civil sanction. *Id.* at 121.The court made reference to principle that the severity of punishment is a policy factor in determining if culpability is required or the level of culpability, and the companion principle that increasing the penalty for a crime increased likelihood that legislative intent was to require culpability. *Id.* at 122. The court made reference to principle that, to determine the appropriate culpable state for a crime or a specific objective element, lawyers should examine the culpability levels for parallel state crimes, and for identical or similar federal crimes. *Id.* at 124. *See also* People v. Whitlow, 433 N.E.2d 629, 633-34 (Ill. 1982) (making reference to policy that severity of punishment is an important factor in determining if legislature intended strict liability crime or element, and making reference to principle that to identify the appropriate culpability level, courts should examine the culpability levels for identical or similar federal crimes); People v. Valley Steel Prods. Co., 375 N.E.2d 1297, 1304-05 (Ill. 1978) (asserting principle that the fact that the crime was graded as a felony, and the potential length of imprisonment if the accused was convicted, suggested some level of culpability must be proven); State v. Neuzil, 589 N.W.2d 708, 711 (Iowa 1999) (making reference to policy goal of not requiring proof of subjective culpability in order to avoid the possibility that a disturbed person accused of stalking would claim that he believed he was not trying to frighten the person targeted); State v. Buchanan, 549 N.W.2d 291, 294 (Iowa 1996) (implying policy that strict liability may be warranted when the purpose of criminalizing interference with an officer would be furthered by eliminating any culpability requirement); State v. Freeman, 450 N.W.2d 826, 826-27 (Iowa 1990) (relying on precedent for comparing culpability of crime charged to that previously assigned to similar crimes, and to principle that crimes consist of acts and culpability); Saadiq v. State, 387 N.W.2d 315, 323 (Iowa 1986) (relying on distinction between general and specific intent as partial basis for rejecting accused's claim that he must

know he had previously committed a felony to be subsequently convicted of the crime of being a felon in possession of a firearm); Eggman v. Scurr, 311 N.W.2d 77, 78 (Iowa 1981) (asserting principle that crimes consist of acts and culpability and relying on principle comparing culpability of theft crime in question to that assigned by the legislature and interpreted by the courts for other theft crimes to conclude that all theft crimes require at least "general intent"). In *State v. Conner*, 292 N.W.2d 682 (Iowa 1980), the court placed reliance on the principle that the appropriate culpability should be determined by comparing relative punishments for sequence of related crimes (here, homicide crimes) to conclude that the involuntary manslaughter category punished as a felony must require culpability of recklessness, since less severely punished manslaughter category required proof of recklessness. *Id.* at 684. The court placed reliance on the principle that ascertaining culpability requires reliance on the purpose and design of the criminalization. *Id.* at 685. Later, the court placed reliance on principle that looks to the culpability required at common law for a traditional crime to interpret the culpability for the same or a similar crime enacted by the legislature and also placed reliance on policy that it is unfair to impose strict liability for a crime because an accused may not be morally blameworthy. *Id.* at 687. *See also* State v. Lewis, 953 P.2d 1016, 1022-23 (Kan. 1998) (making reference to prior case policy analysis of when strict liability was appropriate to maximize protection of public health); State v. Mountjoy, 891 P.2d 376, 381-85 (Kan. 1995) (engaging in extensive discussion of precedent, both federal and state, to identify the policies that should be considered in determining if it is appropriate to impose strict liability and relying on a policy of maximizing protection of public to hold that violation of "Healing Arts" misdemeanor crime was a strict liability crime.); State v. Seamen's Club, 691 A.2d 1248, 1251 (Me. 1997) (making reference to precedent to imply policy that to ascertain the appropriate culpable mental state, or if strict liability is appropriate, courts should rely on the culpability assigned prior to the revision of the penal code to the category of crimes to which crime charged belonged); State v. Dana, 517 A.2d 719, 719-20 (Me. 1986) (expressing policy preference for requiring culpability); State v. Morey, 427 A.2d 479, 483-84 (Me. 1981). In *State v. Carson*, 941 S.W.2d 518 (Mo. 1997), the court relied on precedent to identify policy that serious felonies require proof of culpability for objective element(s) and also placed reliance on the policy that the culpability level previously identified by the court as appropriate for an antecedent crime is significant in selecting the appropriate culpability level for the current crime. *Id.* at 520-21. The court placed reliance on policy that the various objective elements used by the legislature to define the same crime in a variety of ways, should be construed to have the same level of culpability at least with regard to the crucial conduct or conduct substitute (here, possession) objective element. *Id.* Finally, the court identified and placed reliance on the policy that the appropriate culpability level for a greater crime should be the same or higher then that for a lesser crime. *Id. See also* State v. Beishir, 646 S.W.2d 74, 76 (Mo. 1983) (holding that due process and fundamental fairness are not violated by legislative decision that made deviate sexual intercourse felony a strict-liability crime). In *State v. Bergen*, 677 A.2d 145 (N.H. 1996), the court articulated policy that legislative guideline requiring some level of culpability, even when crime definition omits reference to culpability, is in actuality a directive to the courts to employ policy analysis to ascertain the appropriate level of culpability. *Id.* at 146. It went on to place reliance on culpability for the common law antecedent crime to current public lewdness statute. *Id.* Later, the court assessed what level of culpability it thought was needed to prevent criminalization of innocent conduct and decided "knowingly" was sufficient to protect accused charged with indecent exposure. *Id.* at 147. In *People v. Ryan*, 626 N.E.2d 51 (N.Y. 1993), the court asserted the policy that the grades of same crime, carrying significantly different penalties, differentiated only by circumstantial element of the weight of the controlled substance possessed, is evidence that legislature intended to require culpable mental state for that weight element. *Id.* at 54-55. It asserted the policy that the appropriate culpability for a circumstantial element of a crime, which significantly changed the grade of the crime, should be set high enough so as to make the criminalization scheme consistent with policies of individual responsibility and proportionality prevalent in the Penal Law. *Id.* In *People v. McNamara*, 585 N.E.2d 788 (N.Y. 1991), the court used the culpability required for

comparable crimes in other jurisdictions as guidance for determining the appropriate culpable mental state. *Id.* at 791. It articulated a policy that the determination of the appropriate culpability level should be guided by the particular evil at which it is directed. *Id.* In *People v. Coe*, 522 N.E.2d 1039 (N.Y. 1988), the court used a Model Penal Code provision, which equated common-law culpability concept of "willfully" to its culpability concept of "knowingly," to equate "willfully" in public health law crimes to "knowingly" in its state penal code. *Id.* at 1040. It asserted a policy that strict liability for crimes in the public health statute would result in criminalization of seemingly innocuous conduct. *Id.* The court identified a policy that protection of public requires rejection of interpreting such crimes to require evil motive or purposeful violation of public health law regulations. *Id.* In *State v. McDowell*, 312 N.W.2d 301 (N.D. 1981), the court concluded that it is appropriate to impose strict liability for a misdemeanor that includes up to thirty days in jail in its punishment options. *Id.* at 303. It undertook an extended analysis of United States Supreme Court decisions, with *Morissette v. United States*, 342 U.S. 246 (1952), as the centerpiece. *Id.* at 303-05. The court reviewed these decisions to glean guidance on when it was appropriate to impose strict liability for a crime. *Id.* The court concluded that one guideline emerging from these decisions was whether the crime in question had common law origins. *Id.* Because the crime in question was not found in the core penal code, the court concluded that presumptively it was not a common law crime, thereby supporting a conclusion of strict liability. *Id.* at 306. Second, the court found that these decisions provided a guideline with regard to evaluating societal policy goals, that the goal of this crime was to prevent business chaos that could result from the presentment of insufficient funds checks, and therefore the legislature intended a strict liability crime. *See McDowell*, 312 N.W.2d at 303-05. Finally, the court revisited the penalty for the crime and concluded that United States Supreme Court decisions had imposed strict liability for crimes more severely punished, and that a misdemeanor conviction does not carry with it the repercussions of a felony conviction. *Id.* at 307. *See also* State v. Goetz, 312 N.W.2d 1, 11 (N.D. 1981) (rejecting the accused's assertion that "evil intent" was required in securities crime because such culpability would exceed that required for penal code crimes). In *State v. Schlosser*, 681 N.E.2d 911 (Ohio 1997), the court concluded that the state's RICO statute imposed strict liability, in part because this would maximize promotion of the good of the public welfare, without seriously violating liberty interests of individuals because everyone who engaged in corrupt practices has an adverse impact on local and national economies and hence should be punished. *Id.* at 914-15. It asserted principle that more serious are consequences of crime to public, more likely legislative intent was to impose strict liability. *Id.* The court asserted, without reference to any evidence, that to require recklessness would cripple RICO'S intended effect of stopping criminal enterprises. *Id.* at 915. In *Willams v. State*, 565 P.2d 46 (Okla. Crim. App. 1977), the court stated the basic criminal law policy premise with approval -- "criminal intent is the essence of all criminal liability." *Id.* at 48. It focused upon ascertaining whether culpability was required if crime made no reference to it by asserting if crime was one of moral turpitude as contrasted with a crime properly characterized as mala prohibitum, culpability must be proven by the state. *Id.* In *State v. Chang Hwan Cho*, 681 P.2d 1152 (Or. 1984), the court asserted that the legislative and judicial policy was to limit criminalization without fault so that crimes outside the criminal code as well as those in the code are to be presumptively construed or were held after policy analysis to have a culpable mental state. *Id.* at 1156-57. The court endorsed the principle that if a crime is punished so as to potentially injure an accused's liberty interest, this is a strong reason to conclude that some level of culpability must be proven by the prosecution with regard to the crime, even if no culpability concept is found in the crime definition. *Id.* It implied that simply because criminalization is designed to protect public property does not justify strict liability. *Id.* In *State v. Buttrey*, 651 P.2d 1075 (Or. 1982), the court relied on precedent for the principle that strict liability is justified for public welfare crimes, but not for crimes rooted in the common law. *Id.* at 1075-76. It subsequently used this principle to eventually support a felony conviction for driving while a license was suspended, despite severity of penalty and the claim of this accused that he was unaware his license was suspended. *Id.* The court articulated the principle that blameless people may be criminalized to eradicate

evil and relied on the principle that strict liability is justified when requiring proof of culpability may make successful prosecution difficult. *Id.* at 1077. In *State v. Nagel*, 279 N.W.2d 911 (S.D. 1979), the court placed reliance upon the policy underlying the crime -- here the "Blue Sky" securities regulation law, which it identified as maximizing the protection of inexperienced investors. *Id.* at 914-15. It concluded that this purpose warranted imposing strict liability, however, it did not demonstrate that it was aware of the difference in policy implications for imposing strict liability for all of the objective elements of the crimes involved, or just the circumstantial element of "unregistered." *Id.* The court attempted to distinguish United States Supreme Court holdings in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), and *Morissette v. United States*, 342 U.S. 246 (1952). The court, to distinguish *United States Gypsum Co.*, which held that the prosecution must prove culpability, asserted that anti-competitive conduct is more vague and more likely to encompass innocent conduct then is conduct related to sales of securities. *Id.* It asserted that securities crimes were like public welfare crimes which the *Morissette* court stated could be strict liability crimes (or an element could be strict liability) in part because an accused by checking could determine that conduct was wrong). *Id.* In *State v. Larsen*, 865 P.2d 1355 (Utah 1993), the court relied on precedent to identify policy that called for rejecting inclusion of a "scienter" requirement in a securities fraud crime. *Id.* at 1358-59. Also, the court distinguished appropriate culpability for this state crime from the United States Supreme Court decision in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), which held that a federal securities crime did require "scienter" as the culpability for the crime. *See Nagel*, 279 N.W.2d at 914-15. *See also* State v. Fontana, 680 P.2d 1042, 1045 (Utah 1984) (implying policy of employing precedent from another state to evaluate culpability for depraved indifference murder). In *State v. Elton*, 680 P.2d 727 (Utah 1984), the court asserted to determine the requisite culpable mental state for the circumstantial element of the age of the victim (sixteen or less) for the crime of unlawful sexual intercourse, the purpose(s) for criminalization must be examined. *Id.* at 729. One such purpose is to deter persons from engaging in sexual intercourse with a young, immature person, and thereby avoid risks of unexpected pregnancies. *Id.* In light of that purpose, counterbalanced by long established requirements for some level of culpability, the court decided that criminal negligence is the appropriate culpability for the age of the victim element. *Id.* It identified and then rejected the policy justifications for the position taken in many jurisdictions that strict liability should be imposed with regard to the age of the victim as a circumstantial element in a crime involving consensual sex with a young woman. *Id.* at 730. It identified and rejected what it implied was conceptually flawed use of doctrine of transferred intent in majority jurisdictions. *Id.* The court held it was unfair therefore to hold the accused morally responsible with regard to the age of his consenting sex partner because the accused was engaging in crime (fornication). *Elton*, 680 P.2d at 731. It found that this policy justification turned the doctrine of lesser included crimes on its head, and was potentially fundamentally unfair. *Id.* *See also* State v. Lakey, 659 P.2d 1061, 1063 (Utah 1983) (implying, based upon two prior precedent cases, the policy that the appropriate culpability for theft by false pretense must be purpose, and noting that these cases had held when an accused gave person a postdated check or otherwise knew check was to be held for a time before presentment, such a person could not be convicted of crime); State v. Stepniewski, 314 N.W.2d 98, 101-05 (Wis. 1982) (reviewing history in federal and state law of public welfare offenses which impose strict liability, and making express reference to policies justifying strict liability -- relatively small penalties and need to protect public from potential harm). In *State v. Collova*, 255 N.W.2d 581 (Wis. 1977), the court expressly recognized that when the legislature failed to decide on the appropriate culpable mental state for a crime, the courts must then ascertain the legislative intent, but went on to determine the requisite culpability by a policy analysis. *Id.* at 584. It cited to the principle that the element of "scienter" was rule with regard to the definitions of crimes. *Id.* at 584-85. The court cited to the public welfare offense category exception to the requirement of culpability, and identified key rationales for strict liability to include regulatory origins, assumption of risks, administrative efficiency, small penalties, and the need to effectively protect the public. *Id.* at 585. It then focused upon the

relatively severe penalty if convicted of this misdemeanor of driving while one's license was suspended or revoked (mandatory minimum of ten days in county jail), to conclude that some level of culpability must be proved by the state with regard to circumstantial element that the driver's license must be suspended or revoked at the time the person is driving. *Id.* at 587. The court finally decided that simple negligence would suffice as appropriate culpable mental state. *Id.* at 588. In *People v. Brown*, 457 N.E.2d 6 (Ill. 1983), the court employed precedent, principle, and policy to try to justify its conclusion that the legislature intended to create a strict liability crime. *Id.* at 7-8. This analysis is flawed by the fact that by the court's own admission that statute criminalizes innocent persons, the purpose of criminalization was to deter theft of automobiles, and theft as a traditional crime almost universally held to be a crime requiring proof of relatively high culpability. *Id.* at 9. *See also* State v. Young, 525 N.E.2d 1363, 1369 (Ohio 1988) (focusing so heavily on deciding whether recklessness, its statutory default culpability, would satisfy the constitutional "scienter" requirement for criminalizing possession of child pornography that it completely ignored policy and precedent which had long established "knowingly" as the appropriate/requisite culpable mental state for possession crimes).

[45] State v. Tedesco, 397 A.2d 1352, 1359 (Conn. 1978) (holding that the trial record provided a basis for concluding that accused might have been acquitted if the jury had been instructed on the correct level of culpability with regard to the conduct element of the crime charged, though its analysis was without reference to specific facts in the appellate record); State v. Fox, 866 P.2d 181, 182 (Idaho 1993) (holding that trial record provided adequate evidence that the defendant knew he possessed particular prohibited drug, and defendant was actually claiming that there was inadequate evidence to prove that he knew the drug was illegal); People v. Sevilla, 547 N.E.2d 117, 123 (Ill. 1989); State v. Buchanan, 549 N.W.2d 291, 294 (Iowa 1996) (holding that the circumstantial element of a serious misdemeanor, obstructing or resisting a police officer, was a strict-liability element and thus the record need not establish a reasonable basis for finding that the accused was aware that the person he was resisting was a police officer); State v. Cantrell, 673 P.2d 1147, 1150 (Kan. 1983); State v. Morey, 427 A.2d 479, 481, 485 (Me. 1981); State v. Davis, 398 A.2d 1218, 1220 (Me. 1979); State v. Carson, 941 S.W.2d 518, 522 (Mo. 1997) (focusing upon accused's claim that he lacked knowledge about possession of the controlled substance); State v. Jones, 865 S.W.2d 658, 661-62 (Mo. 1993); State v. Munson, 714 S.W.2d 515, 524-26 (Mo. 1986); State v. Brown, 755 P.2d 1364, 1368 (Mont. 1988); State v. Haines, 709 A.2d 762, 767 (N.H. 1998) (deciding that "knowledge" rather than "purpose" was appropriate culpable mental state, making express reference to accused's claim that evidence was insufficient to prove guilt if culpable mental state was "purpose" and finding that the accused was not even attempting to argue that he was unaware he was wearing body armor at the time of the commission of the felony); People v. Ryan, 626 N.E.2d 51, 57 (N.Y. 1993); People v. McNamara, 585 N.E.2d 788, 792-93 (N.Y. 1991) (focusing upon whether the charging instrument alleged facts adequate to prove that a parked vehicle was a "public place" for purposes of the state's public lewdness crime); People v. Coe, 522 N.E.2d 1039, 1041 (N.Y. 1988); State v. Schlosser, 681 N.E.2d 911, 915 (Ohio 1997); State v. McGee, 680 N.E.2d 975, 977 (Ohio 1997); State v. Young, 525 N.E.2d 1363, 1369 (Ohio 1988); State v. Guthrie, 741 P.2d 509, 510 (Or. 1987) (remanding case to determine if the evidence was sufficient to convict); State v. Chang Hwan Cho, 681 P.2d 1152, 1157 (Or. 1984) (concluding that the state had failed to offer evidence to prove accused acted with any level of culpability); State v. Langan, 652 P.2d 800, 804 (Or. 1982) (concluding that the trial record included ample evidence that accused was aware of facts that would make activity in place of business "unlawful" gambling); State v. Olsen, 462 N.W.2d 474, 477 (S.D. 1990) (holding that the state failed to produce evidence that the accused was aware of risk of danger to others, and affirming the preliminary dismissal of second-degree manslaughter charge, though noting that the state need not prove that accused was aware of risk of death); State v. Carson, 950 S.W.2d 951, 956 (Tenn. 1997) (holding that the record established that the accused, who waited outside while planned armed robbery took place, was also guilty

of aggravated assault and the reckless endangerment crimes committed by his co-defendants because they were foreseeable in light of the robbery); State v. Wilson, 924 S.W.2d 648, 651-52 (Tenn. 1996) (focusing on the result element of assault and whether the state had proved at least that the accused was aware that conduct would put a reasonable victim in fear of imminent bodily injury and concluding (probably erroneously) that the state failed to prove that accused was aware of that fact to a reasonable certainty that when he and cohorts fired several gunshots into a dwelling); State v. Fontana, 680 P.2d 1042, 1048 (Utah 1984); State v. Lakey, 659 P.2d 1061, 1064 (Utah 1983); State v. Kemp, 318 N.W.2d 13, 20 (Wis. 1982); State v. Collova, 255 N.W.2d 581, 586 (Wis. 1977).

[46] State v. Silveira, 503 A.2d 599, 603-04 (Conn. 1986) (making an express and implicit recognition); State v. Pinero, 778 P.2d 704, 715 (Haw. 1989) (stating that jury instructions must include instruction on the requisite culpability for the elements of the crime charged); State v. Stiffler, 788 P.2d 220, 221 (Idaho 1990) (noting that the precise question the court must address in this case is whether any mistake of accused with regard to the age of the female with whom he had sexual intercourse would disprove the criminal intent required for statutory rape). *See also* State v. Freeman, 450 N.W.2d 826, 826-27 (Iowa 1990) (citing generally to common law for principle that mistake is only a defense when it precludes proof of the mental state necessary to commit the crime). In *State v. Tedesco*, 397 A.2d 1352, 1357 (Conn. 1978), the court partially recognized the doctrine was unnecessary but then recharacterized the defense claim as mistake of law. *Id.* at 1357. It later decided another of defendant's claims of error raised an issue regarding the requisite culpable mental state for the crime charged, and whether the evidence justified the conviction once the requisite culpable mental state was decided upon. *Id.* at 1358-59. The court failed to realize that these defense claims were substantively the same or, at the very least, overlapping. *Id.*

[47] State v. Silveira, 503 A.2d 599, 603 (Conn. 1986).

[48] In *People v. Crane*, 585 N.E.2d 99 (Ill. 1991), the accused, charged with intentional and knowing murder, claimed he acted in self-defense the first time he assaulted the deceased, and that he believed deceased was already dead the second time he burned his prone body. *Id.* at 102. The trial judge rejected defense counsel's request for a mistake-of-fact instruction with regard to the burning because the Illinois statute on mistake of fact made it clear that the doctrine was a way of acknowledging that the accused may not have had the requisite culpable mental state. *Id.* The trial judge's reason for rejecting this request was that he had instructed the jury that the state must prove beyond a reasonable doubt that the accused knew his acts were likely to cause the death of the deceased. *Id.* The Illinois Supreme Court found that the trial judge's actions were grounds for reversal because Illinois statutes expressly recognized the mistake-of-fact defense, and the culpability instruction did not alert the jury to the defense. *Id.* The court ignored completely the more salient point that the trial judge had failed to use the statutory definition of "knowingly" to explain to the jury that the state must prove that the accused was aware of the probability that death would result. *See also* State v. Freeman, 267 N.W.2d 69, 70-71 (Iowa 1978) (noting that the trial judge gave erroneous culpability instruction with regard to the theft charge, but the nature of that error was never identified by the Iowa Supreme Court); State v. Beishir, 646 S.W.2d 74, 77 (Mo. 1983) (characterizing Model Penal Code provision on culpability with regard to the age of the victim in a deviate sexual intercourse case as creating a defense). For further discussion, see *infra* notes 176-80 and accompanying text.

[49] State v. Hazlewood, 946 P.2d 875 (Ala. 1997) (2.5 points); State v. Rice, 626 P.2d 104 (Ala. 1981) (1.5 points); Hentzner v. State, 613 P.2d 821 (Ala. 1980) (2 points); State v. Guest, 583 P.2d 836 (Ala. 1978) (1.5 points); People v. Krovarz, 697 P.2d 378 (Colo. 1985) (4 points); People v. Moore, 674 P.2d 354

(Colo. 1984) (1 point); City of Englewood v. Hammes, 671 P.2d 947 (Colo. 1983) (2.5 points); People v. Mascarenas, 666 P.2d 101 (Colo.1983) (2 points); People v. Andrews, 632 P.2d 1012 (Colo. 1981) (4 points); People v. Bridges, 620 P.2d 1 (Colo. 1980) (.5 point); People v. Washburn, 593 P.2d 962 (Colo. 1979) (1.5 points); Chicone v. State, 684 So.2d 736 (Fla.1996) (2.5 points); State v. Gray, 435 So.2d 816 (Fla. 1983) (1 point); Daniels v. State, 448 S.E.2d 185 (Ga. 1994) (2 points); Jones v. State, 439 S.E.2d 645 (Ga. 1994) (1 point); Potter v. State, 684 N.E.2d 1127 (Ind. 1997) (0 points); Dausch v. State, 616 N.E.2d 13 (Ind. 1993) (1 point); State v. Keihn, 542 N.E.2d 963 (Ind. 1989) (3.5 points); Clarkson v. State, 486 N.E.2d 501 (Ind. 1985) (0 points); State v. Larson, 653 So.2d 1158 (La. 1995) (1.5 points); State v. Cinel, 646 So.2d 309 (La. 1994) (1.5 points); State v. Ritchie, 590 So.2d 1139 (La. 1991) (2.5 points); State v. Chism, 436 So.2d 464 (La. 1983) (1.5 points); State v. Fuller, 414 So.2d 306 (La. 1982) (2.5 points); State v. Duncan, 390 So.2d 859 (La. 1980) (1.5 points); State v. Elzie, 343 So.2d 712(La. 1977) (2.5 points); Outmezguine v. State, 641 A.2d 870 (Md. 1994) (2 points); Garnett v. State, 632 A.2d 797 (Md. 1993) (2 points); Warfield v. State, 554 A.2d 1238 (Md. 1989) (2.5 points); Commonwealth v. Luna, 641 N.E.2d 1050 (Mass. 1994) (.5 point); Commonwealth v. Alvarez, 596 N.E.2d 325 (Mass. 1992) (1 point); Commonwealth v. Schuchardt, 557 N.E.2d 1380 (Mass. 1990) (.5 point); Commonwealth v. Miller, 432 N.E.2d 463 (Mass. 1982) (1 point); People v. Quinn, 487 N.W.2d 194 (Mich. 1992) (2.5 points); People v. Cash, 351 N.W.2d 822 (Mich. 1984) (2 points); In re Welfare of A.A.E., 590 N.W.2d 773 (Minn. 1999) (2.5 points); State v. Orsello, 554 N.W.2d 70 (Minn. 1996) (3 points); State v. Ryan, 543 N.W.2d 128 (Neb. 1996) (1.5 points); State v. Williams, 503 N.W.2d 561 (Neb. 1993) (.5 point); State v. LaFreniere, 481 N.W.2d 412 (Neb. 1992) (2 points); State v. Beck, 471 N.W.2d 128 (Neb. 1991) (.5 point); State v. Meyer, 460 N.W.2d 656 (Neb. 1990) (0 points); State v. Bachkora, 427 N.W.2d 71 (Neb. 1988) (1 point); State v. Schott, 384 N.W.2d 620 (Neb. 1986) (1.5 points); Batt v. State, 901 P.2d 664 (Nev. 1995) (1.5 points); Jenkins v. State, 877 P.2d 1063 (Nev. 1994) (1 point); Robey v. State, 611 P.2d 209 (Nev. 1980) (.5 point); State v. Bridges, 628 A.2d 270 (N.J. 1993) (1.5 points); State v. Sewell, 603 A.2d 21 (N.J. 1992) (5 points); State v. Lashinsky, 404 A.2d 1121 (N.J. 1979) (1.5 points); Santillanes v. State, 849 P.2d 358 (N.M. 1993) (2 points); State v. Pierce, 788 P.2d 352 (N.M. 1990) (2 points); Reese v. State, 745 P.2d 1146 (N.M. 1987) (1.5 points); State v. Lucero, 647 P.2d 406 (N.M. 1982) (1 point); State v. Pierce, 488 S.E.2d 576 (N.C. 1997) (.5 point); State v. Bogle, 376 S.E.2d 745 (N.C. 1989) (1 point); Commonwealth v. Falana, 696 A.2d 126 (Pa. 1997) (0 points); Commonwealth v. Lurie, 569 A.2d 329 (Pa. 1990) (1.5 points); Commonwealth v. Lobiondo, 462 A.2d 662 (Pa. 1983) (3.5 points); State v. Champa, 494 A.2d 102 (R.I. 1985) (.5 point); State v. Rowell, 487 S.E.2d 185 (S.C. 1997) (1.5 points); State v. Bryant, 447 S.E.2d 852 (S.C. 1994) (1.5 points); State v. Jefferies, 446 S.E.2d 427 (S.C. 1994) (3 points); State v. Ferguson, 395 S.E.2d 182 (S.C. 1990) (2 points); Schultz v. State, 923 S.W.2d 1 (Tex. Crim. App. 1996) (2.5 points); Bruno v. State, 845 S.W.2d 910 (Tex. Crim. App. 1993) (1 point); McQueen v. State, 781 S.W.2d 600 (Tex.Crim.App. 1989) (3.5 points); Hill v. State, 765 S.W.2d 794 (Tex. Crim. App. 1989) (.5 point); Kelly v. State, 748 S.W.2d 236 (Tex. Crim. App. 1988) (1 point); Stewart v. State, 718 S.W.2d 286 (Tex. Crim. App.1986) (0 points); Alvarado v. State, 704 S.W.2d 36 (Tex. Crim. App. 1985) (4.5 points); Ledesma v. State, 677 S.W.2d 529 (Tex. Crim. App. 1984) (.5 point); Roof v. State, 665 S.W.2d 490 (Tex. Crim. App. 1984) (1.5 points); Murphy v. State, 665 S.W.2d 116 (Tex. Crim. App. 1983) (0 points); State v. Mott, 692 A.2d 360 (Vt. 1997) (.5 point); State v. Searles, 621 A.2d 1281 (Vt. 1993) (2 points); State v. Sargent, 594 A.2d 401 (Vt. 1991) (3 points); State v. Stanislaw, 573 A.2d 286 (Vt. 1990) (1.5 points); State v. Audette, 543 A.2d 1315 (Vt. 1988) (2 points); State v. Patch, 488 A.2d 755 (Vt. 1985) (.5 point); State v. Groom, 947 P.2d 240 (Wash. 1997) (1 point); State v. Shipp, 610 P.2d 1322 (Wash. 1980) (3.5 points); State v. Stroh, 588 P.2d 1182 (Wash. 1979) (1 point); State v. Brown, 422 S.E.2d 489 (W.Va. 1992) (3 points); Bryan v. State, 745 P.2d 905 (Wyo. 1987) (.5 point); Capshaw v. State, 737 P.2d 740 (Wyo. 1987) (2.5 points); Dorador v. State, 573 P.2d 839 (Wyo. 1978) (2 points).

[50] People v. Krovarz, 697 P.2d 378 (Colo. 1985) (4 points); People v. Andrews, 632 P.2d 1012 (Colo. 1981) (4 points); State v. Sewell, 603 A.2d 21 (N.J. 1992) (5 points); Alvarado v. State, 704 S.W.2d 36 (Tex. Crim. App. 1985) (4.5 points).

[51] State v. Hazlewood, 946 P.2d 875 (Ala. 1997) (2.5 points); Hentzner v. State, 613 P.2d 821 (Ala. 1980) (2 points); City of Englewood v. Hammes, 671 P.2d 947 (Colo. 1983) (2.5 points); People v. Mascarenas, 666 P.2d 101 (Colo. 1983) (2 points); Chicone v. State, 684 So.2d 736 (Fla. 1996) (2.5 points); Daniels v. State, 448 S.E.2d 185 (Ga. 1994) (2 points); State v. Keihn, 542 N.E.2d 963 (Ind. 1989) (3.5 points); State v. Ritchie, 590 So.2d 1139 (La. 1991) (2.5 points); State v. Fuller, 414 So.2d 306 (La. 1982) (2.5 points); State v. Elzie, 343 So.2d 712 (La. 1977) (2.5 points); Outmezguine v. State, 641 A.2d 870 (Md. 1994) (2 points); Garnett v. State, 632 A.2d 797 (Md. 1993) (2 points); Warfield v. State, 554 A.2d 1238 (Md. 1989) (2.5 points); People v. Quinn, 487 N.W.2d 194 (Mich. 1992) (2.5 points); People v. Cash, 351 N.W.2d 822 (Mich. 1984) (2 points); In re Welfare of A.A.E., 590 N.W.2d 773 (Minn. 1999) (2.5 points); State v. Orsello, 554 N.W.2d 70 (Minn. 1996) (3 points); State v. LaFreniere, 481 N.W.2d 412 (Neb. 1992) (2 points); Santillanes v. State, 849 P.2d 358 (N.M. 1993) (2 points); State v. Pierce, 788 P.2d 352 (N.M. 1990) (2 points); Commonwealth v. Lobiondo, 462 A.2d 662 (Pa. 1983) (3.5 points); State v. Jefferies, 446 S.E.2d 427 (S.C. 1994) (3 points); State v. Ferguson, 395 S.E.2d 182 (S.C. 1990) (2 points); Schultz v. State, 923 S.W.2d 1 (Tex. Crim. App. 1996) (2.5 points); McQueen v. State, 781 S.W.2d 600 (Tex. Crim. App. 1989) (3.5 points); State v. Searles, 621 A.2d 1281 (Vt. 1993) (2 points); State v. Sargent, 594 A.2d 401 (Vt. 1991) (3 points); State v. Audette, 543 A.2d 1315 (Vt. 1988) (2 points); State v. Shipp, 610 P.2d 1322 (Wash. 1980) (3.5 points); State v. Brown, 422 S.E.2d 489 (W.Va. 1992) (3 points); Capshaw v. State, 737 P.2d 740 (Wyo. 1987) (2.5 points); Dorador v. State, 573 P.2d 839 (Wyo. 1978) (2 points).

[52] State v. Rice, 626 P.2d 104 (Ala. 1981) (1.5 points); State v. Guest, 583 P.2d 836 (Ala. 1978) (1.5 points); People v. Moore, 674 P.2d 354 (Colo. 1984) (1 point); People v. Bridges, 620 P.2d 1 (Colo. 1980) (.5 point); People v. Washburn, 593 P.2d 962 (Colo. 1979) (1.5 points); State v. Gray, 435 So.2d 816 (Fla. 1983) (1 point); Jones v. State, 439 S.E.2d 645 (Ga. 1994) (1 point); Potter v. State, 684 N.E.2d 1127 (Ind. 1997) (0 points); Dausch v. State, 616 N.E.2d 13 (Ind. 1993) (1 point); Clarkson v. State, 486 N.E.2d 501 (Ind. 1985) (0 points); State v. Larson, 653 So.2d 1158 (La. 1995) (1.5 points); State v. Cinel, 646 So.2d 309 (La. 1994) (1.5 points); State v. Chism, 436 So.2d 464 (La. 1983) (1.5 points); State v. Duncan, 390 So.2d 859 (La.1980) (1.5 points); Commonwealth v. Luna, 641 N.E.2d 1050 (Mass. 1994) (.5 point); Commonwealth v. Alvarez, 596 N.E.2d 325 (Mass. 1992) (1 point); Commonwealth v. Schuchardt, 557 N.E.2d 1380 (Mass. 1990) (.5 point); Commonwealth v. Miller, 432 N.E.2d 463 (Mass. 1982) (1 point); State v. Ryan, 543 N.W.2d 128 (Neb. 1996) (1.5 points); State v. Williams, 503 N.W.2d 561 (Neb. 1993) (.5 point); State v. Beck, 471 N.W.2d 128 (Neb. 1991) (.5 point); State v. Meyer, 460 N.W.2d 656 (Neb. 1990) (0 points); State v. Bachkora, 427 N.W.2d 71 (Neb. 1988) (1 point); State v. Schott, 384 N.W.2d 620 (Neb. 1986) (1.5 points); Batt v. State, 901 P.2d 664 (Nev. 1995) (1.5 points); Jenkins v. State, 877 P.2d 1063 (Nev. 1994) (1 point); Robey v. State, 611 P.2d 209 (Nev. 1980) (.5 point); State v. Bridges, 628 A.2d 270 (N.J. 1993) (1.5 points); State v. Lashinsky, 404 A.2d 1121 (N.J.1979) (1.5 points); Reese v. State, 745 P.2d 1146 (N.M. 1987) (1.5 points); State v. Lucero, 647 P.2d 406 (N.M. 1982) (1 point); State v. Pierce, 488 S.E.2d 576 (N.C. 1997) (.5 point); State v. Bogle, 376 S.E.2d 745 (N.C. 1989) (1 point); Commonwealth v. Falana, 696 A.2d 126 (Pa. 1997) (0 points); Commonwealth v. Lurie, 569 A.2d 329 (Pa. 1990) (1.5 points); State v. Champa, 494 A.2d 102 (R.I. 1985) (.5 point); State v. Rowell, 487 S.E.2d 185 (S.C. 1997) (1.5 points); State v. Bryant, 447 S.E.2d 852 (S.C. 1994) (1.5 points); Bruno v. State, 845 S.W.2d 910 (Tex. Crim. App. 1993) (1 point); Hill v. State, 765 S.W.2d 794 (Tex. Crim. App. 1989) (.5 point); Kelly v. State, 748 S.W.2d 236 (Tex. Crim. App. 1988) (1 point); Stewart v. State, 718 S.W.2d 286 (Tex. Crim. App. 1986) (0 points); Ledesma v. State, 677 S.W.2d 529 (Tex. Crim. App.

1984) (.5 point); Roof v. State, 665 S.W.2d 490 (Tex. Crim. App. 1984) (1.5 points); Murphy v. State, 665 S.W.2d 116 (Tex. Crim. App. 1983); State v. Mott, 692 A.2d 360 (Vt. 1997) (.5 point); State v. Stanislaw, 573 A.2d 286 (Vt. 1990) (1.5 points); State v. Patch, 488 A.2d 755 (Vt. 1985) (.5 point); State v. Groom, 947 P.2d 240 (Wash. 1997) (1 point); State v. Stroh, 588 P.2d 1182 (Wash. 1979) (1 point); Bryan v. State, 745 P.2d 905 (Wyo. 1987) (.5 point).

[53] In *People v. Krovarz*, 697 P.2d 378 (Colo. 1985), the court noted that the trial judge did not isolate the element of the attempted aggravated robbery crime for which the defendant lacked specific intent, and therefore it would analyze the required mental state as it relates to all elements of the crime. *Id.* at 380-81. It expressly recognized that attempted aggravated robbery consisted of all three types of objective elements -- conduct, circumstance, and result -- and expressly asserted that its task was therefore to examine the culpability concept of knowledge in relationship to each of these types of objective elements. *Id.* In *People v. Mascarenas*, 666 P.2d 101 (Colo. 1983), the court reversed an aggravated robbery conviction because it found that the trial court's jury instruction may have given the jury the impression that "knowingly" had to be proven only with regard to the result element of the crime, and not to the conduct element, "taking." *Id.* at 107-08. Hence in this case, in contrast to the cases discussed, *infra* at notes 68-69 and accompanying text, express recognition of the need to attach a culpable mental state independently to each objective element of the crime resulted in the correct outcome in the case. *Id. See also* People v. Andrews, 632 P.2d 1012, 1015 (Colo. 1981); Chicone v. State, 684 So.2d 736, 743 (Fla. 1996) (making an express reference to circumstantial elements of "contraband drug" and "drug paraphernalia"); People v. Quinn, 487 N.W.2d 194, 199 (Mich. 1992) (recognizing that the legislature can require different levels of culpability for different objective elements of the same crime, including imposing strict liability for one element of a crime, but requiring some level of culpability for all other objective elements of the crime); State v. Ryan, 543 N.W.2d 128, 138 (Neb. 1996) (recognizing that mens rea should apply to each of the statutory elements which criminalize otherwise innocent conduct, citing as authority the United States Supreme Court decision in *United States v. X-Citement Video*, 513 U.S. 64 (1994)); State v. Sewell, 603 A.2d 21, 23-25 (N.J. 1992) (focusing on identifying the appropriate culpability for the assault-oriented conduct element of robbery, and asserting that to convert theft to robbery, the state must prove either accused caused bodily injury during the course of the theft or used force, and that the issue it had to decide was the culpability level for those alternative elements); Reese v. State, 745 P.2d 1146, 1147-48 (N.M. 1987) (focusing solely on the assignment of culpability to the circumstantial element of the characteristic of the victim of the aggravated assault and battery charges -- the victim must be a police officer for the aggravation to apply); State v. Jefferies, 446 S.E.2d 427, 431 nn. 7-8 (S.C. 1994) (defining "knowingly" and "purposefully" in relation to result objective elements without specifically identifying the result element of kidnapping); Schultz v. State, 923 S.W.2d 1, 3-4 (Tex. Crim. App. 1996) (evaluating court precedent with regard to appropriate culpability for result element of crimes when court's view was that criminalization was justified by that result element); Bruno v. State, 845 S.W.2d 910, 912 (Tex. Crim. App. 1993) (relying upon precedent as establishing that, to convict of unauthorized use of a vehicle, the state must prove culpability not only for conduct element, but also for critical circumstantial element of "without the owner's effective consent," but upholding the conviction despite the fact that jury instruction had failed to specifically direct jury to attach appropriate culpability of knowledge to the key circumstantial element.); McQueen v. State, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989); Kelly v. State, 748 S.W.2d 236, 238-39 (Tex. Crim. App. 1988) (relying on precedent to confirm that assault crimes are result-based crimes, and stating that culpability must be proven related to the serious bodily injury result element of the crime); Alvarado v. State, 704 S.W.2d 36, 38-39 (Tex. Crim. App. 1985) (asserting that culpability must be applied to conduct which can be of three types under the penal code, conduct, circumstance, or result and also asserting that not all four levels of culpability can be attached to all three types of conduct elements -- all four can only be attached to result elements); State v. Sargent, 594 A.2d 401, 402 (Vt.

1991) (focusing the appropriate culpability inquiry specifically on "confines" element of kidnapping, and expressly categorized it as a result element); State v. Audette, 543 A.2d 1315, 1316 (Vt. 1988) (making reference to result category of elements to ascertain the appropriate culpable mental state for kidnapping).

[54] In *Hentzner v. State*, 613 P.2d 821 (Ala. 1980), the court asserted that its task was to define "willfully" and concluded there were three possible definitions: accused must be proven to be aware of what he was doing; what he was doing was illegal; or what he was doing was wrong. *Id.* at 825. It opted for the third definition, on the grounds that it comports with normative principle that culpability for crimes, other than strict-liability crimes, is consciousness of wrongdoing. *Id.* In *People v. Krovarz*, 697 P.2d 378 (Colo. 1985), the court expressly defined "knowledge" as it applied to each category of objective element, but noted that the Colorado legislature amended its revised Penal Code to expressly define "knowledge" in relation to result elements of crimes. *Id.* at 382. Later, the court noted that, in 1977, the Colorado legislature eliminated definition of "intention" as it applied to conduct elements of crimes. *Id.* at 382-83. *See also* City of Englewood v. Hammes, 671 P.2d 947, 952 (Colo. 1983) (defining "knowingly" as applied to conduct, circumstance, and result objective elements); People v. Mascarenas, 666 P.2d 101, 107 (Colo. 1983) (approving by implication jury instruction defining "knowingly" as applied to conduct, circumstance, and result objective elements); People v. Andrews, 632 P.2d 1012, 1015-16 (Colo. 1981) (making express reference to "knowingly" with regard to conduct and circumstance elements and later making reference to statutory definition of "negligence" as it related to result and circumstantial elements of a crime); People v. Washburn, 593 P.2d 962, 964 (Colo. 1979) (noting that "intentionally" was specifically defined in statute); Chicone v. State, 684 So.2d 736, 740-41 n.5 (Fla. 1996) (equating common law "evil intent," "scienter," with more recent case law concept of "guilty knowledge" in the context of identifying the appropriate culpability for a drug possession conviction). In *Daniels v. State*, 448 S.E.2d 185 (Ga. 1994), the court asserted that, to constitute crime in the state, the prosecution must usually show criminal intention or negligence. *Id.* at 188. The court went on to define negligence by incorporating some general recklessness connotations -- reckless disregard of consequences or the rights and safety of others. *Id.* *See also* Jones v. State, 439 S.E.2d 645, 648 (Ga. 1994) (stating that malice implied the absence of all elements of justification or excuse, and the presence of an actual intent to cause the particular harm, or the wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result); Dausch v. State, 616 N.E.2d 13, 15 (Ind. 1993) (making express reference to definitions of "intentionally" and "knowingly," but because the legislature defined these concepts only related to "conduct," the court's reference was general -- hence encompassing all three types of objective elements within the concept of conduct); State v. Keihn, 542 N.E.2d 963, 965 (Ind. 1989); State v. Ritchie, 590 So.2d 1139, 1148 (La. 1991) (equating "criminal negligence" with gross negligence in tort law as conduct demonstrating disregard of interests of others amounting to gross deviation from standard of care of reasonable person under the circumstances); State v. Chism, 436 So.2d 464, 467 (La. 1983) (holding an accessory-after-the-fact crime to require prosecution to prove two different levels of culpability -- negligence with regard to commission of felony by other person, and intent to assist person avoid arrest, trial, conviction, or imprisonment and deciding that with regard to the latter culpability state could prove general or specific intent); State v. Fuller, 414 So.2d 306, 309 (La. 1982) (defining specific intent by reference to a state statutory definition that focused on intent with regard to prescribed criminal consequences); State v. Duncan, 390 So.2d 859, 861 (La. 1980) (making same statutory definition of "specific intent" as in *State v. Fuller*, 414 So.2d 306, 309 (La. 1982)); State v. Elzie, 343 So.2d 712, 714 (La. 1977) (noting the same statutory definition of "specific intent" as in *State v. Fuller*, 414 So.2d 306, 309 (La. 1982) and in *State v. Duncan*, 390 So.2d 859, 861 (La. 1980) and stating that the "general intent" statutory definition means the equivalent of "knowledge" with regard to consequences identified in the definition of the crime); Commonwealth v. Luna, 641 N.E.2d 1050, 1052 (Mass. 1994) (holding that modern common-law definition of "willful" equates it to "intentional conduct" and prosecution need not

prove an evil intent but failing to provide an indication how in the context of the objective elements of the crimes charged, the latter culpability definition differed significantly from the former); Commonwealth v. Schuchardt, 557 N.E.2d 1380, 1383 (Mass. 1990) (holding that "wantonness" is not lesser culpability to "willful and malicious," because wanton conduct, unlike the latter culpability, must be likely to cause substantial harm); *In re* Welfare of A.A.E., 590 N.W.2d 773, 775-76 (Minn. 1999) (making reference to statutory definition of "intentionally" as purpose to do the thing or cause the result and knowledge of those facts which are necessary to make conduct criminal which appear after the word "intentionally" and equating accused's claim that knowledge is requisite culpability to claim that crime of intentionally discharging a firearm under circumstances likely to endanger another was a "specific intent" crime). In *State v. Orsello*, 554 N.W.2d 70 (Minn. 1996), the court sought to articulate the difference in culpability of specific compared to general intent. It stated that general intent requires only that the accused intentionally engage in specific, prohibited conduct, while specific intent requires accused acted with an intention to produce a specific result. *Id.* at 72. The court made express reference to the degree to which the 1963 Minnesota Penal Code had borrowed culpability definitions from the Model Penal Code. *Id.* In *State v. LaFreniere*, 481 N.W.2d 412 (Neb. 1992), the court defined "knowledge" as a perception of facts needed to prove the crime. *Id.* at 414-15. It made no reference to "objective" elements generally, or to the fact that the objective element to which knowledge was to be attached was the circumstantial element of the "stolen" nature of the property the accused allegedly sold. *Id.* *See also* State v. Bachkora, 427 N.W.2d 71, 74 (Neb. 1988) (defining recklessness with regard to the result element of bodily injury in Model Penal Code terms); State v. Schott, 384 N.W.2d 620, 624 (Neb. 1986) (asserting common-law definition of "intentionally," and statutory definition of "recklessly"); Batt v. State, 901 P.2d 664, 667 (Nev. 1995) (identifying common-law definitions of "gross negligence"). In *State v. Sewell*, 603 A.2d 21 (N.J. 1992), the court expressly recognized the hierarchical culpability concept relationship between "purpose," "knowledge," and "recklessly." *Id.* at 23-24. It expressly referred to the legislatively created difference and similarity between "knowledge" and "recklessness" as those concepts are defined in relation to a result element of a crime. *Id.* at 28. *See also* State v. Pierce, 488 S.E.2d 576, 589 (N.C. 1997) (noting that specific intent crimes are crimes which have as an essential element a specific intent that a result be reached, while general intent crimes are crimes which only require commission of some act); Commonwealth v. Lobiondo, 462 A.2d 662, 664-65 (Pa. 1983) (reciting Model Penal Code emulating definition of "negligence" adopted by the Pennsylvania legislature, expressly stating definition of "recklessness," and then equating traditional common law "gross negligence" with the penal code definition of "recklessness"); State v. Champa, 494 A.2d 102, 105 (R.I. 1985) (suggesting a guideline for distinguishing general from specific intent -- when crime is a misdemeanor the prosecution need not prove specific intent); State v. Rowell, 487 S.E.2d 185, 186 (S.C. 1997) (equating recklessness to conscious failure to exercise due care or conscious indifference to the rights and safety of others); State v. Bryant, 447 S.E.2d 852, 854 (S.C.1994) (equating, in a conclusory fashion, "willful" with "intentional," and distinguished "malicious" from these concepts). In *State v. Jefferies*, 446 S.E.2d 427, 430 (S.C. 1994), the court, where the legislature had not revised its culpability definitions, expressly cited to four hierarchical culpability concepts of the Model Penal Code, as well as traditional common law categories of general and specific intent. *Id.* at 430-31. It cited with approval the earlier equation of the common law culpability concept of "specific intent" with the Model Penal Code culpability concept of "purpose." *Id.* *See also* State v. Ferguson, 395 S.E.2d 182, 183 (S.C. 1990) (citing to four hierarchical culpability concepts of the Model Penal Code.); Kelly v. State, 748 S.W.2d 236, 238 (Tex. Crim. App. 1988) (applying definition standards of "intent" and "knowledge" to result element of causing serious bodily injury); Alvarado v. State, 704 S.W.2d 36, 37 (Tex. Crim. App. 1985) (making the same analysis as in *Kelly v. State*, 748 S.W.2d 236, 238 (Tex. Crim. App. 1988)); State v. Sargent, 594 A.2d 401, 402 (Vt. 1991) (employing the Model Penal Code's hierarchical definition structure and rationale for why serious felonies normatively required proof of at least "knowingly" as opposed to recklessly or negligently, though the legislature had not revised

culpability definitions); State v. Stanislaw, 573 A.2d 286, 291 (Vt. 1990) (defining criminal negligence, and citing with approval the Model Penal Code definition of "negligence"); State v. Audette, 543 A.2d 1315, 1316 (Vt. 1988) (equating general intent with regard to result elements as requiring no more than proof of culpable criminal negligence, while specific intent with regard to result equated to intent). In *State v. Shipp*, 610 P.2d 1322 (Wash. 1980), the court made reference to two definitions of "knowledge" in the WASH. REV. CODE § 9A.08.010(1)(b). *Id* at 1325. First, knowledge meant awareness of facts, circumstances, or results described in the definition of a crime. *Id*. Second, "knowledge" meant a belief formed by a reasonable person in the same situation and with the same information as the accused that a fact described in a crime's definition exists. *Id*. The court held that second definition only permitted but did not require a jury to find that the specific accused was aware of the objective element/fact, but failed to appreciate that even this limited sanctioning of the second definition of "knowledge" created a substantial risk that the concept had been converted to "criminal negligence." *Id*. In *State v. Brown*, 422 S.E.2d 489 (W.Va. 1992), the court defined "specific intent" in a manner that commentators had characterized as its "most common usage" -- to designate a special mental element that is required above and beyond the actus reus of the crime. *Id*. at 493-94. The court, after holding that embezzlement by a public official was not a specific intent crime, expressly declined to hold that the requisite culpable mental state was therefore properly characterized "general intent." *Id*. In fact, the court, expressly relying on the recommendation and arguments of the Model Penal Code, characterized common law use of "general" in contrast to "specific" intent as a source ambiguity and confusion. *Id*. *See also* Bryan v. State, 745 P.2d 905, 908-09 (Wyo. 1987) (asserting that sexual assault was a general intent crime, and general intent, required only that state prove act was voluntary, and inference arises that accused intended result); Capshaw v. State, 737 P.2d 740, 742 (Wyo. 1987) (asserting that when crime is defined without reference to intent to do further act or result it is a "general intent" crime, but where such intention is expressly stated in the crime, it is a "specific intent" crime); Dorador v. State, 573 P.2d 839, 843 (Wyo. 1978) (asserting that delivery of controlled substance is a general intent crime requiring proof act was voluntary and done with knowledge of the nature of the substance delivered).

[55] State v. Rice, 626 P.2d 104, 109 (Ala. 1981) (making reference to two other game and wildlife regulatory crimes, both of which did expressly include a culpability level, to imply that the game and wildlife crime at issue also should be interpreted to include a culpability level). In *People v. Krovarz*, 697 P.2d 378 (Colo. 1985), the court noted the Colorado legislature's 1977 changes to the definitions of intention and knowledge, as they relate to the objective element categories of conduct and result, as support for court's conclusion that knowledge would suffice as culpable mental state for attempt crimes as they relate to objective elements of completed crime. *Id*. at 382-83. The court ignored the statute's express requirement that the substantial step the actor must take to commit an attempt must be strongly collaborative of the actor's "purpose" to complete the crime. *Id*. It noted that belief that circumstance exists was expressly stated in "impossibility" provision related to attempt as sufficing as requisite culpable mental state. *Id*. *See also* People v. Moore, 674 P.2d 354, 358 (Colo. 1984) (making express reference to statute proving guideline that even if a crime is defined without reference to a culpable mental state one nevertheless is normatively applied); People v. Andrews, 632 P.2d 1012, 1015 (Colo. 1981) (referring to statutory requisite culpability guideline that, when one culpable mental state is specified in a crime's definition, it applied to every element of the offense unless an intent to limit its application clearly appeared); Chicone v. State, 684 So.2d 736, 743 n.11 (Fla. 1996) (comparing legislature's specific identification of requisite culpability level for more serious but related crime to lack of specific culpability identification for two crimes for which defendant was convicted in case). In *State v. Gray*, 435 So.2d 816 (Fla. 1983), the court made an express reference to the general, and not very useful, common-law principles that legislature may punish conduct without regard to the mental attitude of the offender. *Id*. at 819. Thus, the general intent of the accused to do the act is deemed to give rise to the presumption of

intent to achieve the criminal result, and the legislature may dispense with requiring that the state prove awareness of the facts making conduct criminal. *Id.* *See also* Jones v. State, 439 S.E.2d 645, 648 (Ga. 1994) (citing to statute that provided a person shall be found not guilty of a crime if the act was induced by a misapprehension of fact which, if true, would have justified the act or omission); State v. Keihn, 542 N.E.2d 963, 967-68 (Ind. 1989) (noting the failure of the legislature to adopt proposed express culpability guideline, exploring the legislative history of the crime examined, reviewing the severity of penalties for other traffic crimes, and noting that traffic offenses that have lower penalties than crime charged in this case all expressly or by implication require state to prove "knowledge"); State v. Larson, 653 So.2d 1158, 1162-63 (La. 1995) (making reference to Louisiana Penal Code provisions stating that a crime may consist of an act or omission that has criminal consequences without criminal intent, and that for some crimes no criminal intent is required and comparing the inclusion of express culpability concept in other subsections of same statute to support conclusion that legislature intended strict liability for the crimes charged in this case.); State v. Cinel, 646 So.2d 309, 316 (La. 1994) (relying on legislative history, specifically, a statement of the sponsor of key amendment to the definition of the charged crime). In *State v. Ritchie*, 590 So.2d 1139 (La. 1991), the court held that the general statutory section relating to "elements of crime" required proof of general or specific intent, or of criminal negligence that produces criminal consequences. *Id.* at 1148. It relied on the reporter's commentary to the criminal code section defining criminal negligence, and equated it with gross negligence in civil law. *Id.* The court also applied the principle that the legislature, in enacting the statute, referred to both recklessness and negligence and must have known that the state supreme court had previously equated those culpability concepts. *Id.* In *State v. Fuller*, 414 So.2d 306 (La. 1982), the court made an express reference to the rule of statutory construction that words (here "specific intent") should be taken in their usual sense in context and with reference to purpose of provision. *Id.* at 309-10. It referred to the absence of a second culpability word in the definition of aggravated battery to support the conclusion that the legislature intended specific intent in a relatively recent second-degree battery crime. *Id.* *See also* State v. Elzie, 343 So.2d 712, 713 n.2 (La. 1977) (making reference to statutory guideline identifying when specific intent, general intent, or only negligence should be construed as the appropriate culpable mental state). In *Outmezguine v. State*, 641 A.2d 870 (Md. 1994), the court relied on an earlier decision for a guideline that required examination of culpability for another method of committing rape (where the legislature expressly stated that the prosecution must prove "knowledge" with regard to a circumstantial element of that crime related to a characteristic of the victim) to conclude that the failure of the legislature to include a knowledge requirement in the statutory rape crime with regard to the age of the victim supported an inference that the legislature meant to make that element strict liability. *Id.* at 881. It suggested the principle that to ascertain legislative intent with regard to culpability for the specific definition of a crime, courts should examine the culpability decision the legislature made for similar crimes. *Id.* The court made use of the principle of examining the original enactment history of the crime under evaluation to determine if other forms of the bill that contained a different culpability requirement were introduced, but not enacted. *Id.* at 881-82. It examined the legislative history of the current enactment of the child pornography crime to identify what prompted the legislature to delete a provision which would have excluded a mistake of age defense. *Id.* *See also infra* notes 106-07 and 110, explaining the critical conceptual error made by the Maryland Court of Appeals in this case with regard to its use of both of the latter two principles. In *Garnett v. State*, 632 A.2d 797 (Md. 1993), the court made an express reference to the inclusion of a culpability requirement in a separate section defining the same crime of second degree rape to infer that the legislature's omission of such a concept in the statutory rape subsection of second-degree rape signaled the intention to make the crime a strict liability one. *Id.* at 804-05. It also made an express reference to aspects of specific legislative history of current statutory rape subsection to point out that the state senate's version of the bill had a culpability requirement while the state house's version did not. *Id.* Eventually the House version of the bill was enacted. *Id.* In *Warfield v. State*, 554 A.2d 1238 (Md. 1989), the court examined the legislative

history of an antecedent and related crime to conclude that, for the crime in the case at bar, only general and not specific intent attached to the breaking and entering of a dwelling or a storehouse. *Id.* at 1249-50. It expressly made reference to principle that culpability for a crime should be identified by examining the culpability assigned by the legislature to antecedent and subsequent criminalization decisions and its implication for the culpability goal of the legislature for this crime. *Id.* In *Commonwealth v. Miller*, 432 N.E.2d 463 (Mass. 1982), the court made an express reference to and relied upon statutory construction rule that when a legislature reenacts a crime intact after a particular construction of that crime was placed on it by the state supreme court, the legislature is presumed to have accepted that construction. *Id.* at 465. In this instance, it made reference to its construction of the statutory rape crime as requiring no culpability with regard to the circumstantial element of the age of the minor, and the subsequent reenactment of that crime without inclusion of an express culpability concept. *Id.* In *People v. Quinn*, 487 N.W.2d 194 (Mich. 1992), the court made express reference to the statutory provision abrogating the traditional assumption that penal code provisions are to be strictly construed. Instead, the penal code is to be interpreted in accord with fair import of its terms. *Id.* at 200. It made express reference to the legislative history that led to the enactment of crime under evaluation, including earlier interpretations of a similar but narrower crime, to support conclusion that "loaded" circumstantial element of crime was intended by the legislature to be strict liability element. *Id.* In *People v. Cash*, 351 N.W.2d 822 (Mich. 1984), the court made reference to statutory rule of interpretation that legislature in reenacting and/or revising a crime, is presumed to know interpretations of the crime made by the state supreme court prior to the enactment. *Id.* at 826-27. Therefore, if the reenactment does not expressly change that interpretation, the legislature is said to have adopted it. *Id.* In this instance, the state supreme court had rejected reasonable mistake with regard to the age of the victim in a decision made decades prior to the reenactment. *Id.* The court relied on fact that in another subsection of the third-degree criminal sexual conduct crime, the legislature expressly required culpability with regard to the circumstantial element that the "victim" was mentally defective, and hence incapable of giving valid consent. *Id.* The court implied the principle that in determining appropriate culpability, it would place some reliance on fact that, as of the date of the enactment other state legislatures (and/or Model Code) had revised their common-law position, even though the legislature had failed to clearly indicate such a revision. *Cash*, 351 N.W.2d at 822. In *State v. Orsello*, 554 N.W.2d 70 (Minn. 1996), the court articulated the guideline that when a legislature enacts a crime with identical or similar conduct elements as a prior one, and where that prior crime was enacted or was interpreted prior to the enactment of the second crime and was held to require a certain level of culpability with regard to those conduct elements, the second crime should be interpreted to require that same level of culpability for those same elements. *Id.* at 74-75. Such an interpretation furthers overall goal of consistency. *Id.* The court then asserted that use of word "intentional" with reference to conduct, along with "in a manner" infers the legislature was requiring more than general intent. *Id.* In making this assertion, however, the court ignored its earlier definition of "general intent" which seemed to mirror this language more closely than the court's earlier definition of specific intent. *Id.* In *State v. Ryan*, 543 N.W.2d 128 (Neb. 1996), the court asserted the guideline that statutes will not be interpreted as changing the common law unless such change is clearly indicated. *Id.* at 135. Hence, with regard to common law established culpability requirements for a specific crime, absence of an aspect of such culpability should not be interpreted as a legislative intention per se to abandon that aspect. *Id. See also* Jenkins v. State, 877 P.2d 1063, 1067 (Nev. 1994) (implying that other crimes in statutory scheme provide basis that state must prove at least constructive knowledge with regard to a critical circumstantial element). In *State v. Bridges*, 628 A.2d 270 (N.J. 1993), the court's evaluation sought to identify the appropriate culpable mental state for those held vicariously liable for crimes committed by a co-conspirator. *Id.* at 273. The revised penal code provision on such conspiracy liability contained no culpable mental state reference, so the court placed reliance on a decision it made prior to the enactment of the penal code, on the principle that the legislature in enacting the conspiracy provision would have done

so with that decision in mind. *Id*. at 275-76. It asserted that the legislative history implications with regard to the appropriate culpability should be revised in light of more recently discovered legislative history documents and placed reliance on a commentary by chairman of group that drafted the original conspiracy provision which omitted any basis for liability for crimes based on the conspiracy, which was critical of subsequent inclusion of such a provision. *Id*. at 276-77. In *State v. Sewell*, 603 A.2d 21 (N.J. 1992), the court made express reference to legislative culpability-identifying "gap fillers," unless the clear intent for strict liability knowledge must be proven by state. *Id*. at 23. It made reference to the legislative history questioning the appropriateness of recklessness as culpability for simple assault, and rejecting its use as default culpability when crime failed to include a culpability provision or clearly indicated a legislative decision to impose strict liability for at least an element of the crime under evaluation. *Id*. at 25-26. *See also* State v. Lashinsky, 404 A.2d 1121, 1125 n.2 (N.J. 1979) (relying by implication on a statutory guideline making "knowledge" the default culpability when no culpability concept is stated in the crime). In *State v. Pierce*, 788 P.2d 352 (N.M. 1990), the court made an express reference to the repeal of forcible rape and related crimes and comprehensive reenactment based upon another state's statutory scheme. *Id*. at 358-59. The court suggested the principle that when a legislature enacts a comprehensive revision of related crimes it is presumed to know the corresponding provisions of the Model Penal Code, and when it omits a culpability provision contained in the latter, it did so purposefully. *Id*. In *Commonwealth v. Lurie*, 569 A.2d 329 (Pa. 1990), the court implied that crimes with multiple and interrelated definitions must be read in context of the definitions, the scheme of those definitions, the purpose of criminalization, and the punishment provisions. *Id*. at 331-32. It implied the principle that when a multiple definition crime has an express culpability level for one definition, that culpability level should be held as the appropriate culpability for other definitions which contain no such level. *Id*. The court asserted the principle that when a multiple definition crime has a uniform penalty provision for all relevant definitions, and there is an express culpability level for one of those definitions, then fairness requires that other definitions, which contain no culpability definition, be held to require the same level of culpability. *Id*. In *Commonwealth v. Lobiondo*, 462 A.2d 662 (Pa. 1983), the court stated that the statute must be construed, if possible, to give effect to all of its provisions. *Id*. at 664. It stated that specific statutory definitions of concepts mean that prior common law definitions and constructions under superseded statutes are no longer controlling. *Id*. The court further held that provisions of criminal code are necessarily interrelated and should be construed in their entirety. *Id*. *See also* State v. Champa, 494 A.2d 102, 105 (R.I. 1985) (asserting that when crime is a misdemeanor, the prosecution need not prove specific intent). In *State v. Jefferies*, 446 S.E.2d 427 (S.C. 1994), the accused was charged with kidnapping. The court relied on revisions of kidnapping crime, first inserting and then deleting objective element of “holding for hostage,” to conclude current appropriate culpable mental state was "knowledge" and not "purpose." *Id*. at 430. It also asserted the judicial authority to insert, when legislature inadvertently omits, a word, here, the culpability concept. *Id*. In *State v. Ferguson*, 395 S.E.2d 182 (S.C. 1990), the court asserted the principle that common-law crimes and other crimes where the legislature has not clearly indicated the contrary, require proof of some level of culpability. *Id*. at 183-84. It indicated that the legislature would not intend to make serious crime a strict-liability crime. *Id*. In *Schultz v. State*, 923 S.W.2d 1 (Tex. Crim. App. 1996), the court implied the rule of statutory construction that since legislature in another crime specifically focused on protecting children, and specified a culpable mental state for the circumstantial element of the age of the child, its failure to assign a culpable mental state to more generic circumstantial elements in crime charged meant that legislature did not intend to require culpability with regard to those circumstantial elements. *Id*. at 2-3. It expressly made reference to Code Construction Act provision that the entire statute is intended to be effective and held that the culpability level stated in statute applied only to conduct element, and relied on legislative history, specifically, a hearing dialogue about purpose/scope of the new crime. *Id*. *See also* McQueen v. State, 781 S.W.2d 600, 604 (Tex. Crim. App. 1989) (relying upon general purpose provision of penal code, to prevent condemnation of innocent conduct, to support its holding that knowledge was

appropriate culpability for circumstantial element of without the effective consent of the owner). In *Roof v. State*, 665 S.W.2d 490 (Tex. Crim. App. 1984), the accused was charged with indecency with a child and argued that the prosecution must prove that he was aware the child was indeed a child (under seventeen) at the time he exposed himself in her presence. *Id.* at 491. The court rejected this claim, relying in part on fact that the legislature had rejected a general reasonable mistake of fact defense with regard to the age of the victim for crimes in the specific chapter. *Id.* It also placed reliance on the Practice Commentary, and found implied no culpability for the age of a victim, because it focused upon recognizing that culpability was required for the presence of the child. *Id.* In *State v. Searles*, 621 A.2d 1281 (Vt. 1993), the court asserted the statutory interpretation principle that when a crime's definition contains no culpability requirement and where legislative language warrants the conclusion, no culpability requirement will be read into the crime. *Id.* at 1282-83. It examined the legislative history and noted that earlier versions of the crime of sexual assault of a minor recognized a defense related to lack of knowledge of age of the consensual sex partner, but the final version of the bill deleted that defense. *Id.* The court compared the express inclusion of an affirmative defense based on belief related to the circumstantial element of the age of the minor in the enactment of sexual exploitation of a minor crime, and its absence in the sexual assault of a minor crime. *Id.* *See also* State v. Patch, 488 A.2d 755, 760 (Vt. 1985) (asserting principle that when a legislature eliminates "malice" from definition of crime the court lacks authority to read that culpability requirement back into the crime). In *State v. Brown*, 422 S.E.2d 489 (W.Va. 1992), the crime's definition made reference in its first part to "embezzles" or "fraudulently converts." The court gave great significance to the "or" language to conclude that the legislature intended two distinct crimes, the latter with a greater culpability requirement then the former. *Id.* at 491. This conclusion was reached despite the fact that no culpability was specified for "embezzles," and historically the court acknowledged that embezzlement, as with most common law larceny derivative crimes, required the prosecution to prove "specific intent" to deprive the owner permanently of the property. *Id.* It also reached this conclusion despite the fact that the legislature characterized the crime twice as "larceny," including the subsection that characterized as "embezzles" the appropriation by a public official of funds entrusted to him. *Id.* In *State v. Groom*, 947 P.2d 240 (Wash. 1997), the accused was charged with an unlawful search. The court asserted that absence of a culpable mental state was evidence of legislative intent to make crime a strict liability crime. *Id.* at 246. In *State v. Shipp*, 610 P.2d 1322 (Wash. 1980), the court asserted a legislative interpretation point that when a legislature creates a hierarchy of culpability terms and chooses one of the terms from that hierarchy as the appropriate culpable mental state for a particular crime, the legislature would not want that concept interpreted in a manner that would equate it with a different culpable mental state in that hierarchy. *Id.* at 1325-26. The court suggested the legislative interpretation point that because general culpability concepts are incorporated by reference into numerous crimes in the penal code, giving such a concept a definition which does not comport with common understanding of that term and which is not specifically spelled out in the separate definition of that concept, would mislead the ordinary person. *Id.*

[56] In *State v. Rice*, 626 P.2d 104 (Ala. 1981), the court stated that the normal interpretation is that consciousness of wrongdoing is an essential element to warrant the imposition of penal liability. *Id.* at 107. It made express reference to an exception for strict liability crimes, and their rationale related to regulatory and public welfare offenses. *Id.* The court expressly relied upon the principle that criminal statutes are to be strictly construed so as to require the state to prove some level of culpability unless legislative intent to impose strict liability is clearly demonstrated. *Id.* at 108. It suggested that it had extended this principle to crimes which did not have their origin in the common law and asserted that this principle was of state constitutional dimension in the context of this regulatory crime which criminalized the possession or transport of illegally taken game. *Id.* The crime was overbroad, unless at least negligence was read into the statute as the appropriate culpability with respect to the illegality circumstantial element.

Id. at 109. In *Hentzner v. State*, 613 P.2d 821 (Ala. 1980), the court held that "willfully" meant that the state must prove that accused knew what he was doing was wrong, because such a requirement comports with the normative principle that culpability for crimes, other than strict-liability crimes, is consciousness of wrongdoing. *Id.* at 825-26. It suggested that consciousness of the act will suffice when the act is mala in se, that is, immoral by its very nature. *Id.* The court identified a rationale for strict-liability crimes -- small penalties, protection of the public from potential harm attributable to complex commercial activities spawned by the industrial revolution, and no serious harm to a person's reputation results from a conviction. *Id.* For example, a securities crime potentially involving twenty years in prison was not a public welfare offense, and hence it was improper to impose strict liability for this particular crime. *Id.* In *State v. Guest*, 583 P.2d 836 (Ala. 1978), the court relied on the nebulous "consciousness of wrongdoing" culpability principle as well as the same strict-liability policy factors, and found that, because of these principles, the felony crime of statutory rape must be construed to have a culpability requirement of negligence with regard to the circumstantial element of the age of the victim. *Id.* at 838-39. The court rejected the principle that culpability for one element of a crime which would make the person guilty of another crime can justify finding the person guilty of crime charged without proving culpability for specific objective element of crime charged that was not an objective element of the other crime. *Id.* *See also* People v. Krovarz, 697 P.2d 378, 381-82 (Colo. 1985) (citing to authorities who argued that actor is sufficiently dangerous when he takes substantial step with knowledge of conduct, circumstances, and result elements of completed crime); People v. Moore, 674 P.2d 354, 357-58 (Colo. 1984) (making reference to an earlier decision which suggested a constitutional prohibition against criminalizing felony theft by receiving stolen property based only on proof that a reasonable person would have known that goods were stolen and also making reference to its prior holdings that even if crime contains no culpable mental state, culpable mental state may be implied). In *City of Englewood v. Hammes*, 671 P.2d 947 (Colo. 1983), the court made express reference to the principle that a culpability requirement is the norm with regard to crime, and a strict-liability statutes (crimes) exceptions must be narrowly drawn where they infringe on constitutional freedom. *Id.* at 952. It cited to the principle that crimes which have their origin in the common law "must" contain a mens rea element, and that the predecessor of this crime was the common-law crime of "obstructing an officer." *Id.* *See also* People v. Mascarenas, 666 P.2d 101, 107 (Colo. 1983) (noting the same common-law origin crime culpability mandatory principle as in *City of Englewood v. Hammes*, 671 P.2d 947 (Colo. 1983), aggravated robbery of drugs, is simply a variant of common-law crime of aggravated robbery); People v. Bridges, 620 P.2d 1, 3 (Colo. 1980) (noting the same common law origin crime culpability mandatory principle as in *City of Englewood v. Hammes*, 671 P.2d 947 (Colo. 1983), and holding that engaging in a riot was a crime at common law). In *People v. Washburn*, 593 P.2d 962 (Colo. 1979), the court noted this was same common-law origin crime culpability mandatory principle as in *City of Englewood v. Hammes*, 671 P.2d 947 (Colo. 1983), and theft of rental property was a crime concerning theft which has its origins in the common law. *Id.* at 964. The court made reference to one of its earlier decisions, asserting but not explaining, that the appropriate culpability for a theft crime is more than negligence but need not be specific intent. *Id.* No policy or principle was referred to defining "specific intent" and no mention was made of history of theft crimes in which they have almost universally been held to be specific intent crimes. The court subsequently acknowledged that the legislative intent was to create a specific intent crime with respect to theft of rental property as defined at time accused allegedly committed this crime. *Id.* In *Chicone v. State*, 684 So.2d 736 (Fla. 1996), the court noted that in the context of holding that the accused in a possession of contraband prosecution must be proven to know the illicit nature of the thing possessed, the court cited with approval an earlier decision asserting the policy that the "scienter" requirement is the norm to protect the innocent from being criminalized for acts of others, and to preserve constitutional rights of citizens. *Id.* at 739. It subsequently cited with approval the principle that criminal statutes are to be strictly construed against the state and most favorably to the accused. *Id.* at 740. The court noted that commentators and courts have argued

that a presumption of culpability should be broadly applied to crimes solely creatures of statutes, and that characterizing crimes as mala in se or malum prohibitum is not a useful basis for deciding upon the need for a culpability requirement. *Id.* at 741-42. It expressly cited with approval authorities asserting the principle that crimes punished by significant periods of imprisonment, most obviously felonies, should not be viewed as strict liability crimes, because "felony" is as bad a word as one can give to a man or thing. *Id.* at 742. In *State v. Gray*, 435 So.2d 816 (Fla. 1983), the court expressly asserted that some authorities, without identifying them, maintained that a legislature with regard to infamous/mala in se and/or common law crimes lacks the authority to define them without requiring specific intent. *Id.* at 820. It then asserted that "that these authorities are suspect." *Id.* In *Daniels v. State*, 448 S.E.2d 185 (Ga. 1994), the possible violation of the constitutional overbreadth doctrine required the court to read into "anti-mask" crime two culpable mental states. *Id.* at 187-89. The court generally recognized the possibility of strict liability acts, but held that the constitutional vulnerability of this crime without reading in culpability requirements prevented considering strict liability construction. *Id.* In *State v. Keihn*, 542 N.E.2d 963 (Ind. 1989), the court identified a state court policy split on whether driving while a license is suspended crime requires proof of culpability with regard to the circumstantial element that license was suspended at time person was driving. *Id.* at 965-66. It cited to United States Supreme Court precedent for principles that "intent" generally remains an indispensable element of a criminal offense, and that far more than omission of a culpability concept from the crime's definition is necessary to warrant conclusion of strict liability. *Id.* at 964. The court expressly recited seven policy factors in evaluating whether some level of culpability is warranted for a crime or an element of a crime from WAYNE R. LAFAVE AND AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW (1986). *Id.* In *State v. Larson*, 653 So.2d 1158 (La. 1995), the court made an express reference to the principle that Anglo-American jurisprudence requires proof of mens rea by the prosecution as the rule rather than the exception. *Id.* at 1161. It made express reference to the establishment of this principle by the eighteenth century in England by quoting from the opinion in *Morissette v. United States*, 342 U.S. 246 (1952), which quoted Blackstone. *Id.* The Court also made express references to United States Supreme Court's sanctioning of "strict liability" for "public welfare" crimes, to "public welfare" crime indicators such as light penalties and regulatory purpose, and United States Supreme Court authority -- at least in dicta -- indicating that regulation of alcohol by criminal sanctions may be properly characterized as public welfare offense(s). *Id.* It also made express recognition of commentator support for the guideline that no crime punishable by a term of imprisonment should be construed to be a strict liability crime, but then rejecting that suggestion in the case. *Id.* It then made express recognition but rejected as applicable to the crime charged in this case the constitutional principle that criminalization of obscenity is only constitutional when the crime requires the prosecution to prove culpability. *Id.* In *State v. Cinel*, 646 So.2d 309 (La. 1994), the court expressly recognized a policy that the national constitutional principle that criminalization of obscenity is only constitutional when the crime requires the prosecution to prove some level of culpability, also applies to the criminalization of the possession of child pornography. *Id.* at 313. Ultimately, the court held that some level of culpability (perhaps no more than criminal negligence) must be proven by the state with regard to awareness of the age of the person(s) depicted. *Id.* at 317. In *State v. Ritchie*, 590 So.2d 1139 (La. 1991), the court referred to the principle of lenity for the proposition that a court will construe criminal statute's definition of a crime in favor of most narrow application when there are serious doubts concerning the meaning of a term. *Id.* at 1149. It then made reference to due process concerns that prompted the court to only construe a statute as not requiring proof of a criminal mental state when the legislative intent to so eliminate is express. *Id.* *See also* State v. Elzie, 343 So.2d 712, 713 (La. 1977) (noting that the prosecution must prove specific intent when the statutory definition of the crime includes intent to produce prescribed consequence). In *Outmezguine v. State*, 641 A.2d 870 (Md. 1994), the court made reference to and then evaluated the First Amendment constitutional policy that cautions states to avoid imposing strict liability on crimes or elements of crimes when to do so would "chill" the exercise of First Amendment

rights. *Id.* at 878. It then made reference to and use of the principle that, in ascertaining the culpability level for a crime or a specific element of a crime, a court will look to the culpability level assigned that crime or element by the legislatures and/or courts of other jurisdictions. *Id.* at 883-84. In *Garnett v. State*, 632 A.2d 797 (Md. 1993), the court cited to Justice Jackson's opinion in *Morissette v. United States*, 342 U.S. 246 (1952), advocating on social policy grounds that crimes normally must consist of an evil mind as well as an evil hand. *Id.* at 800. It recognized the industrial revolution that spawned the advent of strict liability regulatory crimes -- usually with modest criminal sanctions, and contrasting such crimes with the statutory rape felony charged in this case -- punishable by a maximum of twenty years in prison. *Id.* The court identified well-known commentators and Model Penal Code criticism of strict liability criminalization and specific commentator criticism of serious criminalization of consensual sex with a teenage minor based on strict liability, that is, regardless of whether the suspect reasonably believed the female was above the age of minority. *Id.* at 800-02. The court found that punishing a person simply because his intended conduct would have been immoral under the facts as he supposed them to be is inaccurate on both descriptive and normative grounds. *Id.* at 802. The court then noted that seventeen of fifty state legislatures and four other state supreme courts have sanctioned a "mistake of age" defense under certain conditions to crimes involving consensual sex with underage persons. *Id.* It made reference to the principle that criminal statutes' scope of criminalization should be strictly construed, but qualified this point by subordinating this principle to the specific legislative intent with regard to culpability for the element of the specific crime at issue in this case. *Garnett*, 632 A.2d 797 at 804. In *Warfield v. State*, 554 A.2d 1238 (Md. 1989), the court characterized a crime charged as mala in se rather than malum prohibitum, without explaining the reason for its characterization, but explaining the distinction between the two concepts. *Id.* at 1249-50. It also made reference to a survey of states with regard to their culpability requirements for trespass. *Id.* In *Commonwealth v. Alvarez*, 596 N.E.2d 325 (Mass. 1992), the court placed reliance on federal decisions holding that the "school zone" aggravating element of sale of controlled substance crime was strict liability, and that such a strict liability finding does not violate due process. *Id.* at 328. It rejected the accused's claim that strict liability with regard to the circumstantial "school zone" element violated due process protection of the state constitution. *Id.* While the court had previously read a culpability requirement into crimes even when none was stated in order to diminish the threat of a due process violation, it took position in this case that if the legislature clearly intended such strict liability the due process threat disappeared. *Id.* In *Commonwealth v. Miller*, 432 N.E.2d 463 (Mass. 1982), the court expressly made reference to general principle that crimes presumptively require culpability but then decided not to apply it. *Id.* at 465-66. It also made reference to the constitutional rule that due process does not require inclusion of a culpability element in every crime. *Id.* The court argued that for statutory rape the circumstantial element of the age of the minor, strict liability was appropriate as it previously had held for the married circumstantial element in bigamy crime. *Id.* It failed to provide a policy justification for this analogy. *Id.* In *People v. Quinn*, 487 N.W.2d 194 (Mich. 1992), the court acknowledged the anti-strict liability policy position of the Model Penal Code and its commentators. *Id.* at 197-98. It synthesized *Morissette v. United States*, 342 U.S. 246 (1952), and other United States Supreme Court decisions for the two related principles that first, when a legislature codifies a common-law crime and fails to include an express culpability requirement, it is nevertheless conclusively presumed that a culpability requirement should be read into the statute. *Id.* at 198. Where, however, the codified crime was not recognized as such at common law, the question of whether any level of culpability should be read into the statute is a matter of legislative intent. *Id.* The court resorted to a characterization of male prohibitum rather than mala in se to label transporting a loaded firearm misdemeanor so as to conclude that the "loaded" circumstantial element was a strict liability one. *Id.* at 200. It also synthesized United States Supreme Court decisions to identify the principle that strict liability for all objective elements of a crime is disfavored. *Id.* The court noted certain commentators' policy factors used by courts when a legislature enacts a crime without an express culpability concept to ascertain if any level of culpability should be read

into the crime. *Quinn*, 487 N.W.2d 194 at 196. It relied on a policy of maximizing protection of the public relied upon to help justify strict liability conclusion with regard to "loaded" circumstantial element of transporting firearms misdemeanor and made reference to how sister jurisdictions have decided the same or similar culpability issue. *Id.* at 202. In *People v. Cash*, 351 N.W.2d 822 (Mich. 1984), the court made reference to what it characterized as minority and majority views with regard to circumstantial element of the age of the victim of statutory rape and its successor crimes. *Id.* at 826. It characterized the majority view as not allowing an accused to argue as a defense that he reasonably believed that the victim was an adult. *Id.* The court relied upon a policy of protecting children from consensual sex to uphold a five- to fifteen-year prison sentence of a man convicted of having arguably consensual sex with a girl one month shy of her seventeenth birthday. *Id.* at 826-27. Next, the court suggested a policy that, with regard to the circumstantial elements involving characteristics of the victim, such as appearance in estimating age, are subject to change between the date of the alleged crime and the trial, and hence the trier of fact could not truly put itself in the accused's position with regard to what he knew or reasonably should have known about that characteristic at the time of the crime. *Id.* at 828. *See also In re* Welfare of A.A.E., 590 N.W.2d 773, 777 (Minn. 1999) (rejecting the state's contention that generic circumstantial objective element of "under circumstances likely to endanger another" was a strict liability element because such an interpretation would eviscerate significance of that element and could lead to an absurd result). In *State v. Orsello*, 554 N.W.2d 70 (Minn. 1996), the court cited with approval WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW (1986), for the principle that crimes which have their origins in the common law must have some level of culpability as a necessary element. *Id.* at 72. It articulated a policy that when a legislature enacts new crime it is sometimes necessary to assure required fair notice that the crime be interpreted to include a particular level of culpability. *Id.* at 74. The court went on to suggest the related principle that when the trial record demonstrated that the trial judge, attorneys, and jury were confused as to scope of a new crime, limiting scope by requiring certain level of culpability might be necessary to insure crime provided minimally fair notice. *Id.* at 76. It noted that most of the "anti-stalking" new crimes that had survived constitutional challenge in other states were interpreted to include a specific intent requirement. *Id.* at 77. In *State v. Ryan*, 543 N.W.2d 128 (Neb. 1996), the court stated that penal statutes are to be strictly construed and it is not the job of the courts to supply missing words or sentences to make a penal provision clear. *Id.* at 134. It asserted that it also follows related principle of giving penal statutes sensible interpretation in accordance with the provision's purpose and mischief to be remedied. *Id.* The court also asserted the principle that when two interpretations of a statute are possible, and one of them puts the constitutionality of the statute in question, a court will adopt the other interpretation. *Id.* The court then asserted, erroneously, that without the inclusion of a separate malice culpability requirement in a second-degree murder statute, the provision would be of doubtful constitutionality, despite the fact that revised Nebraska Penal Code required an intentional killing. *Id.* In *Jenkins v. State*, 877 P.2d 1063 (Nev. 1994), the court expressed the policy that penal liability requires not only the act but also the existence of a guilty mind. *Id.* at 1066. It then expressed the policy that the definition of a culpability concept of willful is less protective of an accused when the crime's purpose is to protect minors. *Id.* Hence, "willful" in the context of such a crime requires only proof of general intent, that is, intent to do the act, and not proof of intent to cause the injury to another or to violate the law. *Id. See also* Robey v. State, 611 P.2d 209 (Nev. 1980) (asserting a policy that when a crime requires proof of a culpable mental mind the state must prove conscious wrongdoing); State v. Bridges, 628 A.2d 270, 277 (N.J. 1993) (justifying its decision to make objective negligence the appropriate culpability for co-conspirators with regard to other crimes committed by their cohorts by self-imposing a requirement that such crimes must be closely connected with the criminal conspiracy). In *State v. Sewell*, 603 A.2d 21 (N.J. 1992), the court compared the Model Penal Code position with regard to the appropriate culpable mental state for the use of force/causing bodily injury element of robbery to the position taken by the New Jersey legislature. *Id.* at 25-26. It made reference to principle that criminal statutes are to be strictly

construed and not extended by implication as reasons for choosing a higher rather then lesser level of culpability. *Id.* at 28. In *Santillanes v. State*, 849 P.2d 358, 361-65 (N.M. 1993), the court made reference to its policy that when a crime is enacted without a culpability requirement the court, absent clear contrary legislative intent, will presume that mens rea must be proven. *Id.* at 361. The presumption was based on what the common law required and the assumption that the legislature would not, without expressly indicating such, derogate the common law. *Id.* It rejected civil negligence as a basis for the possible imposition of a penitentiary term, and noted commentator policy agreement with this point. *Id.* at 363. The court reviewed appellate decisions from other states and found that the bulk of them as a matter of policy rejected civil negligence as the culpability requirement justifying imposition of serious criminal sanctions. *Id.* at 363-64. It made reference to the principles of strict construction of criminal statutes and lenity and employed the principle that when moral condemnation attaches to the conviction of a crime, the culpability the state must prove to convict of such a crime must warrant such contempt. *Id.* at 364-65. In *State v. Pierce*, 788 P.2d 352 (N.M. 1990), the court asserted that the purpose of the comprehensive revision of sex crimes was to further the protection of the bodily integrity of men and women. *Id.* at 358-59. It then suggested the principle that the legislative goal of protecting children supported its conclusion that the government need not prove the accused intended sexual gratification when he contacted or penetrated the intimate parts of a child. *Id.* In *Reese v. State*, 745 P.2d 1146 (N.M. 1987), the court asserted that due process compelled its holding that the crime of aggravated assault of a police officer requires prosecution to prove that the accused had some level of subjective culpability with regard to the circumstantial element that the victim was a police officer. *Id.* at 1147-48. It expressed the view that the purpose of aggravating assault because a police officer is the victim is designed to deter interference with such officer's enforcement of the law, and therefore the added punishment is warranted in only those cases where the accused is proven to have some level of culpability regarding the officer's status. *Id.* In *State v. Lucero*, 647 P.2d 406 (N.M. 1982), the court made reference to the common law presumption that crimes involve proof of criminal intent, to the right of the legislature to impose strict liability, and that once the legislature clearly makes that choice, the presumption is in favor of upholding that decision. *Id.* at 408. It identified a rationale for sanctioning strict liability as evidence that the public interest is so compelling and potential for harm so great, that individual interests are subordinated. *Id.* Curiously, the court applied this principle to a child abuse felony with an express culpability requirement. *Id. See also* Commonwealth v. Lurie, 569 A.2d 329, 332 (Pa. 1990) (stating the traditional policy that criminal statutes must be strictly interpreted to protect accused remains applicable to crimes defined outside of a revised penal code, even if that code contains a provision seemingly designed to supersede that policy); State v. Rowell, 487 S.E.2d 185, 186-87 (S.C. 1997) (asserting the principle that criminal law ordinarily requires both an evil mind and evil hand as well as the principle that the culpable mental state of recklessness cannot be proven solely by proof of a violation of a civil statute.); Schultz v. State, 923 S.W.2d 1, 4 (Tex. Crim. App. 1996) (evaluating court precedent with regard to crimes the criminalization of which the court finds justified by a result element of crime). In *McQueen v. State*, 781 S.W.2d 600 (Tex. Crim. App. 1989), the court asserted that the unauthorized use of a motor vehicle involved the felony criminalization of innocent conduct if strict liability is found with regard to the circumstantial element of "without the owner's effective consent." *Id.* at 602. It made reference to the crime of theft, and concluded that the key element warranting its criminalization was also the same circumstantial element of "without the owner's effective consent." *Id.* at 603-04. The court noted that in a previous case it had held that the appropriate culpability for that element in theft was knowledge. *Id. See also* Alvarado v. State, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985) (asserting that when legislature enacts crime which specifies particular conduct it is criminalized because of that conduct and hence culpability evaluation must focus on that specific conduct); Ledesma v. State, 677 S.W.2d 529, 531 (Tex. Crim. App. 1984) (implying that to avoid a finding that the "stop and identify" misdemeanor crime was unconstitutionally vague, it must be interpreted to find that the appropriate culpable mental state for the circumstantial element of refusing to disclose one's name

to a police officer is "knowledge"); Roof v. State, 665 S.W.2d 490, 491 (Tex. Crim. App. 1984) (asserting that most American jurisdictions have rejected as inappropriate the attachment of culpability to the circumstantial element of the age of a minor for sexually related offenses). In *State v. Mott*, 692 A.2d 360 (Vt. 1997), the court expressly relied on the policy that when crimes have no common law antecedent the level of culpability for the crime is a matter of statutory construction. *Id.* at 365. The accused was convicted of failing to obey a family court order which prohibited him from calling or writing his wife. *Id.* The court held the crime required the culpability of "knowing" with regard to the act of contacting the ex-spouse, and perhaps negligence with regard to exposure to the contents of the order, but that the accused need not have the purpose of violating the order. *Id.* In *State v. Searles*, 621 A.2d 1281 (Vt. 1993), the court found that statutory rape is historically a strict liability crime with regard to the age of the female, and neither the state legislature nor the courts had ever deviated from that traditional common law policy decision. *Id.* at 1282-83. It asserted that one policy factor in determining the appropriate culpable mental state, if any, for a crime is the purpose of the criminalization. *Id.* The court identified the sequence of policy factors it had developed (apparently taking a totality of policy factors approach) to use in determining whether it was appropriate to conclude that the legislature had made a decision to impose strict liability including: the severity of the punishment, the seriousness of the harm to the public, the accused's opportunity to ascertain the true facts, the difficulty of prosecution if intent is required, and the number of prosecutions expected. *Id.* In *State v. Sargent*, 594 A.2d 401 (Vt. 1991), the court asserted that an enduring principle of criminal law was that crimes with result elements are interpreted to require the state to prove that the accused had some culpability with regard to that result element. *Id.* at 402. It asserted that a relatively high level of culpability was required for the result element of kidnapping, because of the severity of the punishment (maximum twenty-five years) for the crime. *Id.* In *State v. Stanislaw*, 573 A.2d 286 (Vt. 1990), the accused was charged with involuntary manslaughter based on the unlawful act of providing liquor to a minor. *Id.* at 288. The court asserted a principle that the legislative failure to include a culpable mental state in the definition of a crime does not normally require a court to conclude that the legislative intention was to create a strict liability crime. *Id.* at 289. It asserted the policy that current crimes recognized as crimes at common law are presumed to require the state to prove some level of culpability. *Id.* at 289-90. It also asserted that an enduring principle of criminal law was that crimes with result elements are interpreted to require the state to prove that the accused had some culpability with regard to that result element. *Id.* The court stated a sequence of policy factors in assessing legislative intention with regard to culpability level or perhaps strict liability, and concluded that most significant factor was the severity of the punishment for the crime. *Id.* It also identified other policy factors and stated that the level of culpability must be set higher than that found sufficient for civil liability, given the potential maximum 15-year term of imprisonment for involuntary manslaughter. *Stanislaw*, 573 A.2d at 289-90. In *State v. Audette*, 543 A.2d 1315 (Vt. 1988), the court evaluated the policy regarding culpability for kidnapping previously undertaken by appellate courts in other states. *Id.* at 1316-17. It asserted that a principle of criminal law was that crimes with result elements are interpreted to require the state to prove that the accused had some culpability with regard to that result element. *Id.* The court cited to *Morissette v. United States*, 342 U.S. 246 (1952), for the principle that where crimes have their origins in common law, courts assume some level of mens rea is required. *Id.* It identified a sequence of policy factors it used in assessing legislative intention with regard to culpability level or perhaps strict liability, and concluded that most significant factor was the severity of the punishment for the crime. *Id.* In *State v. Groom*, 947 P.2d 240 (Wash. 1997), the court suggested that when criminalized conduct is also expressly prohibited by a state constitutional provision, this indicated heightened protection (here against warrantless searches of home), and supported a finding that the crime was a strict liability crime. *Id.* at 246. It identified as another policy concern, warranting a conclusion of strict liability, the seriousness of harm to the public resulting from illegal searches of homes. *Id.* In *State v. Shipp*, 610 P.2d 1322 (Wash. 1980), the court asserted that it would violate due process to interpret the definition of "knowledge" to

allow the jury to conclusively presume the accused had such "knowledge" with regard to objective elements of the crime, because the jury found that a reasonable person in the same situation and with the same information would have such "knowledge." *Id*. at 1325-26. It found that the broadening of the definition of "knowledge" to include culpable ignorance would violate the policy against strict construction of penal statutes, and would violate the due process requirement of fair notice of the terms of the law. *Id*. In *State v. Stroh*, 588 P.2d 1182 (Wash. 1979), the accused was charged with tampering with a witness because he asked a police officer not to attend an administrative hearing involving one of his clients. *Id*. at 1183-84. He claimed that the crime required the prosecution to prove that he had some form of intent to obstruct justice. *Id*. The court rejected this claim based in part on its reasoning that the policy underlying this crime assumes that every attempt to so influence a witness necessarily involves at least the threat of obstructing justice. *Id*. Hence, if "knowingly" is a culpable mental state with regard to the circumstantial element of "witness" or "about to be called as a witness," every convicted person will conclusively be shown to have the intent to obstruct justice. *Id*. The court then synthesized prior cases in which it had imposed a specific intent requirement to find the principle that when this was done it was done with regard to criminalized conduct which itself did not merit criminalization. *Id*. In *State v. Brown*, 422 S.E.2d 489 (W.Va. 1992), the court recognized other sources that have established the principle when the crime of embezzlement is committed by a public official the culpability requirement is watered down because such officials are not as closely supervised by the employer, the public. *Id*. at 492-93. It also asserted the related principle that public officials are held to a higher standard of conduct, and hence a lesser culpability is required, because public funds are a matter of the public welfare. *Id*. at 492. The court relied on decisions from other states also holding that state need not prove that a public official intended to deprive the public permanently of its property at the time she appropriated that property. *Id*. at 492-94. It equated "fraudulent intent" with requiring state to prove that the accused's purpose was to violate law and rejected imposing this burden on the prosecution because it would render numerous crimes ineffective. *Id*. at 494. In *Capshaw v. State*, 737 P.2d 740 (Wyo. 1987), the court approved the principle that when a crime contains no reference to the culpability concepts of "knowledge" and "intent" the court will not require their proof. *Id*. at 743-44. It then compared state statutory approaches with regard to requiring specific intent to deprive the owner permanently of the property as an element of receipt of stolen property. *Id*. It declared at the end of its survey that the position that no such proof is required is the majority rule, and decided it would follow that rule. *Id*.

[57] City of Englewood v. Hammes, 671 P.2d 947, 953 (Colo. 1983); People v. Andrews, 632 P.2d 1012, 1017 (Colo. 1981); Daniels v. State, 448 S.E.2d 185, 188-89 (Ga. 1994); Dausch v. State, 616 N.E.2d 13, 15 (Ind. 1993); State v. Keihn, 542 N.E.2d 963, 968 (Ind. 1989); State v. Chism, 436 So.2d 464, 469 (La. 1983); State v. Fuller, 414 So.2d 306, 310 (La. 1982); State v. Duncan, 390 So.2d 859, 861 (La. 1980); State v. Elzie, 343 So.2d 712, 716 (La. 1977); Warfield v. State, 554 A.2d 1238, 1248, 1252 (Md. 1989); *In re* Welfare of A.A.E., 590 N.W.2d 773, 777 (Minn. 1999); State v. Williams, 503 N.W.2d 561. 565 (Neb. 1993) (focusing on sufficiency of evidence with regard to requisite culpability for the conduct but the result element of first degree assault); State v. LaFreniere, 481 N.W.2d 412, 416 (Neb. 1992); State v. Beck, 471 N.W.2d 128, 130-31 (Neb. 1991) (holding erroneously that the evidence offered by the accused with regard to the culpability for the legal duty circumstantial element of the crime was irrelevant because the court reviewed the divorce decree and found nothing in its content that would provide a basis for the accused to believe that he could stop paying child support if his wife interfered with his visitation rights); State v. Schott, 384 N.W.2d 620, 625 (Neb. 1986); Batt v. State, 901 P.2d 664, 666-67 (Nev. 1995); State v. Sewell, 603 A.2d 21, 29 (N.J. 1992); State v. Lashinsky, 404 A.2d 1121, 1127 (N.J. 1979); Santillanes v. State, 849 P.2d 358, 366 (N.M. 1993); State v. Bogle, 376 S.E.2d 745, 749 (N.C. 1989); Commonwealth v. Lobiondo, 462 A.2d 662, 666 (Pa. 1983); State v. Bryant, 447 S.E.2d 852, 854 (S.C. 1994); State v. Jefferies, 446 S.E.2d 427, 433 (S.C. 1994); State v. Ferguson, 395 S.E.2d 182, 184 (S.C.

1990); McQueen v. State, 781 S.W.2d 600, 604 (Tex. Crim. App. 1989); Hill v. State, 765 S.W.2d 794, 797 (Tex. Crim. App. 1989); Alvarado v. State, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985); State v. Sargent, 594 A.2d 401, 403 (Vt. 1991); State v. Shipp, 610 P.2d 1322, 1326-27 (Wash. 1980); Capshaw v. State, 737 P.2d 740, 745-46 (Wyo. 1987); Dorador v. State, 573 P.2d 839, 843 (Wyo. 1978).

[58] State v. Guest, 583 P.2d 836, 838-39 n.5 (Ala. 1978) (recognizing that the mistake concept could just as easily be expressed by reference to the inability of the state to prove that the accused had the mental state for the crime or the specific element of the crime, by eventually citing to WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW (2d ed. 1986) as authority); People v. Andrews, 632 P.2d 1012, 1016) (Colo. 1981) (rejecting defendant's argument that he could be convicted of the crime of aggravated theft of an automobile if the state only proved that he was mistaken about authorization to exercise control of the car by holding that the requisite culpable mental state for the crime was knowingly, and making express reference to a statutory provision that mistake was only an affirmative defense when it negated requisite culpable mental state). In *Alvarado v. State*, 704 S.W.2d 36, 37 (Tex. Crim. App. 1985), the court made express reference to precedent which had held that the focus of criminalization on the crime of assault was on the result element, and hence attachment of the appropriate culpability must focus on that objective element. The precedent case then expressly recognized that this specific focus with regard to culpability evaluation would in turn affect the application of the mistake of fact defense. *Id.* In *Jones v. State*, 439 S.E.2d 645, 648 (Ga. 1994), the court expressly cited to a secondary authority as the basis for express recognition of the principle that "mistake of fact" is a defense to a crime to the extent that ignorance of some fact negates the existence of the mental state required to establish a material element of the crime. *Id.* The court followed this statement of the principle, by misapplying it by holding that it did not apply to a cruelty to children crime where the culpability was wanton and willful doing of an act with an awareness of plain and strong likelihood that cruel and excessive physical or mental pain would result. *Id.*

[59] Implicit recognitions may also be seen in a decision such as *State v. Brown*, 422 S.E.2d 489, 494 (W. Va. 1992), in which the court held that it would require the state to prove a purposeful act which by implication included, in the court's view, knowledge of circumstantial elements such as the public nature of the funds appropriated. The court therefore concluded that a public official who mistakenly spent public funds for his own use could not be successfully prosecuted. *Id.*

[60] *See supra* notes 37, 49 and accompanying text. In more detail the comparisons were as follows: seven (7) decisions constituting approximately nine percent (9%) of category 1 cases received a point-per-case score between 4 and 6 points, while four (4) decisions constituting five percent of category 2 cases received a point-per-case score between 4 and 6 points, see *supra* notes 38, 50 and accompanying text; thirty-eight (38) decisions constituting approximately forty-seven percent (47%) of category 1 cases received a point-per-case score between 2 and 3.5 points, while thirty-one (31) decisions constituting thirty-six (36%) percent of category 2 cases received a point-per-case score between 2-3.5 points, see *supra* notes 39, 51 and accompanying text; thirty-five (35) decisions constituting approximately forty-four percent (44%) of category 1 cases received a point-per-case score between 0 and 1.5 points, while fifty-one (51) decisions constituting fifty-nine (59%) percent of category 2 cases received a point-per-case score between 0 and 1.5 points, see *supra* notes 40, 52 and accompanying text.

[61] *See supra* notes 41, 53 and accompanying text

[62] *See supra* notes 42, 54 and accompanying text.

[63] *See supra* notes 43, 55 and accompanying text.

[64] *See supra* notes 44, 56 and accompanying text.

[65] *See supra* notes 45, 57 and accompanying text.

[66] *See supra* notes 46, 58 and accompanying text.

[67] *See supra* note 30.

[68] *See supra* notes 41 and 53 and accompanying text (identifying those state supreme court decisions in category one and two states which did focus on identifying the individual objective elements for the crime). The following cases were selected to illustrate the magnitude of this omission. In *Spitz. v. Municipal Court*, 621 P.2d 911 (Ariz. 1980), the court characterized the issue on appeal as "Is the sale of alcoholic beverages to a person under the age of 19 a misdemeanor . . . a crime requiring guilty knowledge?." *Id.* at 912. In another case, the actual issue concerned only to the age of the buyer of the liquor, not the appropriate culpable mental state for the rest of the crime. *See* State v. Morse, 617 P.2d 1141, 1146 (Ariz. 1980). A revised receipt-of-stolen-property statutory definition was interpreted to include knowingly controls property of another, but with the court failing to perceive that this language would require the state to prove that the accused was aware of a conduct and a circumstantial element, control of the property, and that the property was owned by another person. The evidence in the case, by the court's own admission, showed that the accused believed that the property was abandoned at the time he took control. *Id.* In *Robinson v. State*, 737 S.W.2d 153 (Ark. 1987), the accused was charged with aggravated robbery and argued that the prosecution's trial evidence failed to prove he had the requisite culpable mental state. *Id.* at 154. The Arkansas Supreme Court found the evidence sufficient by reference to the fact that the victim interpreted the defendant's action in holding a knife to her throat as a demand for money and hence offered the accused all of her money. *Id.* In fact the defendant raped the victim, and never made an express demand for money, although he did take the money offered by the victim. *Id.* The Arkansas Supreme Court made no reference to the objective elements of the aggravated robbery, nor the appropriate culpability required for those elements. General reference was made by the court to "intent" and to the possibly unconstitutional presumption that one is presumed to intend the natural consequences of his act. *Id.* No reference was made by the court to Model Penal Code culpable mental states adopted by the Arkansas Penal Code. *See also* State v. Blalock, 756 P.2d 454, 456 (Mont. 1988). In *Potter v. State*, 684 N.E.2d 1127 (Ind. 1997), the accused was convicted of Class A felony rape which required compulsion and use of a deadly weapon to accomplish rape or possession of a deadly weapon during the rape. *Id.* at 1134. The accused did not have a knife in his possession at the time of the sexual act, nor did he threaten its use at that time, but earlier that same evening had threatened to kill his wife(victim), children, and himself. *Id.* On appeal, the accused complained that the judge had refused to specifically instruct the jury that the prosecution must prove knowingly and intentionally in relation to each objective element, including the use of the knife. *Id.* The Indiana Supreme Court ruled that the failure to give the instruction was not prejudicial because the judge did instruct the jury that the knife must be used in the commission of the rape. *Id.* at 1135. The court thereby completely ignored the point of the requested instruction - telling the jury that the state must prove beyond a reasonable doubt that the accused was aware at the time he was using the knife that he was doing so to obtain the acquiescence of the alleged victim in the rape. In *State v. Williams*, 503 N.W.2d 561 (Neb. 1993), the court completely failed to first analyze the objective elements in the penal code's revised and interrelated definitions of first-, second-, and third-degree assaults. It therefore never focused its culpability analysis on how the different levels of culpability related to different objective elements in order to make comprehensive sense out of the assault definition scheme. Instead, the court reverted to a common law culpability generic labeling process to erroneously conclude that all three of the assault crimes were crimes of general and not specific intent,

and therefore the fact that the accused arguably did not intend to inflict seriously bodily injury was irrelevant to the first degree assault prosecution. *Id.* at 563. In *State v. Lashinsky*, 404 A.2d 1121 (N.J. 1979), the court held that disorderly conduct required the prosecution to prove that the accused knowingly interfered with another person in a public or private place when the latter was lawfully at such place. *Id.* at 1126. The court held that the state need only prove that the conduct was volitional and purposeful and produced the prohibited result. *Id.* The court ignored identification of the appropriate/requisite culpable mental state for the result element of "interferes," and for the circumstantial elements of "person," "place," and "lawfully". *See also* Commonwealth v. Falana, 696 A.2d 126, 129 (Pa. 1997).

[69] *See supra* note 68 (cases). In *State v. Missamore*, 803 P.2d 528 (Idaho 1990), the accused was charged with trespass and argued that he was entitled to a mistake of fact instruction. *Id.* at 532. The trespass definition that was the basis for the charge included refusing to leave the "property" upon request by "owner." *Id.* at 531. The accused was standing in an area that was on the border of the complainant's land. *Id.* If even recklessness was the requisite culpable mental state with respect to circumstantial element(s) of "owner" and/or "property," the above fact could have given a properly instructed jury reason to find that the state had not proven culpability beyond a reasonable doubt. The Idaho Supreme Court, however, ruled that refusal to give a mistake of fact instruction was correct because all that the state had to prove is that the defendant refused to leave property that belonged to another after being so requested by the owner or authorized agent. *Id.* at 532. Hence, the Idaho Supreme Court, perhaps unwittingly, held that a circumstantial element critical to justifying serious criminalization was a strict liability element. *See also* State v. Buchanan, 549 N.W.2d 291, 293-94 (Iowa 1996) (working with common law culpability concepts of general and specific intent to erroneously conclude that resisting or obstructing a police officer is a general intent crime, but murder is a specific intent crime). In *State v. Blalock*, 756 P.2d 454 (Mont. 1988), the accused was charged with trespass. *Id.* at 455. The accused claimed that the requisite culpable mental state was "knowingly" with regard to the circumstantial element, the real property of another, and that he lacked that culpability because he did not realize he had entered the property of another. *Id.* at 455-56. The Montana Supreme Court responded by asserting that it is well established that an accused need not form an intent to commit a specific crime or to intend the result that occurred to be found guilty of knowingly committing a crime. *Id.* at 456. The court went on to respond further with another non sequitur "that ignorance of the law has never been a defense in Montana." *Id.* In the end, the Montana Supreme Court erroneously rejected the accused's lack of culpability claim, resulting in finding strict liability for a circumstantial element crucial to justifying criminalization. In *State v. Nagel*, 279 N.W.2d 911 (S.D. 1979), the court asserted that the policy underlying "Blue Sky" securities regulation law, maximizing protection of inexperienced investors, warranted imposing strict liability. *Id.* at 915. The court, however, did not demonstrate that it was aware of the difference in policy implications for imposing strict liability for all of the objective elements of the crimes involved, or just the circumstantial element of "unregistered." The accused's lack of culpability claim given the facts of the case, was directed towards another circumstantial element, whether what they were doing involved "securities." *Id.* at 914. *See also* Potter v. State, 684 N.E.2d 1127, 1134 (Ind. 1997). In *State v. Ryan*, 543 N.W.2d 128 (Neb. 1996), *overruled by* State v. Burlison, 583 N.W.2d 31, 35 (Neb. 1998), the court held that second-degree murder required proof of the additional culpability concept "malice," despite the revision of the crime so as to specifically require an intentional killing. *Id.* at 136. The court erroneously relied on the principle that some intentional killings are justified. *Id.* at 137. The court failed to identify the objective elements of the crime first, and therefore what the "intent" culpability had to be proved with regard to. Instead, it focused on factors, such as self-defense and the right of the state to execute persons, to erroneously conclude that "malice" must be a separate culpability element. *Id. See also* State v. Williams, 503 N.W.2d 561, 563 (Neb. 1993); Commonwealth v. Falana, 696 A.2d 126, 129 (Pa. 1997) (focusing on whether the accused had wrongful intent at the time he uttered a threat to the victim in the trial courtroom, not on whether he

made that statement with the objective of obstructing the administration of justice -- the result element the court earlier had identified as an element of the crime).

[70] State v. Missamore, 803 P.2d 528, 533 (Idaho 1990); State v. Blalock, 756 P.2d 454, 456 (Mont. 1988) (discussed *supra* note 69); State v. Nagel, 279 N.W.2d 911, 915-16 (S.D. 1979) (discussed *supra* note 69); In *State v. Larsen*, 865 P.2d 1355 (Utah 1993), the court omitted the focus on the requisite culpable mental state for such objective elements as "material fact," "misrepresentation," and "circumstances," and rejected a good faith defense. *See id.* at 1360. The court instead recited, but did not specifically apply to these and other objective elements of the crime, the culpability concept of "willfulness." Hence, the court failed to perceive that it might be sanctioning strict liability for some of the crucial circumstantial objective elements of this securities crime. *See also* Clarkson v. State, 486 N.E.2d 501, 506-07 (Ind. 1985) (finding that the accused, who was convicted of several securities felonies, was not prejudiced by the failure of the judge to give express culpability instruction with regard to any of the objective elements of any of the crimes). In *Outmezguine v. State*, 641 A.2d 870 (Md. 1994), the court made the error of relying on the culpability element's inclusion in other subsections of a series of child pornography crimes to conclude that the absence of the same culpability concept in the subsection accused was convicted under meant that the legislature intended strict liability with regard to the age of the victim. *Id.* at 874. The court's error was its failure to recognize that the culpability concept in other subsections might have been intended by the legislature to attach to different conduct elements in those crimes, whose nature was more general than the more specific conduct defined in the subsection in question. Hence it was not at all clear that the culpability concept in those crimes was meant to attach to the circumstantial element of the age of the victim. As a matter of policy, it was clear that in all three subsections the age of the victim was the crucial element justifying criminalization and perhaps saving the constitutionality of the criminalization. *See* John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM. CRIM. L. REV. 111 (1996) (asserting that there are some crimes and/or elements of crimes that are strict liability and some crimes where negligence is deemed at least the requisite culpable mental state). It was not clear if Diamond recognized that his findings may be objective element specific rather then strict liability or negligence for the entire crime. It was also not clear if he was implying that strict liability or negligence was at least the requisite culpability for an objective element critical to justifying criminalization. There was an indication that he was making a finding that it was factually true. *Id.* at 129. Diamond did not make clear what percentage of strict liability and/or negligence he identified were the result of culpability evaluations by the legislature, the courts, or both. It was also not clear if he was advocating that strict liability was appropriate in the crimes he identified, or whether it is more broadly appropriate. *See also* Simons, *supra* note 4.

[71] Several Illinois Supreme Court decisions present this issue. *See, e.g.*, People v. Sevilla, 547 N.E.2d 117, 120 (Ill. 1989) (failing to file a retailer tax); State v. Beishir, 646 S.W.2d 74, 77 (Mo. 1983) (construing a deviate sexual intercourse statute to be strict liability without reference to the distinction between objective elements -- conduct regarding the sexual conduct, and circumstantial regarding the age of the victim). Of course it does not help when legislatures repeal guideline provisions which expressly made reference to proving the requisite culpability for each element of the crime. *See* State v. Elton, 680 P.2d 727, 728 (Utah 1984) (citing to a Utah statutory requisite culpability guideline, UTAH CODE ANN. § 76-2-101(1), which prior to its repeal in 1983, expressly provided that the requisite culpability must be proven as to each element of the crime).

[72] State v. Wilson, 924 S.W.2d 648, 650 (Tenn. 1996) ("By requiring that the act be either intentionally or knowingly committed, the legislature has required the state to prove an element in addition to the mere voluntary commission of the criminal act."). In *People v. Washburn*, 593 P.2d 962 (Colo. 1979), the court

asserted that a theft of rental property charge cannot be defended by a claim that the conduct was not wrong. *Id.* at 964-65. The court failed, however, to identify each objective element of the crime, what culpability was necessary to be proven with regard to each element, in order to justify felony criminalization. Hence, the court failed to appreciate that a claim that the conduct was not wrong could mean that felony criminalization was only warranted if a particular level of culpability was required for each of the objective elements of the crime, including those circumstantial element(s) with a legal reference such as "rental property."

[73] For example, in *Alvarado v. State*, 704 S.W.2d 36 (Tex. Crim. App. 1985), the accused was charged with assault of a child by causing seriously bodily injury to a child. *Id.* at 37. The court ruled that the critical element justifying criminalization was the result element of serious bodily injury. *Id.* at 39. The conduct element on the other hand was unspecified, and hence meant any act which caused such an injury to a child. The court ruled that the trial judge should have instructed the jury in a manner that would limit attachment of the alleged culpability level of at least knowledge to only the result element. *Id.*

[74] In *People v. Hering*, 976 P.2d 210 (Cal. 1999), the California Supreme Court asserted that the difference between specific and general intent was to some degree only linguistic, because the former involved intent to do a current act, while the latter involved intent to do a future act. *Id.* at 213. The statement implied that the only objective element in crimes is an act. The statement was made in the context of making a culpability evaluation for two crimes, both of which had several complex circumstantial elements. *Id.* *See also* People v. Sargent, 970 P.2d 409, 412 (Cal. 1999) (defining common law culpability concepts in state pattern jury instructions with reference to only the conduct category of objective element types). In *State v. Orsello*, 554 N.W.2d 70 (Minn. 1996), the court sought to articulate the difference in culpability of specific compared to general intent. *Id.* at 72. General intent, the court asserted, required only that the accused intentionally engage in specific, prohibited conduct, while specific intent required that the accused acted with an intention to produce a specific result. *Id.* The court failed to recognize that it had not addressed the key issue of whether the "specific result" it made reference to had to be an objective element of the crime, or did not have to be an objective element of the crime, or that it made no difference. *See also* State v. Beck, 471 N.W.2d 128, 130 (Neb. 1991) (choosing to ignore express statutory language that required at least negligence be proven with regard to the circumstantial element of legal duty to pay support). While in *Beck*, this failure was not outcome-determinative, in *State v. Meyer*, it was arguably outcome-determinative, because the accused alleged facts that might have resulted in a reasonable person believing he was no longer obligated to pay the child support. *See* 460 N.W.2d 656, 658 (Neb. 1990). *See also* State v. Bachkora, 427 N.W.2d 71, 73 (Neb. 1988) (summarizing its earlier holding that the accused could be found guilty of recklessly causing serious bodily injury without the prosecution having to prove recklessness with regard to the result element of serious bodily injury).

[75] *See supra* notes 68-70 (discussion of cases). *See also* Spitz v. Municipal Court, 621 P.2d 911, 912 (Ariz. 1980) (age of the victim); State v. Morse, 617 P.2d 1141, 1146 (Ariz. 1980) (personal property of another). *But see* State v. Olsen, 462 N.W.2d 474, 477 (S.D. 1990) (assessing culpability required for a reckless killing, and eventually concluding that the state must prove only awareness of risk to safety of others); Outmezguine v. State, 641 A.2d 870, 874 (Md. 1994) (age of the victim in a child "pornography" crime).

[76] *See supra* notes 42, 54 and accompanying text.

[77] *See supra* note 62 and accompanying text.

[78] *See* State v. Schmiedt, 525 N.W.2d 253 (S.D. 1994); State v. Rash, 294 N.W.2d 416 (S.D. 1980). In *Schmiedt*, the defendant claimed aggravated assault, in which no culpability concept was expressly mentioned, was a "specific intent" crime. *See* 525 N.W.2d at 256. The court, without reference to South Dakota Criminal Code's five hierarchical culpability concepts, see *supra* note 20, evaluated whether the crime required specific as opposed to only general intent. *Id.* In *Rash*, because the defendant made reference to the argument that specific intent was equivalent to purpose or knowledge, the court did also, but with reference to the Model Penal Code provisions, and not the South Dakota Criminal Code's definitions of culpability concepts. *See* 294 N.W. 2d at 417-18. In *State v. Larsen*, 865 P.2d 1355 (Utah 1993), the defendant was convicted of violating Securities Law and claimed on appeal that the crime, which incorporated the culpability concept of "willfully," required proof of scienter. *Id.* at 1358. The Utah Supreme court rejected that claim, without attempting to define scienter, without recognizing it was a common law culpability concept, and without making reference to culpability hierarchical concepts in its revised criminal code as guidance for defining scienter. *Id.* Also, the court sought to elaborate on the statutory definition of "willfully" by making reference to how the concept was defined by courts in jurisdictions without culpability concept advancement. *Id.* In *State v. Williams*, 503 N.W.2d 561 (Neb. 1993), the Nebraska Legislature seemingly employed Model Penal Code hierarchy in defining interrelated and hierarchical crimes of first-, second-, and third-degree assault, but this revision was negated by the Nebraska Supreme Court decision. *Id.* at 563. The court resorted to common law culpability concepts of general and specific intent, and erroneously held that the state need not prove beyond a reasonable doubt that the accused was at least aware that his conduct would cause serious bodily injury to the victim. *Id.*

[79] In *Phillips v. State*, No. CR-96-0001, 1998 Ala. Crim. App. LEXIS 269 (Ala. Crim. App. Dec. 18, 1998), *cert. granted, remanded sub nom. Ex parte* Phillips, No. 1981083, 2000 Ala. LEXIS 82 (Ala. Mar. 10, 2000), *on remand at, remanded sub nom.* Phillips v. State, No. CR-96-0001, 2000 Ala. Crim. App. LEXIS 97 (Ala. Crim. App. Apr. 28, 2000), the court discussed the signal sent by the legislature when it omits reference to "knowledge" or other apt words in a crime the court characterized as passed in aid of police power. The court never made reference to its own culpability hierarchy, but did refer to a commentator's mention of four culpability levels. *Id.* The court eventually held that the impact of its decision might be to result in convictions of hunters who are subjectively innocent. *Id.* The court thereby ignored the fact that the impact of its decision might also be to convict hunters who are objectively innocent.

[80] State v. Hopkins, 782 P.2d 475, 477 (Utah 1989) (identifying recklessness as the minimum culpability level in an aggravated sexual assault crime).

[81] *Id.*

[82] In *State v. Silveira*, 503 A.2d 599 (Conn. 1986), the court acknowledged that first-degree manslaughter included a definition that required proof of recklessness with regard to the death, but then asserted that because the defendant was arguing that he did not intend to shoot the victim he was not entitled to a mistake of fact instruction on this definition of first degree manslaughter. *Id.* at 604. The court failed to perceive that the claim of lack of intent could encompass the claim that at the time of firing the gun the accused was not even aware of a substantial and unjustified risk that his conduct could cause the death of another human being. The court failed to examine the trial transcript to determine if/how the judge defined "intent" and "reckless." In *State v. Hopkins*, 782 P.2d 475 (Utah 1989), the accused was charged with aggravated sexual assault. *Id.* at 476. The court identified the victim's lack of consent as one of the objective elements and that the minimum culpable mental state expressed in the crime was recklessness. *Id.* at 477. The court then rejected the accused's claim that a reasonable belief that the victim gave

consent was not a defense, because this claim sought to insert an additional subjective culpable mental state into the crime. *Id.* This was error on several levels. First, the statute already required a subjective culpable mental state, recklessness -- actual awareness by the accused of the risk -- that arguably applied to all objective elements, including the circumstantial consent element. Second, the accused's assertion was that a lesser and objective culpable mental state -- negligence -- must be proven by the state with regard to the consent element.

[83] Spitz. v. Municipal Court, 621 P.2d 911, 913 (Ariz. 1980) ("When a person does an act which reasonable persons should recognize will harm the health or morals of a youth, there is sufficient criminal intent to warrant conviction though the actor for good reason does not realize that the child is below the particular age selected by law. . . .") (quoting State v. Cutshaw, 437 P.2d 962, 973 (Ariz. Ct. App. 1968) (citation omitted)). In other words, the appropriate culpability is apparently negligence with regard to the age of the victim, but the actor is guilty even if he is not negligent with regard to that circumstantial element.

[84] In *State v. Swain*, 718 A. 2d 14 (Conn. 1998), the accused argued that the appropriate culpability for the circumstantial element of driving while her license was suspended was knowledge. *Id.* at 4. The Connecticut Supreme Court rejected this claim on policy grounds and further found that the policy justified a finding of strict liability. *Id.* at 5. The court never considered, however, that perhaps the appropriate culpability was "recklessness" or "criminal negligence," despite the express availability of those lower culpability levels in the penal code. In *State v. Neuzil*, 589 N.W.2d 708, 711 (Iowa 1999), the Iowa Supreme Court ignored the express culpability language in the definition of "stalking" which required either that the accused "know" his conduct was causing fear of bodily injury or death or that the accused should know. Instead, the court focused its attention on deciding that a specific intent instruction with regard to this element was properly denied. *Id.* The trial judge in fact gave no instruction with regard to any level of culpability for this element. *See id.* at 410. For a similar erroneous analysis by a court without a culpability hierarchy, see *infra* note 96 and accompanying text. *See also infra* note 125 (making general reference to the mixed performance of state supreme courts in applying penal code culpability concepts and hierarchical interrelationship to crimes outside of the code).

[85] State v. Calamity, 735 P.2d 39, 43 (Utah 1987) (holding that general and specific intent culpability concepts are eliminated by the revised criminal code); State v. Lashinsky, 404 A.2d 1121, 1125n.2 (N.J. 1979).

[86] State v. Smith, 554 A.2d 713, 715-17 (Conn. 1988) (making express reference to and using "specific intent" and "general intent" without recognizing the lack of clear definition distinctions between these concepts, and employing an analysis that ends by equating specific intent to Model Penal Code culpability level of recklessness); State v. Tedesco, 397 A.2d 1352, 1359 (Conn. 1978) (using common law ambiguous "specific intent" culpability concept to determine the appropriate culpable mental state). *See also* People v. Frieberg, 589 N.E.2d 508, 517 (Ill. 1992) (employing defendant's characterization of "specific intent" as point of departure for analyzing defendant's culpability argument); State v. Carson, 950 S.W.2d 951, 954 (Tenn. 1997) (characterizing Tennessee's Model Penal Code emulating definition of "intent" as similar to the common law).

[87] State v. Morse, 617 P.2d 1141 (Ariz. 1980) (making several references to specific intent). In *State v. Torres*, 660 P.2d 522, 524 (Haw. 1983), the state on appeal asserted that with regard to the charging instrument, incest was a crime of general and not specific intent and hence no specific culpability need be alleged. *Id.* at 1147. The Hawaii Supreme Court decided the case by relying on a procedural statute, which retained reference to common law culpability concepts. *Id.* This procedural statute obviously had

not been modified to reflect Hawaii's substantive adoption of new culpability concepts.

[88] People v. Krovarz, 697 P.2d 378, 379 (Colo. 1985) (noting that the Colorado legislature, effective 1978, had reintroduced into its criminal code "specific intent," equating it to "intentionally," which in turn was defined similarly to the Model Penal Code concept of "purposefully," and equating "general intent," equating it to "knowingly"); People v. Washburn, 593 P.2d 962, 965 n.4 (Colo. 1979); Commonwealth v. Lobiondo, 462 A.2d 662, 664-65 (Pa. 1983).

[89] In *Commonwealth v. Lobiondo*, 462 A.2d 662 (Pa. 1983), the accused argued that the crime of assault required proof of gross negligence. *Id.* at 664. The court held that gross negligence was equated to recklessness by the legislature, using as authority the fact that in the current involuntary manslaughter crime the legislature used recklessness or gross negligence. *Id.* at 665. Employment of "or" in that crime would suggest a difference between those two culpability concepts. The attorney for the accused, on the other hand, had failed to recognize that the code's definition of "negligence" was identical to the historic concept of gross negligence.

[90] State v. Guthrie, 741 P.2d 509, 510 (Or. 1987) (rejecting the intermediate appellate court's claim that a crime involving failure to get requisite permit for a truck was a strict liability crime, but then failing to provide any guidance to identify the appropriate/requisite culpable mental state, hence making it difficult if not impossible for the intermediate appellate court to determine if the accused was guilty of the crime).

[91] State v. Jennings, 722 P.2d 258, 262 (Ariz. 1986) (rejecting strict liability, but selecting "knowledge" as the requisite culpable mental state without reference to three other culpable mental states or an explanation of why "knowledge" was selected). In a series of decisions, the Colorado Supreme Court resolved ambiguities about a crime by holding a culpable mental state was required. The Colorado Supreme Court, however, without further analysis, held that the appropriate culpable mental state was knowledge. *See, e.g.*, People v. Moore, 674 P.2d 354, 358 (Colo. 1984) (holding that knowingly is the requisite culpable mental state for sale of counterfeit controlled substance felony, but the court failed to specifically decide if the state must prove that the accused is aware that the substance is "counterfeit," and/or is aware that the substance appeared to be a controlled substance); City of Englewood v. Hammes, 671 P.2d 947, 951 (Colo. 1983) (reaching the conclusion without evaluation that knowing is requisite culpable mental state for a city ordinance criminalizing interference with a police officer in the course of duty); People v. Bridges, 620 P.2d 1, 3 (Colo. 1980). In *State v. Torres*, 660 P.2d 522 (Haw. 1983), "intentionally" was asserted as indisputably the appropriate culpability for the act of incest, with reference only to the fact that no legislative intent to impose strict liability appeared. *Id.* at 524. The court ignored three other culpability level options -- knowledge, recklessness, and negligence -- that could be the appropriate culpable mental state once it decided that incest/an element of incest was not strict liability. *Id.* In *People v. Brown*, 457 N.E.2d 6, 7 (Ill. 1983), an Illinois Class A misdemeanor criminalized possession of a motor vehicle with an altered vehicle identification number, even if the accused did not "know" the number had been altered. The Illinois Supreme Court construed the statute to demonstrate a legislative intent to impose strict liability for a crime for which a person could serve up to a year in prison, without considering whether "recklessness" or "negligence" were the appropriate culpable mental states for this possession crime. *Id.* at 9. For commentator recognition, in the context of an assessment of when strict liability is warranted, that appellate courts have failed to fully consider the range of culpability concepts available as options in an appropriate culpability analysis, see Simons, *supra* note 4, at 1120.

[92] State v. Jennings, 722 P.2d 258, 261-62 (Ariz. 1986) (placing reliance on specific prior precedent and the principle that strict liability is the exception to be found only where legislative intent is clear, resulting in the conclusion that negligence is the requisite culpable mental state for the circumstantial element of

driving without a license). *But see* State v. Williams, 698 P.2d 732, 734 (Ariz. 1985) (employing policy analysis to conclude that knowledge was the appropriate culpable mental state for this element).

[93] People v. Hering, 976 P.2d 210, 213 (Cal. 1999) (recognizing difficulty and problems with distinguishing specific from general intent). In *Commonwealth v. Schuchardt*, 557 N.E.2d 1380 (Mass. 1990), the court held that "wanton" destruction of property was not lesser culpability to "willful and malicious" destruction of property because the former, unlike the latter, required conduct whose likely effect is substantial harm. *Id.* at 1383. The court failed to recognize that the crimes in question focused on a result objective element, and with regard to that result element, the court failed to specify what "willful and malicious" required the prosecution to prove. In *State v. Ryan*, 543 N.W.2d 128 (Neb. 1996), *overruled by* State v. Burlison, 583 N.W.2d 31 (Neb. 1998), the court overturned a second-degree murder conviction because the trial judge instructed the jury that if the state proved beyond a reasonable doubt that the accused intentionally killed the victim he should be found guilty, without also instructing the jury on the additional culpability element of "malice." But as students of common law murder well know, malice aforethought was simply a term of art at common law and encompassed several types of culpability towards the result element death -- one of which that was almost universally held to be was intentional, i.e. acting with the objective of causing the death of another human being. *See also* State v. Champa, 494 A.2d 102, 105 (R.I. 1985) (suggesting that it had created a guideline that when the crime is a misdemeanor, specific intent need not be proven by the prosecution, but failing to explain the logic or policy that would justify such a guideline).

[94] In *People v. Hering*, 976 P.2d 210 (Cal. 1999), the court relied on a court-made doctrine that there is no significant difference between definitions of "specific" and "general" intent unless the defendant argues specific "mental defenses" such as voluntary intoxication, mental disease, or mental impairment. *Id.* at 213. Hence, two defendants who were charged with offering medical services in order to induce subsequent patient referrals were held not to be entitled to an instruction and possible acquittal on the theory that the state had failed to prove that they made the offer of medical discounts for the purpose of inducing future patient referrals. *Id.* The court made the gross error of asserting that the defendants must allege a "mental defense" in order to be entitled to an instruction on "specific intent." *Id.* In *Outmezguine v. State*, 641 A.2d 870 (Md. 1994), the accused's conviction of child pornography felony was upheld by the Maryland Court of Appeals despite the accused's suggestion that one appropriate resolution of the case was to construe the legislative intent to require the state to prove recklessness or negligence with regard to the age of the person depicted in the sexual conduct pictures. *Id.* at 876. The court failed to give significant consideration to this option -- Maryland had no such culpability definitions. In *Commonwealth v. Alvarez*, 596 N.E.2d 325 (Mass. 1992), the accused was charged with selling a controlled substance within 1000 feet of a school and "defended" by claiming he did not "know" he was within that proximity to a school. *Id.* at 327. Neither the accused nor the court in rejecting this defense made any reference to the lesser culpability concepts of "recklessness" or "negligence" as the appropriate culpable mental state for the "school zone" objective element that added a mandatory two additional years onto any term of imprisonment imposed on the accused for the sales crime(s). *See also* State v. Ryan, 543 N.W.2d 128 (Neb. 1996), *overruled by* State v. Burlison, 583 N.W.2d 31 (Neb 1998).

[95] People v. Hering, 976 P.2d 210, 213 (Cal. 1999) (relying on court-made doctrine that there is no significant difference between definitions of "specific" and "general" intent, unless the defendant argues specific "mental defenses" such as voluntary intoxication, mental disease, or mental impairment); Jones v. State, 439 S.E.2d 645, 648 (Ga. 1994) (holding that "maliciously" is of such obvious significance and there is such a common understanding that no specific definition of the concept need be given to the jury); State v. Chism, 436 So. 2d 464, 467 (La. 1983) (holding that an accessory after the fact crime required the

prosecution to prove intent to assist another person to avoid arrest, trial, conviction, or imprisonment by proving either general or specific intent, but failing to attempt to explain how the definitions of these concepts in this context would make a difference in what the state had to prove); Commonwealth v. Luna, 641 N.E.2d 1050, 1053 (Mass. 1994) (defining "willfully"); State v. Orsello, 554 N.W.2d 70, 72, 75 (Minn. 1996) (defining specific intent as the intent to cause a particular result or perhaps knowledge that the objective result element of the crime is likely to occur). In *State v. LaFreniere*, 481 N.W.2d 412 (Neb. 1992), the court first defined "knowingly" as the perception of facts needed to prove the crime, but later stated that an acceptable definition of knowingly was that a reasonable man would believe, based on the facts possessed by the accused, that the circumstantial element in question (here the stolen nature of the property accused sold) existed. *Id.* at 414-15. This latter definition of knowledge equates it to either simple, gross, or perhaps the Model Penal Code definition of "negligence." *See also* Santillanes v. State, 849 P.2d 358, 361-62 (N.M.1993) (holding that when the legislature includes but fails to define a culpability concept, the court must fill that definition gap); State v. Patch, 488 A.2d 755, 760 (Vt. 1985) (equating "specific intent" with "purpose" and "knowing"). *But see* State v. Audette, 543 A.2d 1315 (Vt. 1988) (holding that the appropriate/requisite culpability for kidnapping is general intent which equates to Model Penal Code culpability concepts of purpose and knowledge). In *Bryan v. State*, 745 P.2d 905, 908 (Wyo. 1987), the court asserted that sexual assault was a general intent crime. *Id.* at 908. General intent, the court asserted, required only that the state prove the act was voluntary, and the inference arises that the accused intended the result. *Id.* at 909. Hence, there was no requirement that a judge taking a guilty plea to first degree sexual assault inform the accused that sexual intrusion required a factual basis for inferring that the purpose of the assault was for sexual gratification. *Id.*

[96] In *People v. Quinn*, 487 N.W.2d 194 (Mich. 1992), the court held that when the legislature enacts a crime that was not recognized as such at common law, the court's task is to determine if the legislature intended that knowledge be proven as an element of the offense or whether the legislature intended to hold the offender liable regardless of what he knew. *Id.* at 198. Omitted from such an analysis are the intermediate policy options, that the legislature intended the state must prove recklessness, criminal negligence, or even civil negligence as the requisite culpability level.

[97] Warfield v. State, 554 A.2d 1238, 1250 (Md. 1989) (defining general intent in criminal trespass type statute to mean aware of the fact that the actor is making an unwarranted intrusion by express reference to the Model Penal Code Trespass provision); State v. Jefferies, 446 S.E.2d 427, 430, 431 (S.C. 1994); State v. Ferguson, 395 S.E.2d 182, 183 (S.C. 1990); State v. Sargent, 594 A.2d 401, 402 (Vt. 1991). In *State v. Brown*, 422 S.E.2d 489, 494 n.5 (W. Va. 1992), the court, after holding that embezzlement by a public official was not a specific intent crime, expressly declined to hold that the requisite culpable mental state was therefore properly characterized as "general intent." In fact, the court, expressly relying on the recommendation and arguments of the Model Penal Code, characterized the common law use of "general" in contrast to "specific" intent as a source ambiguity and confusion. *Id.*

[98] State v. Chism, 436 So. 2d 464, 467 (La. 1983) (equating general intent with modern culpability concept of knowledge without explanation); State v. Audette, 543 A.2d 1315 (Vt. 1988) (holding that appropriate/requisite culpability for kidnapping is general intent, which it equates to Model Penal Code culpability concepts of purpose and knowledge).

[99] State v. Chism, 436 So. 2d 464, 467 (La. 1983).

[100] For example, in *State v. Shipp*, 610 P.2d 1322 (Wash. 1980), the court made express reference to two definitions of "knowledge" in WASH. REV. CODE § 9A.08.010(1)(b). *Id.* at 1325. First, knowledge meant awareness of facts, circumstances, or results described in the definition of a crime. *Id.* Second,

"knowledge" meant a belief formed by a reasonable person in the same situation and with the same information as the accused that a fact described in a crime's definition exists. *Id*. The court held that the second definition only permitted but didn't require a jury to find that the specific accused was aware of the objective element/fact. *Id*. The court failed to appreciate that even this limited sanctioning of the second definition of "knowledge" created a substantial risk that the concept had been converted to "criminal negligence."

[101] For example, in *Alvarado v. State*, 704 S.W.2d 36 (Tex. Crim. App. 1985), a specialty crime, involving varying degrees of severe injury to an elderly or disabled person or to a child, made reference to all four culpable mental states and then sought to grade the crime differently dependent upon the severity of the injury to these types of persons and the level of culpability of the accused towards that result element. The Texas Legislature failed to assign specifically any of these culpability levels to the circumstantial element of the status of the person that qualified them for the special protection of this statute. Inclusion of all four levels of culpability therefore arguably made it even more difficult to decide upon an appropriate culpable mental state for this circumstantial element crucial to this criminalization, because prosecutors, defense lawyers, and courts would likely be even more reluctant to conclude that the legislature simply failed to make a culpability decisions. *See infra* notes 102-109 and accompanying text. Hence, attaching the level of culpability the legislature attached to the grading decisions it made related to the result element, and culpability for that result element (as described above) would not seem appropriate given the different functions served by these objective elements

[102] Some rules of statutory interpretation as they relate to culpability evaluations should be retained and employed where applicable. *See, e.g.*, Garnett v. State, 632 A.2d 797, 804-05 (Md. 1993) (making express reference to aspects of specific legislative history of current statutory rape subsection to point out that the Senate version of the bill had a culpability requirement while the House version of the bill did not, and eventually the House version of the bill was enacted).

[103] *See generally supra* notes 43, 54 (discussion of cases). *Compare State v. Rice*, 626 P.2d 104, 109 (Ala. 1981) (making reference to two other game and wildlife regulatory crimes, both of which expressly included a culpability level, to imply that the game and wildlife crime at issue also should be interpreted to include a culpability level), *with* State v. Larson, 653 So.2d 1158, 1163 (La. 1995) (concluding that inclusion of an express culpability concept in other subsections of the same statute meant that the legislature intended strict liability for the crimes charged).

[104] *See supra* notes 43, 55, 70-71, and *infra* notes 158-165. *See, e.g.*, State v. Swain, 718 A.2d 1, 11 (Conn. 1998) (holding that if the legislature had decided to require culpability then it could, as it had for other crimes, expressly include that concept in the definition of the crime).

[105] *See, e.g.*, State v. Mountjoy, 891 P.2d 376, 381 (Kan. 1995) (relying upon a guideline for the proposition that if a crime was a misdemeanor or a traffic violation then the legislature could make it a strict-liability crime or element). It should be noted that there is a consensus among state supreme courts that almost no crime is strict liability with regard to all of its objective elements. *See supra* notes 43, 54 (discussion of cases).

[106] *See generally supra* notes 43-44, 54-55 (discussion of cases). *See, e.g.*, Warfield v. State, 554 A.2d 1238, 1250 (Md. 1989); State v. McGee, 680 N.E.2d 975, 977 (Ohio 1997) (relying in part on this guideline in making a culpability evaluation of a section of the endangering children crime); Commonwealth v. Lurie, 569 A.2d 329, 331 (Pa. 1990).

[107] *See, e.g.*, Outmezguine v. State, 641 A.2d 870, 881 (Md. 1994) (relying on one of its earlier decisions for a guideline that required examination of culpability for another method of committing rape -- where the legislature expressly stated that the prosecution must prove "knowledge" with regard to a circumstantial element of that crime related to a characteristic of the victim, to conclude that the failure of the legislature to include a knowledge requirement in the statutory rape crime with regard to the age of the victim supported an inference that the legislature meant to make that element strict liability); State v. Orsello, 554 N.W.2d 70, 74-75 (Minn. 1996) (articulating a guideline that when the legislature enacts a crime with identical or similar conduct elements as a prior crime(s), and where that prior crime as enacted or as interpreted prior to the enactment of the second crime was held to require a certain level of culpability with regard to those conduct elements, the second crime should be interpreted to require that same level of culpability for those same elements); State v. Conner, 292 N.W.2d 682, 684-87 (Iowa 1980) (placing reliance on the principle that the appropriate culpability should be determined by comparing the relative punishments for a sequence of related crimes (here homicide crimes -- hence with the same objective elements) to conclude that the involuntary manslaughter category if punished as a felony must require culpability of recklessness, since a less severely punished manslaughter category required proof of recklessness). In *State v. Carson*, 941 S.W.2d 518, 520-21 (Mo. 1997), the court erred when it identified and placed reliance on the policy that the appropriate culpability level for a greater crime should be the same or higher then that for a lesser crime because this is only true (and then it must be done) when the lesser and greater crime have identical objective elements. This guideline also suggests that the historical guideline that the appropriate culpable mental state for crimes that have common law antecedents should adopt that policy decision is viable provided the two crimes have identical objective elements. *See, e.g.*, State v. Bergen, 677 A.2d 145, 145-47 (N.H. 1996) (placing reliance on culpability for the common law antecedent crime to current public lewdness statute). *See also* discussion *infra* notes 158-65 and accompanying text.

[108] *See, e.g.*, State v. Rice, 626 P.2d 104, 109(Ala. 1981) (making reference to two other game and wildlife regulatory crimes, both of which did expressly include a culpability level, to imply that the game and wildlife crime at issue also should be interpreted to include a culpability level); State v. Keihn, 542 N.E.2d 963, 968 (Ind. 1989) (reviewing and comparing severity of penalties for other traffic crimes and noting that traffic offenses that have lower penalties than the crime charged in this case all expressly or by implication require state to prove "knowledge").

[109] *See, e.g.*, Saadiq v. State, 387 N.W.2d 315, 323 (Iowa 1986) (making express reference, but erroneously placing reliance upon, guideline which provided that all persons are presumed to know the law as part of the basis for rejecting accused claim that he must know he had previously committed a "felony" to be convicted later of the crime of being a felon in possession of a firearm). Contrast this position with the correct position taken in *State v. Langan*, 652 P.2d 800, 804 (Or. 1982) (holding that with regard to the circumstantial element of "unlawful," the prosecution must prove that the accused was aware of the facts that made the gambling "unlawful," but not the law condemning the facts).

[110] *See, e.g.*, State v. Schlosser, 681 N.E.2d 911, 914 (Ohio 1997) (relying ostensibly on federal court culpability evaluations of federal RICO statute, and a very superficial reading of state legislative history (a sponsor characterized the state RICO statute as state of the art and toughest) to conclude that the legislature intended to impose strict liability for the state RICO crime). Resorting to federal culpability concepts is generally error because these concepts remain ill-defined.

[111] With regard to the protestations to the contrary, see discussion *supra* note 18 and accompanying text

[112] State v. Haines, 709 A.2d 762, 766 (N.H. 1998) (asserting that its decision was to choose knowledge

rather than purpose as the appropriate culpable mental state with regard to felony of use of body armor); State v. Bergen, 677 A.2d 145, 146-47 (N.H. 1996) (articulating the policy that a legislative guideline requiring some level of culpability even when crime definition omits reference to culpability is in actuality a directive to the courts to employ policy analysis to ascertain the appropriate level of culpability); State v. Lewis, 953 P.2d 1016, 1026 (Kan. 1998) (discussing possible dual definition of "knowledge," without reference to any provision or consideration of this matter by the state legislature, and expressly defining and adopting a second concept, "deliberate ignorance," as a component of the definition of "knowledge"). In *State v. Fontana*, 680 P.2d 1042 (Utah 1984), the court expressly made reference to the statutory guideline that provided that when no culpability concept is expressly stated in the definition of a crime, intentionally, knowingly, or recklessness shall suffice. *Id.* at 1045. The court identified its task as determining which of these three concepts was the culpable mental state for the crime of depraved indifference murder. *Id.* This interpretation gave the court discretion to decide which of these three levels of culpability was appropriate for this crime or the specific objective element whose culpability was at issue. Arguably, the guideline's purpose was to instruct courts to insert recklessness as the culpable mental state the government must prove for all objective elements of the crime when no culpable mental state was expressed in the crime, unless specific legislative history indicated a legislative intent for strict liability. *See supra* note 15 and accompanying text. In *Fontana*, the court determined that recklessness was not the correct culpable mental state because the legislature had amended the depraved heart murder provision to delete that concept from the definition. *Fontana*, 680 P.2d at 1046. The court concluded therefore that "knowingly" was the culpability level that the government would have to prove with regard to the objective elements of depraved heart murder. *Id.*

[113] People v. Anderson, 591 N.E.2d 461, 465 (Ill. 1992) (interpreting a 1901 "hazing" crime statute to require recklessness with regard to the result element of injury to another).

[114] State v. Beishir, 646 S.W.2d 74, 77 (Mo. 1983) (relying on pre-revised code decisions to find that both crucial elements of deviate sexual intercourse crime, a serious felony, are strict liability elements). In *State v. Blalock*, 756 P.2d 454 (Mont. 1988), the accused was charged with trespass. *Id.* at 455. The accused claimed that the requisite culpable mental state was "knowingly" with regard to the circumstantial element -- the real property of another, and that he lacked that culpability because he did not realize he had entered the property of another. *Id.* at 456. The Court made no reference to either modern culpability definitions or guidelines in evaluating and rejecting this claim. *See also* People v. McNamara, 585 N.E.2d 788 (N.Y. 1991) (making no reference to legislative guidelines for determining the requisite culpable mental state in evaluating the culpability for the "public place" circumstantial element of a public lewdness statute).

[115] In *People v. McNamara*, 585 N.E.2d 788 (N.Y. 1991), the actor's intent was irrelevant in defining a specific circumstantial element, "public place" in a public lewdness statute, but the interior of a parked vehicle is only a public place when objective circumstances establish that a lewd act committed therein would likely be seen by a casual observer. *Id.* at 792-93. The court failed to identify what, if any, culpability of the accused would have to be proven with regard to that person's awareness, awareness of the risk, or awareness, that the vehicle was a "public place" as defined by the court. Given the court's definition of public place however, it appeared to make, even if the judges were not expressly aware of this culpability decision, criminal or simple negligence the culpable mental state for that circumstantial element.

[116] State v. Beishir, 646 S.W.2d 74, 77 (Mo. 1983) (citing and relying on its own pre-revised penal code precedent and decisions found in a pre-revised code secondary source, WAYNE R. LAFAVE & AUSTIN W.

SCOTT, JR., CRIMINAL LAW (2d ed. 1986) (citing the 1972 edition)). *See also* People v. Moore, 674 P.2d 354, 358 (Colo. 1984) (implying that a statutory guideline presuming a culpable mental state was required, even when the crime contained no culpability concept, was a principle found in the common law of that jurisdiction).

[117] In *State v. Seamen's Club*, 691 A.2d 1248 (Me. 1997), the court made reference to the statutory guideline that even if no culpable mental state is expressly stated in the definition of crime, presumptively, one is required. *Id.* at 1251. The court proceeded, however, to adhere to its previous position that no culpability need be proven by the state (strict liability) with regard to the circumstantial element, that the lobster(s) harvested was too small, of a "short" lobster crime. *Id. See also* State v. Fowler, 676 A.2d 43, 45 (Me. 1996).

[118] State v. Blalock, 756 P.2d 454, 456 (Mont. 1988) (discussed *supra* note 69). *See also* State v. McDowell, 312 N.W.2d 301, 303 (N.D. 1981) (holding out the possibility that an innocent person could be imprisoned if they accidentally wrote a check for insufficient funds, and subsequent events made it impossible for them to pay the check within the proscribed statutory period).

[119] State v. Guthrie, 741 P.2d 509 (Or. 1987).

[120] In *Guthrie,* the court made express reference to a strict liability statutory guideline. *Id.* at 510. Strict liability was the appropriate culpable mental state under this guideline only if the crime in question was expressly characterized by the legislature as a violation and the crime was defined without inclusion of an express culpable mental state, or if the crime should be characterized as a de facto violation in that it is a crime defined outside of the Criminal Code and legislative intent to impose strict liability for the offense was manifest.

[121] State v. Ritchie, 590 So. 2d 1139, 1148 (La. 1991) (applying court-created guideline that the legislature, in enacting a crime referring to both recklessness and negligence, must have known that the state supreme court had previously equated those culpability concepts), *rev'd*, No. 90-K-0478, 1991 La. LEXIS 3458 (La. Dec. 12, 1991); Outmezguine v. State, 641 A.2d 870 (Md. 1994); Commonwealth v. Miller, 432 N.E.2d 463, 465 (Mass. 1982) (making express reference to, and relying upon, court-created statutory construction rule that when legislature reenacts a crime intact after a particular construction of that crime was placed on it by the state supreme court, the legislature is presumed to have accepted that construction). In *People v. Quinn*, 487 N.W.2d 194 (Mich. 1992), the court held that the misdemeanor crime of transporting a loaded firearm in a vehicle should be punished by the maximum sentence of two years in jail. *Id.* at 198. The Michigan Supreme Court concluded that with regard to the circumstantial element of "loaded," it was permissible for it to reach the policy conclusion that this was a strict liability objective element, despite the fact that it also concluded that knowingly carrying an unloaded firearm was not a crime at all. *Id.*

[122] Outmezguine v. State, 641 A.2d 870, 874 (Md. 1994).

[123] *Id.* The Maryland Supreme Court's error was its failure to recognize that the culpability concept in other subsections might have been intended by the legislature to attach only to different conduct elements in those crimes, whose nature was more general (and in one of the crimes focused on omissions) than the more specific conduct defined in the subsection in question. Hence it was not at all clear that the culpability concept in those subsections was meant to attach to the circumstantial element of the age of the victim. All three subsections created felony crimes, carrying a maximum term of imprisonment of ten years, and in all three instances the conduct identified was arguably constitutionally protected. Hence the

only element on which criminalization could be justified was the age of the person used in the "pornography." In *Schultz v. State*, 923 S.W.2d 1 (Tex. Crim. App. 1996), the court asserted an "implied" rule of statutory construction -- that when the legislature in a similar crime that focused on protecting children specified a culpable mental state for the circumstantial element of the age of the child, its failure to assign a culpable mental state to more generic circumstantial elements in the crime charged meant that the legislature did not intend to require culpability with regard to those circumstantial elements. *Id.* at 2. Given the complexity of criminal codes, and the lack of systematic culpability evaluations by state legislatures, there is little to commend this implied rule of statutory construction.

[124] In *Commonwealth v. Miller*, 432 N.E.2d 463 (Mass. 1982), the court made express reference to and relied upon a statutory construction rule that when the legislature re-enacts a crime intact after a particular construction of that crime was placed on it by the state supreme court, the legislature is presumed to have accepted that construction. *Id.* at 465. In this instance, the court made reference to its construing statutory rape crime as requiring no culpability with regard to the circumstantial element of the age of the minor, and the subsequent reenactment of that crime without inclusion of an express culpability concept. *Id*. *See also* People v. Cash, 351 N.W.2d 822, 826 (Mich. 1984); State v. Bridges, 628 A.2d 270, 273, 277 (N.J. 1993).

[125] State v. Lewis, 953 P.2d 1016, 1020-21 (Kan. 1998) (making reference to Kansas Penal Code section that requires that its provisions apply to crimes defined outside the code, unless a contrary intention is expressly or contextually asserted by the legislature); State v. Dana, 517 A.2d 719, 719-20 (Me. 1986) (making reference to a specific culpability evaluation guideline and noting that it normatively applied to crimes defined outside of the penal code); State v. Munson, 714 S.W.2d 515, 522 (Mo. 1986) (holding that requisite culpability guidelines do not apply to crimes defined outside of the code when enacted after code and with a specific culpability identified); State v. McDowell, 312 N.W.2d 301, 303 (N.D. 1981) (making reference to a guideline that even when no culpability concept is stated in a crime, the prosecution must still prove "willfully," but then ruling that this principle was inapplicable to crimes defined outside of penal code); State v. Blanton, 588 P.2d 28, 29 (Or. 1978) (making reference to the Commentary of the Criminal Law Revision Commission for support of the guideline that presumptively each element of any crimes outside of the Criminal Code must be accompanied by a culpable mental state, unless the legislative intent to impose strict liability for an element, or elements of a crime as a whole was clear); State v. Collova, 255 N.W.2d 581, 584n.2 (Wisc. 1977) (making express reference to guidelines in the criminal code, but apparently concluding that such guidelines could not be used when the crime, whose culpability was under analysis, was in a statute outside the criminal code).

[126] *See supra* note 64 and accompanying text.

[127] *See supra* notes 18; 111-125 and accompanying text

[128] In *In re Welfare of A.A.E.*, 590 N.W.2d 773 n.1 (Minn. 1999), the court made reference to the statutory definition of "intentionally" -- purpose to do the thing or cause the result and knowledge of those facts which are necessary to make conduct criminal which appear after the word "intentionally." *Id.* at 775 n.1. Later, however, the court decided that knowledge was not the appropriate culpability level for generic circumstantial element of "under circumstances that endanger the safety of another." *Id*. at 777. The court failed to expressly articulate what level of culpability would be appropriate. In rejecting the state's claim of strict liability, however, the court did make express reference to the relevance of facts unknown to the accused. *Id*. The inference to be drawn from that assertion is that the court, perhaps unwittingly, decided simple negligence was the appropriate culpable mental state. *See also infra* note 179 and accompanying text.

[129] *See supra* notes 44 and 56 and accompanying text.

[130] In *State v. Stiffler*, 788 P.2d 220 (Idaho 1990), the court focused upon the policy that in determining the appropriate culpable mental state the purposes underlying the crime (here statutory rape) should be examined. *Id.* at 221. The court found that two of the three purposes it identified for the crime suggest one level of culpability, while a third suggested a lower level of culpability. *Id.* at 222. The court decided that the appropriate level was that suggested by the third purpose. *Id.* at 223-24. *See also* People v. Sevilla, 547 N.E.2d 117, 119, 120-21 (Ill. 1989); State v. Conner, 292 N.W.2d 682, 684-87 (Iowa 1980); State v. Pierce, 792 P.2d 408, 414 (N.M. 1990); Reese v. State, 745 P.2d 1146, 1147 (N.M. 1987); People v. McNamara, 585 N.E.2d 788, 791 (N.Y. 1991); State v. McDowell, 312 N.W.2d 301, 303-06 (N.D. 1981); State v. Schlosser, 681 N.E.2d 911, 915 (Ohio 1997); State v. Nagel, 279 N.W.2d 911, 914 (S.D. 1979); State v. Elton, 680 P.2d 727, 729 (Utah 1984).

[131] Schultz v. State, 923 S.W.2d 1, 4 (Tex. Crim. App. 1996); McQueen v. State, 781 S.W.2d 600, 602 (Tex. Crim. App. 1989); Alvarado v. State, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985); Ledesma v. State, 677 S.W.2d 529, 531 (Tex. Crim. App. 1984). *See also supra* note 73 and accompanying text.

[132] Schultz v. State, 923 S.W.2d 1, 4 (Tex. Crim. App. 1996) (evaluating court precedent with regard to crimes whose criminalization the court found to be justified by a result element of the crime). In *McQueen v. State*, 781 S.W.2d 600 (Tex. Crim. App. 1989), the court asserted that unauthorized use of a motor vehicle involved felony criminalization of innocent conduct if strict liability is held with regard to circumstantial element of without the owner's effective consent. *Id.* at 602. The court made reference to the crime of theft and concluded that the key element warranting its criminalization was also the same circumstantial element of without the owner's effective consent. *Id.* at 604. The court noted that in a previous case it had held that the appropriate culpability for that element in a theft crime was knowledge. *Id.* In *Alvarado v. State*, 704 S.W.2d 36 (Tex. Crim. App. 1985), the court asserted that when the legislature enacts a crime which specifies particular conduct, it is a crime criminalized because of that conduct and hence the culpability evaluation must focus on that specific conduct. *Id.* at 39. When, however, the conduct identified in the definition of the crime is generic, a result element is usually included, and the focus of the culpability evaluation should be on that result element. *See also* Ledesma v. State, 677 S.W.2d 529, 531 (Tex. Crim. App. 1984) (implying that to avoid a finding that the "stop and identify" misdemeanor crime was unconstitutionally vague, it must be interpreted to find that the appropriate culpable mental state for the circumstantial element of refusing to disclose one's name to a police officer is knowledge).

See also People v. Anderson, 591 N.E.2d 461, 465 (Ill. 1992) (placing reliance on the policy that imprisonment should, in most instances, only be a permissible penalty based upon a finding that the accused was at fault). *See also* other Illinois Supreme Court decisions citing this policy with approval *supra* note 44. In *State v. Sargent*, 594 A.2d 401 (Vt. 1991), the court asserted that an enduring principle of criminal law was that crimes with result elements are interpreted to require the state to prove that the accused had some culpability with regard to that result element. *Id.* at 402. The court asserted that a relatively high level of culpability was required for the result element of kidnapping, because of the severity of the punishment for the crime (maximum twenty-five years). *Id. See also infra* notes 158-65 and accompanying text (discussion of cases).

[133] State v. Rice, 626 P.2d 104, 109 (Ala. 1981) (holding that at least negligence must be read into the statute as the appropriate culpability with respect to the "illegality" circumstantial element); State v. Williams, 698 P.2d 732, 734 (Ariz. 1985) (holding that "knowledge" is the appropriate culpable mental state for the circumstantial element of having a suspended license). For an example of a recent state supreme

court decision ignoring this policy-reconciling guideline, see *People v. Sargent*, 970 P.2d 409 (Cal. 1999). The court relied on the conceptually flawed idea that when an injury is directly inflicted, no instruction on criminal negligence need be given by the trial judge. *Id.* at 415. The court lost focus of the fact that the crucial culpability evaluation was with regard to the universal circumstantial element for all versions of the felony child abuse statute, "under circumstances . . . likely to produce great bodily harm. . . ." *Id.* at 415 n.6. By the time the court gained that focus, thanks to a quality job by appellate defense counsel, it was willing to hold that this grading circumstantial element was "strict liability." *Id.* at 419.

[134] People v. Sevilla, 547 N.E.2d 117, 119, 120-21 (Ill. 1989). In *State v. Stanislaw*, 573 A.2d 286 (Vt. 1990), the accused was charged with involuntary manslaughter based on the unlawful act of providing liquor to a minor. *Id.* at 291. The court asserted that the level of culpability must be set higher than that found sufficient for civil liability given the potential maximum fifteen year term of imprisonment for involuntary manslaughter. *Id.*

[135] Spitz v. Municipal Court, 621 P.2d 911, 913 (Ariz. 1980) (placing reliance upon the policy that low or no culpability is appropriate to maximize protection of children); State v. Pierce, 792 P.2d 408, 415 (N.M. 1990) (suggesting the principle that the legislative goal of protecting children supported its conclusion that the government need not prove that the accused intended sexual gratification when he contacted or penetrated the intimate parts of a child). For a discussion of this policy, see Holley, *supra* note 4, at 260-63.

[136] State v. Buchanan, 549 N.W.2d 291, 294 (Iowa 1996) (implying the policy that strict liability may be warranted when the purpose of criminalizing interference with an officer would be furthered by eliminating any culpability requirement). *But see Reese v. State*, 745 P.2d 1146 (N.M. 1987), in which the court asserted that due process compelled the holding that the crime of aggravated assault of a police officer requires the prosecution to prove that the accused had some level of subjective culpability with regard to the circumstantial element that the victim was a police officer. *Id.* at 1147. Next, the court expressed the view that the purpose of aggravating assault because a police officer is the victim is designed to deter interference with such officer's enforcement of the law, and therefore the added punishment is warranted in only those cases where the accused is proven to have some level of culpability with regard to the officer's status. *Id.* at 1148.

[137] In *State v. Brown*, 422 S.E.2d 489 (W. Va. 1992), the court expressly recognized other sources that have established the principle that when the crime of embezzlement is committed by a public official, the culpability requirement is watered down, because such officials are not as closely supervised by the employer -- the public. *Id.* at 492. The court also asserted the related principle that public officials are held to a higher standard of conduct, and hence lesser culpability is appropriate, because public funds are a matter of the public welfare. *Id.* The court relied on decisions from other states also holding that the state need not prove that a public official intended to deprive the public permanently of its property at the time she appropriated that property. *Id.* at 493.

[138] State v. Mountjoy, 891 P.2d 376, 381-85 (Kan. 1995). The court engaged in extensive discussion of precedent, both federal and state, to identify the policies that should be considered in determining if it is appropriate to impose strict liability. *Id.* The court relied on the policy of maximizing protection of the public to hold that violation of "Healing Arts" misdemeanor crime was a strict liability crime. *Id. See also* State v. Schlosser, 681 N.E.2d 911, 914 (Ohio 1997) (concluding that state RICO statute imposed strict liability). In *People v. Quinn*, 487 N.W.2d 194 (Mich. 1992), the court expressly relied upon the policy of maximizing protection of the public to help justify a strict liability conclusion with regard to the "loaded" circumstantial element of a transporting firearms misdemeanor. *Id.* at 202. *See also* State v. Groom, 947

P.2d 240, 246 (Wash. 1997) (identifying as another policy concern warranting a conclusion of strict liability was the seriousness of harm to the public resulting from illegal searches of homes).

[139] In *State v. Rice*, 626 P.2d 104 (Ala. 1981), the court asserted that the principle that crimes are to be strictly construed with regard to culpability evaluations was of state constitutional dimension in the context of this regulatory crime which criminalized the possession or transport of illegally taken game. *Id.* at 109. The crime was overbroad, unless at least negligence was read into the statute as the appropriate culpability with respect to the illegality circumstantial element. *Id. See also* Chicone v. State, 684 So. 2d 736, 739, 741-42 (Fla. 1996). In *Daniels v. State*, 448 S.E.2d 185 (Ga. 1994), a possible violation of constitutional overbreadth doctrine required the court to read into an "anti-mask" crime two culpable mental states. *Id.* at 187. Later, the court generally recognized the possibility of strict liability acts but held that the constitutional vulnerability of this crime, without reading in culpability requirements, prevented considering strict liability construction. *Id.* at 109 n.4. In *State v. Cinel*, 646 So. 2d 309 (La. 1994), the court expressly recognized that the national constitutional principle that criminalization of obscenity is only constitutional when the crime requires the prosecution to prove some level of culpability also applies to the criminalization of the possession of child pornography. *Id.* at 313. Ultimately, the Louisiana Supreme Court expressly held that some level of culpability (perhaps no more than criminal negligence) must be proven by the state with regard to awareness of the age of the person(s) depicted. *Id.* at 316. In *Outmezguine v. State*, 641 A.2d 870 (Md. 1994), the court made express reference to and then evaluated the first amendment constitutional policy that cautions states that they should avoid imposing strict liability on crimes/element(s) of crimes when to do so would "chill" the exercise of first amendment rights. *Id.* at 878-80. In *State v. Orsello*, 554 N.W.2d 70 (Minn. 1996), the court noted that most of the new "anti-stalking" crimes that had survived constitutional challenge in other states were interpreted to include a specific intent requirement. *Id.* at 76. In *Ledesma v. State*, 677 S.W.2d 529 (Tex. Crim. App. 1984), the court implied that to avoid a finding that the "stop and identify" misdemeanor crime was unconstitutionally vague it must be interpreted to find that knowledge is the appropriate culpable mental state for the circumstantial element of refusing to disclose one's name to a police officer is knowledge. *Id.* at 531.

[140] Chicone v. State, 684 So. 2d 736, 739, 741-42 (Fla.1996); People v. Coe, 522 N.E.2d 1039, 1040 (N.Y. 1988) (asserting policy that strict liability for crimes in Public Health Statute would result in criminalization of seemingly innocuous conduct); State v. Cho, 681 P.2d 1152, 1156 (Or. 1984) (endorsing the principle that if a crime is punished so as to potentially injure an accused's liberty interest this is a strong reason to conclude that some level of culpability must be proven by the prosecution with regard to the crime, even if no culpability concept is found in the crime definition). *But see* State v. Buttrey, 651 P.2d 1075, 1077 (Or. 1982) (articulating principle that blameless people may be criminalized to eradicate evil). In *People v. Brown*, 457 N.E.2d 6 (Ill. 1983), the Illinois Supreme Court employed precedent, principle, and policy to try to justify its conclusion that the legislature intended to create a strict liability crime. *Id.* at 7-9. The court's analysis was flawed by the fact that by the court's own admission that the statute as interpreted criminalized innocent persons, that the purpose of criminalization was to deter theft of automobiles, and theft as a traditional crime is almost universally held to be a crime requiring proof of relatively high culpability. *See also* McQueen v. State, 781 S.W.2d 600, 602 (Tex. Crim. App. 1989) (asserting that unauthorized use of a motor vehicle involved felony criminalization of innocent conduct if strict liability is held with regard to circumstantial element, "of without the owner's effective consent"). *See also infra* notes 159-60 and accompanying text.

[141] *See infra* note 160 and accompanying text (cases). *But see Commonwealth v. Alvarez*, 596 N.E.2d 325 (Mass. 1992), in which the court placed express reliance on federal decisions holding that the "school zone" aggravating element of the sale of a controlled substance crime was strict liability and that such a

strict liability finding does not violate due process. *Id.* at 328. The court expressly rejected the accused's claim that strict liability with regard to the circumstantial "school zone" element violated the due process protection of the state constitution. *Id.* While the court had prior thereto read into crimes a culpability requirement, even when none was stated, in order to diminish the threat of a due process violation, the court took the position in this case that if the legislature clearly intended such strict liability the due process threat disappeared. *Id.*

[142] State v. Smith, 554 A.2d 713, 716 (Conn. 1988) (despite the lack of any support in the statutory language, the Court asserted that a mistake of fact could only be used to negate specific, not general, intent); Potter v. State, 684 N.E.2d 1127, 1135 (Ind. 1997); Outmezguine v. State, 641 A.2d 870, 885 (Md. 1994); People v. Cash, 351 N.W.2d 822, 823 (Mich. 1984). In *Jenkins v. State*, 877 P.2d 1063 (Nev. 1994), the accused was charged with sexual seduction of a minor and tried to raise the defense of mistake of fact. *Id.* at 1065. Nevada limited reliance on mistake of fact to those crimes which required specific intent. *Id.* The Nevada Supreme Court characterized the crime of seduction of a minor as a crime of general intent. *Id.* The court thereby completely missed the real issue of what specifically defined culpability level applied to the crucial elements of "sexual seduction" and "minor." In *Bruno v. State*, 845 S.W.2d 910 (Tex. Crim. App. 1993), the mistake-of-fact doctrine discussion lost focus on culpability evaluation as the court asserted that no mistake of fact separate defense instruction was necessary because the jury, if it believed the complainant's story, as it apparently did in convicting the accused, must have found that in fact circumstantial element of without the effective consent of the owner was proven beyond reasonable doubt. *Id.* at 912. The actual issue in the case, however, a culpability issue, was different. The issue was whether given the conflicting stories told by the complainant and the accused, did the state prove beyond a reasonable doubt that the accused was aware that he lacked the effective consent of the owner. The trial judge failed to specifically instruct the jury with regard to linking "awareness" to the without effective consent of the owner circumstantial element. *See id.* at 911. Furthermore, he expressly instructed that the mistake must be reasonable. *Id.* The Texas Court of Criminal Appeals asserted that the jury must have found the accused's mistake was unreasonable or he would have been acquitted. *Id.* If the appropriate culpability was knowledge, however, the mistake need not be reasonable to warrant acquittal. All that was required was that the jury understand that if the state failed to prove beyond a reasonable doubt that the accused did not believe he had the consent of the owner he must be acquitted. Hence the jury was without even a reasonable possibility of understanding the appropriate culpability as it related to the crucial circumstantial element. In *Hill v. State*, 765 S.W.2d 794 (Tex. Crim. App. 1989), the accused was convicted of commercially dispensing a controlled substance without a valid medical purpose. *Id.* at 795. The accused was a doctor who was related symptoms by an undercover police officer. *Id.* The proper focus of the parties and the trial court should have been on identifying the appropriate culpable mental state for the circumstantial element of without a valid medical purpose. Instead, the focus at trial and on appeal was on whether a mistake of fact "affirmative defense" instruction was proper. *Id.* at 796. The court expressly relied on precedent for the rule that mistake of fact, once enacted by the legislature, required a charge, even if it simply was a reiteration of the elements of the crime. *Id.* at 797. The Court of Criminal Appeals held that therefore it was error to fail to give the requested instruction, and specifically stated that if the accused could offer proof that he reasonably believed he was dispensing the controlled substance for a valid medical purpose he was entitled to acquittal. *Id.* Here, the court committed fundamental and unconstitutional error, since the accused only needed to have the trial record include evidence that cast doubt on whether he in fact believed the drug was for a valid medical purpose. In *State v. Elton*, 680 P.2d 727 (Utah 1984), after a policy analysis led the court to preliminarily conclude that the appropriate culpable mental state for the age of the victim circumstantial element in the crime of unlawful sexual intercourse was negligence, the court turned to relating this finding to the Utah mistake of fact provision. *Id.* at 729-30. The court characterized

the mistake-of-fact provision, which was couched in terms of a defense of disproving the culpable mental state, as an affirmative defense that focused on the subjective state of mind of the defendant, while the negligence culpability as to the age of the victim focused on objective criteria. *Id.* at 731-32. Later, the court returned to the interrelationship of its holding on the appropriate culpability and the mistake of fact doctrine to again assert they are separate and distinct doctrines. *Id.* at 732.

[143] State v. Smith, 554 A.2d 713, 716 (Conn. 1989) (category 1); Potter v. State, 684 N.E.2d 1127, 1135 (Ind. 1997) (category 2); Outmezguine v. State, 641 A.2d 870, 885 (Md. 1994) (category 2); People v. Cash, 351 N.W.2d 822, 823 (Mich. 1984) (category 2); Jenkins v. State, 877 P.2d 1063, 1065 (Nev. 1994) (category 2); Bruno v. State, 845 S.W.2d 910, 912 (Tex. Crim. App. 1993) (category 2); State v. Elton, 680 P.2d 727, 729-30 (Utah 1984) (category 1).

[144] Potter v. State, 684 N.E.2d 1127, 1135 (Ind. 1997).

[145] Outmezguine v. State, 641 A.2d 870, 885 (Md. 1994). *See also* Commonwealth v. Miller, 432 N.E.2d 463, 465 (Mass. 1982).

[146] State v. Sewell, 603 A.2d 21 (N.J. 1992).

[147] *See supra* notes 114-15, 117-18 and accompanying text.

[148] State v. Bridges, 628 A.2d 270, 274-76 (N.J. 1993).

[149] *See* discussion *supra* notes 15, 102-04, 113 and accompanying text.

[150] State v. Young, 525 N.E.2d 1363, 1368-69 (Ohio 1988), *rev'd sub nom.* Osborne v. Ohio, 495 U.S. 103 (1990).

[151] For example, in *State v. Brown*, 422 S.E.2d 489 (W. Va. 1992), the crime definition made reference in first part to "embezzles" or "fraudulently converts." *Id.* at 491. The court gave great significance to "or" to implicitly conclude that the legislature intended two distinct crimes, the latter with a greater culpability requirement than the former. *Id.* This conclusion was reached despite the fact that neither "embezzles" or "fraudulently converts" were specifically (hence distinctly) defined; no culpability was specified for "embezzles"; and historically, the court acknowledged that embezzlement, as with most common law larceny derivative crimes, required the prosecution to prove "specific intent" to deprive the owner permanently of the property. The court also reached this conclusion despite the fact that the legislature characterized the crime twice as "larceny," including the subsection that it characterized as "embezzles" -- the appropriation by a public official of funds entrusted to him. The risk of this legislative drafting technique was borne out even further in this case, when subsequently the court implied that the "embezzles" or "fraudulently converts" should be read for another potential class of culprits identified in the statute, other than public officials, as equating the meaning of "embezzles" with the meaning of "fraudulently converts." *Id.* at 492.

[152] In *State v. Stepniewski*, 314 N.W.2d 98 (Wis. 1982), a statute criminalized "illegal" trade practices, but the reference was to "intentional" refusal, neglect, or failure to obey regulations proscribed by an administrative agency, which had the authority to identify the true objective elements of the crime that constituted the illegal trade practices. *Id.* at 98. The court was unable to recognize that the "regulation" reference opened the door to the identification of the true objective elements, and thereafter the task was to determine the appropriate level of culpability for each such element, and simply held that intention only modified refusal, and not neglect or failure. *Id.* at 101. *See also* State v. Rice, 626 P.2d 104 (Ala. 1981)

(interpreting a crime of possessing or transporting game "illegally" to require proof of at least negligence with respect to "illegally" circumstantial element, but without any evaluation of how to interpret "illegally" in relation to that culpability). *See also* discussion *supra* note 109 and accompanying text

[153] *See supra* notes 21-30, 41-47, 53-59 and accompanying text. For example, in *State v. Pinero*, 778 P.2d 704 (Haw. 1989), the court failed to recognize that only when the trial judge properly instructed the jury on the appropriate level of culpability for murder and for each of the two forms of manslaughter could it decide if the accused had the requisite level to be convicted of murder. *See id.* at 714. Once it decided this issue, then and only then could the jury consider whether the defendant had acted amidst the mitigating circumstances which would convert the murder to one type of manslaughter.

[154] *See supra* notes 41, 53 and accompanying text. The Texas Court of Criminal Appeals did recognize this point. *See, e.g.*, Schultz v. State, 923 S.W.2d 1, 3n.2 (Tex. Crim. App. 1996); McQueen v. State, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989).

[155] In *State v. Fontana*, 680 P.2d 1042 (Utah 1984), depraved indifference murder was defined as "[a]cting under circumstances evidencing a depraved indifference to human life [the actor] . . . engage[s] in conduct which creates a grave risk of death to another and thereby causes the death of another." *Id.* at 1046-47. The court saw its task as deciding whether the appropriate culpable mental state should be intentionally, knowingly, or recklessly, and in the end concluded it should be knowingly at least with regard to the result element of the grave risk of death of another human being. *Id.* at 1046. But the court omitted identification and evaluation of the objective elements of the crime to each of which a culpable mental state had to be attached. Its final definition of culpability, as the defendant asserted, simply turned this murder subcategory into a homicide where the culpability was somewhere between legislatively sanctioned culpability concepts of knowledge and recklessness. *Id.* at 1044. It is not clear, however, if a better interpretation could be made of the appropriate culpability for this crime given its carryover common law objective elements. For further confirmation of culpability analysis illustrating the need to eliminate depraved heart murder as a separate category of murder, see *Balistreri v. State*, 265 N.W.2d 290, 293-94 (Wis. 1978) (quoting from an earlier case, "a depraved mind has a general intent to do the acts and the consciousness of the nature of the acts and possible result but lacks the specific intent to do the harm.") In *People v. Jefferson*, 748 P.2d 1223 (Colo. 1988), the court evaluated constitutional dimensions of retention of depraved indifference murder in the context of an equal protection challenge. The majority opinion upheld a redefined extreme indifference murder statute against such an attack. *Id.* at 1233. The case of *State v. Orsello*, 554 N.W.2d 70 (Minn. 1996), involved an anti-stalking crime. The crime definition made reference to a list of acts, and began that list instead with an additional culpability element. *Id.* at 72. The conduct element in the crime definition was either generic or one of a sequence that identified more specific courses of conduct, but all had to be done purposefully and in a manner likely to intimidate that in fact intimidated. Hence if an accused's purpose was to follow another person, and as a result that person felt intimated, the statute's language created the possibility of a conviction, notwithstanding the facts that: the accused's manner in following might be innocuous, the accused might have a right to follow, and the accused might not realize he was intimidating the other person. In *State v. Mott*, 692 A.2d 360 (Vt. 1997), the accused was convicted of failing to obey a family court order which prohibited him from calling or writing his wife. *Id.* at 362. The court held that the crime required culpability of knowing with regard to the act of contacting the ex-spouse, and perhaps negligence with regard to exposure to the contents of the order, but that the accused need not have the purpose of violating the order. *Id.* at 365. The court failed to focus on the inadvertent failure to comprehend the order, especially in situations such as this case, where the order was made *ex parte*. Nor did the court focus upon the policy wisdom and arguable constitutionality of criminalizing a completely innocuous action.

[156] *See also supra* notes 142-46 and accompanying text. Ironically, some responsibility for the continuing vitality of the doctrine is the strategic error by defense attorneys who continue to insist on a request for an independent instruction on mistake of fact. This error is especially egregious when the statutes or the common law of the state require that the mistake be reasonable. *See supra* note 17 and accompanying text. *See, e.g.*, McQueen v. State, 781 S.W.2d 600, 602 (Tex. Crim. App. 1989).

[157] In *State v. Morse*, 617 P.2d 1141 (Ariz. 1980), the accused, who was charged with receipt of stolen property, made a claim that the court characterized as mistake of law, when in fact he offered evidence to prove that he believed the property was abandoned. *Id.* at 1147. If that evidence was credited, the state could not prove that the defendant was aware that the property was that of another at the time he took control over it. *Id.* As an added curiosity, neither the defense attorney nor the court apparently recognized that the accused's defense theory was identical to that which the accused successfully made in *Morissette v. United States*, 342 U.S. 246 (1952), probably historically the most frequently cited United States Supreme Court culpability evaluation decision.

[158] State v. Guest, 583 P.2d 836, 839 (Ala. 1978). In *Chicone v. State*, 684 So. 2d 736 (Fla. 1996), crimes of possession of contraband drugs and drug paraphernalia were both held to require that the state prove knowingly with respect to the contraband drug and paraphernalia circumstantial elements, i.e., awareness of the nature of the drug that results in its legal characterization as contraband, and of the items that results in their legal characterization as drug paraphernalia. *Id.* at 743. The court cited to the policy goal of protecting innocent people from serious criminalization which could only be achieved by requiring such culpability. *Id. See also* State v. Cinel, 646 So. 2d 309, 316 (La. 1994) (holding that possession of pictures of sex acts can only be criminalized if the persons depicted are minors - hence the state must prove some level of culpability with regard to the age of the person(s) depicted); People v. Ryan, 626 N.E.2d 51, 55 (N.Y. 1993) (focusing on the fact that the only difference in several grades of possession of a contraband drug series of crimes was the weight of the drugs and concluding therefore that a culpable mental state must be attached to this circumstantial element). *See also* Alun Griffiths, Comment, People v. Ryan*: A Trap For The Unwary*, 61 BROOK. L. REV. 1011, 1046-48 (1995) (discussing this case and this specific point); Schultz v. State, 923 S.W.2d 1, 4 (Tex. Crim. App. 1996) (evaluating court precedent with regard to crimes whose criminalization the court found was justified by a result element of crime). In *McQueen v. State*, 781 S.W.2d 600 (Tex. Crim. App. 1989), the court expressly characterized precedent as finding that the culpable mental state was appropriate when a result or circumstantial element was crucial to justifying criminalization. *Id.* at 603. The court went on to expressly hold that the unauthorized use of a motor vehicle crime charged was not a nature of conduct crime since operating a vehicle owned by another was not criminal by the very nature of the conduct, and since no result element was justified, this was a circumstance type offense. *Id. See also* Alvarado v. State, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985) (asserting that when the legislature enacts a statute which specifies particular conduct as criminal it is a crime criminalized because of that conduct and hence the culpability evaluation must focus on that specific conduct). *See also supra* notes 131-34 (discussion of cases).

For commentator discussion of recent United States Supreme Court decisions in which the court at least implicitly recognized the validity of this point, see Pilcher, *supra* note 4, at 23-28. For a commentator, who based on retribution theory, would agree with this general point but would argue that strict liability in grading may be easier to justify than strict liability in criminalization see Simons, *supra* note 4, at 1104-05.

[159] Chicone v. State, 684 So. 2d 736, 743 (Fla. 1996); McQueen v. State, 781 S.W.2d 600, 604 (Tex. Crim. App. 1989).

[160] State v. Guest, 583 P.2d 836, 839 (Ala. 1978) (rejecting the principle that culpability for one element of a crime which would make the person guilty of another less severely punished crime, can justify finding the person guilty of the crime charged, without proving culpability for the specific objective element of the crime charged that was not an objective element of the other crime). Implicit in the court's decision in *Chicone v. State*, 684 So. 2d 736 (Fla. 1996), was recognition that requiring that the state prove that the possession of an item is a "knowing" possession does not protect the innocent from the threat of serious criminalization. *Id.* at 743. The court expressly cited the example of a mail carrier who is aware of his possession of a package but does not know the nature of its contents. *Id.* This example originates from *Liparota v. United States*, 471 U.S. 419, 426 (1985). Later, however, the court significantly "backslid" in its conceptual analysis by holding that only if the defendant expressly requested a more specific jury instruction with regard to identifying the requisite culpability level for the crucial serious criminalization justification objective element of the crime such instruction must be given. *Chicone*, 684 So. 2d at 745-46.

State supreme courts, where the legislatures have not significantly improved their culpability provisions related to mistake of fact, were just as likely as those courts where the legislatures had made such improvements to recognize and apply this principle. Schultz v. State, 923 S.W.2d 1, 4 (Tex. Crim. App. 1996) (demonstrating by court precedent recognition that requiring culpability for conduct element did not warrant the finding that the result element was strict liability when that result element was crucial to criminalization). In *State v. Elton*, 680 P.2d 727 (Utah 1984), the court identified and then rejected the policy justification for the position taken in many jurisdictions that strict liability should be imposed with regard to the age of the victim circumstantial element in a crime involving consensual sex with a young woman. *Id.* at 730-31. The court identified and rejected what it implied was the conceptually flawed use of the doctrine of transferred intent in majority jurisdictions. *Id.* at 731. The court held that it was unfair therefore to hold the accused morally responsible with regard to the age of his consenting sex partner because the accused was engaging in another crime (fornication). *Id.* The court found that this policy justification turned the doctrine of lesser included crimes on its head and was potentially fundamentally unfair. *Id. See also* Griffiths, *supra* note 158, at 1046-48 (characterizing the attachment of a culpability level to other shared objective element(s) of crimes, which therefore cannot account for the difference in grading of these crimes, as "threshold" mens rea).

[161] In *State v. Gray*, 435 So. 2d 816 (Fla. 1983), the court acknowledged that, in an earlier decision, it had asserted that legislative intent was to criminalize as a felony only those threats against witnesses done with the purpose of influencing their testimony. *Id.* at 820. In this case, however, the Florida Supreme Court held that such purpose was not an element of the crime that needed to be pled and proven against the defendant, thereby eliminating the policy justification for aggravating what would otherwise be an assault or attempted assault into a felony. *Id.* This threatening a witness crime is an example of a crime in which felony criminalization can only be justified as appropriate when the culpable mental state goes beyond that required for any of the objective elements of the crime, by requiring a purpose to accomplish evil beyond those objective elements. *See also State v. Bussey*, 463 So. 2d 1141 (Fla. 1985), in which the Florida Supreme Court arguably made the same error in evaluating the culpability required to make a felony of selling a legal substance (without any reference to quantity) to someone while maintaining that the substance was a controlled substance. *Id.* at 1143-44. The only justification for felony criminalization (but this situation should already be larceny/theft crime) is when the accused has the intent to steal, but the Court held that such intent need not be proven. *Id.* at 1145. In *Schultz v. State*, 923 S.W.2d 1 (Tex. Crim. App. 1996), the majority apparently failed to recognize that the crucial culpability issue in the case was whether some level of culpability must be proven by the prosecution with regard to generic circumstantial elements in a revised child abandonment crime. *See id.* at 4. Later in the opinion however, the majority opinion seemed to indicate that "knowledge" was the appropriate culpable mental state for

these generic circumstances, but then, in apparent conflict with this position, asserted that the state need not prove that the accused was aware of the risk. *Id.* at 4 n.6.

[162] Daniels v. State, 448 S.E.2d 185, 189 (Ga. 1994) (reading an anti-mask crime to save the crime from a First Amendment related overbreadth attack, as requiring the accused to have the intention to conceal his identity as well as the intention to intimidate, or that a reasonable person in the position of the accused would be aware of the risk that concealing his face under the circumstances would result in intimidating a reasonable person, in reckless disregard that his conduct would have this result, or of the victim's rights).

[163] In *Saadiq v. State*, 387 N.W.2d 315 (Iowa 1986), the court rejected the accused's claim that he must know he had previously committed a felony to be convicted later of the crime of being a felon in possession of a firearm. *Id.* at 323. In this case, the first conviction was only for an aggravated misdemeanor. *Id.* The court relied on the specific definition of felony in the subsequent possession charge -- any crime punishable by over a year in prison. *Id. See also* Eggman v. Scurr, 311 N.W.2d 77, 80 (Iowa 1981) (deciding that the intent of the legislature was to reduce the culpability for a traditional theft crime from purpose to misappropriate to negligence with regard to misappropriation objective element); State v. McDowell, 312 N.W.2d 301, 303-07 (N.D. 1981) (holding strict liability appropriate for the crucial act of writing a check subsequently dishonored for insufficient funds). *See also supra* notes 43-44. *See also* People v. McNamara, 585 N.E.2d 788 (N.Y. 1991) (interpreting public place in public lewdness misdemeanor to mean that with regard to a vehicle that it is a public place when the objective circumstances establish that the lewd acts committed there can, and likely would be seen by the casual passerby); Commonwealth v. Alvarez, 596 N.E.2d 325, 328 (Mass. 1992); State v. Lucero, 647 P.2d 406, 408 (N.M. 1982) (adhering to its ruling that the child abuse crime was a strict liability crime despite the fact that the crime statute specifically made reference to alternative culpability concepts -- intentionally, knowingly, or negligently); State v. Hopkins, 782 P.2d 475, 477 (Utah 1989) (see *supra* notes 76-77, and accompanying text.); State v. Groom, 947 P.2d 240, 246 (Wash. 1997) (holding that all objective elements of the crime of illegal search of home by police officer were strict liability). *See also supra* note 69 and accompanying text (discussion of cases).

[164] In *People v. Krovarz*, 697 P.2d 378 (Colo. 1985), although taking another's property traditionally has only warranted felony criminalization because the taking was done with the objective of at least risking permanently depriving the owner of the property, the court held that a knowing taking would suffice, at least when the crime was robbery -- the taking by force, threat, or intimidation. *Id.* at 379. The court failed to recognize that a knowing taking, i.e., an awareness I am taking the property of another, is in many situations, where intent is to temporarily borrow such property, completely innocuous, and certainly does not justify the threat of a substantial deprivation of liberty. In *People v. Andrews*, 632 P.2d 1012 (Colo. 1981), the court held that felony aggravated theft of an automobile required only that the accused be proven to have "knowingly" retained possession of an automobile "without authorization," omitting the need to prove that the accused intended to permanently deprive owner of the automobile. *Id.* at 1017. In the case there was overwhelming evidence that the accused did not intend to permanently deprive the owner of the automobile, and there was inadequate proof that the owner, the defendant's employer, prior to his temporary departure or thereafter made clear that his retention of the car was without authorization. *Id.* at 1014-15. *See also* People v. Washburn, 593 P.2d 962, 964 (Colo. 1979) (holding that theft of rental property did not require the state to prove that the accused's intention in retaining the property of the owner, seventy-two hours beyond the rental agreement, was to permanently deprive the owner of that property).

[165] In *People v. Krovarz*, 697 P.2d 378 (Colo. 1985), the accused, likely suffering from mental disease or

defect, was charged with an attempted aggravated robbery when he took money from a store clerk. *Id.* at 379. A psychologist for the defense testified that Krovarz took the money for the purpose of being caught and returning to institutionalization. *Id.* The Colorado Supreme Court focused on facts that proved the accused was aware that he was taking money by force and was aware that the victim would reasonably fear bodily injury, but seemingly held irrelevant that the accused was not intending to even risk depriving the owner permanently of the money. *See id.* at 383. *See also* People v. Andrews, 632 P.2d 1012, 1017 (Colo. 1981).

[166] Several state statutes defining "lesser-included offense" recognize this relationship. *See, e.g.,* ALA. CODE § 13A-1-9(a)(4) (1975) ("an offense is an included one if it differs from the offense charged only in the respect that . . . a lesser kind of culpability suffices to establish its commission."); GA. CODE ANN. § 16-1-6(2) (1998) ("A crime is so included when: . . . it differs from the crime charged only in the respect that . . . a lesser kind of culpability suffices to establish its commission."); TEX. CRIM. P. CODE ANN. § 37.09 (West 1996). With regard to commentator recognition of this relationship, see Andrew D. Goldsmith & Susan Copeland Ferguson, *Lesser Included Offense Analysis of Environmental Crimes*, 7 FORDHAM ENVTL. L.J. 737, 741-42 (1996).

[167] Blockburger v. United States, 284 U.S. 299 (1932); United States v. Dixon, 509 U.S. 688 (1993) (returning to and reconfirming *Blockburger* focus on same elements); Rutledge v. United States, 517 U.S. 292 (1996) (adhering to and applying same element test). *See, e.g.,* HAW. REV. STAT. § 701-109(4)(c) (2000) (defining lesser included offense several ways, including that "[i]t differs from the offense charged only in the respect that . . . a different state of mind indicating lesser degree of culpability suffices to establish its commission."), *overruled by* State v. Burlison, 583 N.W. 2d 31, 35 (Neb. 1998). This statute was cited and discussed in *State v. Pinero*, 778 P.2d 704, 714 (Haw. 1989). For an example of a broader state law definition of lesser offense, see, TEX. CRIM. P. CODE ANN. § 37.09 (1996). *See also* James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1, 6-13 (1995) (identifying three traditional approaches to defining lesser-included offense).

[168] *See supra* note 4 and accompanying text. Earlier, we documented the failure of state legislatures to systematically undertake culpability evaluations for new crimes. *See supra* note 8 and accompanying text. This failure would seem to foredoom systematic, quality, lesser included offense analysis by the state courts and other lawyers. See examples, *infra* notes 171-73 and accompanying text.

[169] Brown v. Ohio, 432 U.S. 161, 165-66 (1977) (identifying that the federal Double Jeopardy Clause generally forbids excessive prosecutions and cumulative punishments for the greater and lesser offenses, whatever the sequence). The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. A lesser-included offense, as narrowly defined above, is by definition the same offense as the greater crime. Prosecutors particularly are held responsible for knowing the lesser-greater relationship between crimes, because failure to prosecute and present crimes with this relationship to the jury will, in most cases, bar subsequent prosecution on the omitted crime. For a detailed evaluation of this point and generally on the impact of the federal constitution's double jeopardy protection, as well as due process protection with regard to the lesser-included-offense doctrine, see Shellenberger & Strazzella, *supra* note 167.

[170] The Ohio statutes involved in *Brown v. Ohio*, 432 U.S. 161 (1977), presented an example of two crimes the only difference between which was an additional culpability requirement that must be proven to accompany at least one of the shared objective elements in order to prove guilt of the greater crime, here

the theft. *Id.* at 166. While neither the Ohio courts or the U.S. Supreme Court sought to identify the appropriate/requisite culpable mental state for either the objective element of taking, or the circumstantial element of without the effective consent of the owner, both recognized that the theft crime required a second and additional culpable mental state with regard to the taking element -- the goal (even if not accomplished) of permanently depriving the owner of the automobile. *Id.* at 168.

By definition, a finding of innocence on the lesser crime means a finding of innocence on the greater crime, because it means that the state failed to prove beyond a reasonable doubt at least one of the objective elements shared by the lesser and greater crime, or failed to prove a lower level of culpability than that found appropriate for the greater crime for at least an objective element shared with the lesser crime. Failure to prove a lesser level of culpability by definition means failure to prove a more culpable mental state.

With regard to acquittal by the trier of fact of the greater crime, conventional wisdom is that a jury instruction (or trial judge consideration) on the lesser crime is not warranted unless trial evidence provides a basis for convicting on the lesser crime. *See* Shellenberger & Strazzella, *supra* note 167, at 7. Where, however, the only difference between the lesser and greater crime is a lower culpability level for the lesser crime for a shared objective element, a jury instruction on the lesser is logically always warranted because the evidence used to attempt to prove the greater crime is exactly the same evidence needed to prove the lesser crime. Only the degree of the accused's cognition with regard to the shared objective element distinguishes this type of lesser included crime from the greater crime. The government is never entitled to a directed verdict with regard to the greater crime based on a judicial finding of guilt beyond reasonable doubt of the higher level of culpability. Hence it is always appropriate for the trier of fact to evaluate all the evidence relevant to culpability introduced during the trial and decide that the accused only had the lower level of culpability with regard to the shared objective element. Hence appellate courts commit gross conceptual error when, as did the Supreme Court in *Hopper v. Evans*, 456 U.S. 605 (1982), they decided, based on an appellate record, to substitute their judgment for that of the trier of fact's and find that the accused could only be convicted of the greater culpability crime. *Id.* at 614. In *Hopper*, the nine justices relied erroneously on that part of the record that proved only what the accused felt about the killing sometime after the killing occurred; not what his objective in fact was at the moment the killing occurred. *Id.* at 612-13. Hence the court erroneously upheld and applied an Alabama statue which created a blanket preclusion of jury consideration of any lesser-included offense in a capital case. Earlier, in *Roberts v. Louisiana*, 428 U.S. 325 (1976), a plurality of the Court made the same egregious conceptual error at the other end of the spectrum by finding that a Louisiana statute which required consideration of lesser-included homicide offenses (some of which at least were distinguished from the capital homicide only by different culpability levels for the same objective element) in a capital murder scheme was unconstitutional. *Id.* at 336. These justices simply failed to comprehend that the prosecution's burden of persuasion with regard to proving culpability beyond a reasonable doubt makes it impossible for the "evidence" in the case to ever preclude a possible reasonable jury finding that the accused only had a lesser level of culpability for the same result element.

With regard to a conviction on the lesser crime, the prosecution had one fair opportunity to investigate, evaluate, charge, and thereafter advocate the level of culpability it can prove with regard to the same objective element. Conversely, an accused has no right to prohibit consideration of both crimes by the trier of fact when the only difference between the crimes is the culpability level for the same objective element. *See* Jeffers v. United States, 432 U.S. 137 (1977) (plurality opinion). Hence, guilt regarding this type of lesser crime means that the jury expressly or implicitly found the accused not guilty of the higher level of culpability. If the prosecution failed to charge the greater crime, it is an admission of lack of

sufficient evidence with regard to the higher level of culpability and fundamental fairness considerations should bar a subsequent prosecution for the greater crime. A prosecutor has no basis to argue in this situation that the additional element that is the difference between the lesser and greater crime did not exist (logically most frequently a reference to a result objective element) at the time of the prosecution of the lesser crime. *See* Garrett v. United States, 471 U.S. 773 (1985).

With regard to a finding of guilt on the greater crime, a conviction on the lesser crime in this circumstance is *per se* subsumed within that conviction, and the accused cannot be simultaneously further punished or prosecuted again for the crime of which he was already convicted. If a court, however, decided after conviction by the trier of fact on the greater crime that there was insufficient evidence of guilt with regard to the higher culpability for the greater crime, that same court should be compelled to evaluate whether there was sufficient evidence for conviction with regard to the lesser level of culpability. If there was sufficient evidence, a conviction on the lesser crime could be entered without the need for a second prosecution, if there was insufficient evidence of the lesser culpability level(s) post conviction court acquittal is also warranted on the lesser included offense. For a related commentators' discussion suggesting that a second trial on the lesser crime should not be barred by double jeopardy, see Shellenberger & Strazzella, *supra* note 167, at 138 n. 478 (characterizing blocking a subsequent prosecution of an accused on a lesser homicide charge once an appellate court has reversed a conviction for an accused of the greater charge, as a "windfall" for the accused).

[171] State v. Hickles, 929 P.2d 141, 150 (Kan. 1996) (denying an accused charged with first degree murder (intent) the right to have the jury charged on second degree murder (reckless) because the evidence indicated to this appellate court that the accused had intent to kill), *habeas corpus denied sub nom.* Hickles v. McKune, 58 F. Supp. 2d 1247 (D. Kan. 1999), *appeal dismissed* No. 99-3221, 2000 U.S. App. LEXIS 13674 (10th Cir. June 12, 2000); State v. Shaw, 438 A.2d 872, 875-76 (Conn. 1982). This same flawed evaluation can also be made by the trial judge with regard to his jury instruction, which could result in unwillingness to give a lesser included offense instruction or giving an erroneous instruction. *See, e.g.*, State v. Pinero, 778 P.2d 704 (Haw. 1989). In *Pinero*, a defendant charged with murder sought an instruction on the lesser included crime of manslaughter. *Id.* at 712. As in many revised penal code states, however, there were two types of manslaughter -- one involving a reckless as compared to a purposeful (murder) taking of a human life. *Id.* at 713. The other involving a purposeful killing done with a mitigating circumstance of extreme emotional distress. *Id.* The Hawaii Supreme Court, by focusing on the latter definition of manslaughter, ruled that by combining the instruction on these two types of manslaughter the trial judge instruction could have confused the jury. *Id.* at 714.

[172] In *Commonwealth v. Schuchardt*, 557 N.E.2d 1380 (Mass. 1990), the court held that "wanton" destruction of property was not a lesser culpability than "willful and malicious" destruction of property because the former, unlike the latter, requires conduct the likely effect of which is substantial harm. *Id.* at 1383. The court failed to recognize that the crimes in question focused on a result objective element, and with regard to that result element, the court failed to specify what "willful and malicious" required the prosecution to prove.

[173] In *People v. Fornear*, 680 N.E.2d 1383 (Ill. 1997), the jury convicted the accused of both aggravated discharge of a firearm and reckless conduct. *Id.* at 1384. Aggravated discharge consisted of the objective elements of discharging a firearm in the direction of another person. *Id.* at 1388. The presumptive culpable mental state for each of the objective elements was knowledge. *Id.* Reckless conduct consisted of the objective elements of any act which caused injury to another person. *Id.* The culpable mental state for these two objective elements was awareness of the risk. *Id.* Hence, reckless

conduct was not a lesser included crime of aggravated discharge of a firearm because it required a result element of actual injury to another person. *Fornear*, 680 N.E.2d at 1388. The Illinois Supreme Court held that a person could not simultaneously act with knowledge and recklessness. *Id*. In this respect that court erred, because conceptually it is possible for a person, at a given moment the person fires a gun, to be aware it is being discharged in the "direction" of another person, but only aware of the risk that it might injure that person.

[174] Chicone v. State, 684 So. 2d 736, 744 (Fla. 1996) (holding that the state must prove "knowing" possession of contraband drugs and drug paraphernalia, but need not allege such knowing possession in the charging instrument); State v. Stanislaw, 573 A.2d 286, 291 (Vt. 1990) (holding that a charge of involuntary manslaughter need not include express reference to culpable mental state of criminal negligence with regard to the death result objective element); State v. Brown, 422 S.E.2d 489 (W. Va. 1992).

[175] State v. Torres, 660 P.2d 522, 525 (Haw. 1983) (relying on a procedural statute which obviously had not been modified to reflect Hawaii's substantive adoption of new culpability concepts).

[176] The minority of courts that did conduct such a review included: Hentzner v. State, 613 P.2d 821, 825 (Ala. 1980) (reviewing the trial judge's instruction to jury which identified a sequence of culpability concepts that the accused must have to be guilty of selling unregistered and nonexempt security, including: willfully, feloniously, and with specific intent to violate the law); State v. Morse, 617 P.2d 1141, 1147 (Ariz. 1980); People v. Hering, 976 P.2d 210 (Cal. 1999); People v. Sargent, 970 P.2d 409, 412 (Cal. 1999) (reviewing a trial judge who instructed the jury that the state must prove only "general intent" to convict of felony child abuse); People v. Bridges, 620 P.2d 1, 3-4 (Colo. 1980) (deciding whether trial court committed reversible error by failing to instruct the jury on any culpable mental state for the felony of engaging in a riot); Chicone v. State, 684 So. 2d 736, 744-46 (Fla. 1996) (holding that if defendant expressly requests more specific jury instruction with regard to identifying the requisite culpability level for a specific objective element of the crime, such instruction must be given, but not otherwise); State v. Pinero, 778 P.2d 704, 715 (Haw. 1989) (holding that jury instruction must include instruction on the requisite culpability for the elements of the crime charged); State v. Silvera, 503 A.2d 599, 604 (Conn. 1986) (failing to examine trial transcript to determine if/how judge defined "intent" and "reckless"); State v. Dana, 517 A.2d 719, 721 (Me. 1986) (finding no instruction given regarding requisite culpability for one crime charged, but then ignoring all reference to new culpability concepts to hold that charge of "attempt" *per se* conveys to jury that "intention" is the requisite culpable mental state); State v. Jones, 865 S.W.2d 658, 661 (Mo. 1993) (focusing directly on failure of jury instructions to include culpable mental state); State v. Green, 629 S.W.2d 326, 328 (Mo. 1982) (finding that the trial judge failed to instruct the jury on a culpable mental state for the conduct element of attempting to obtain a controlled substance by fraud - that he must know or be aware of the substantial risk he is using a false name and prescription); State v. Bergen, 677 A.2d 145, 146 (N.H. 1996) (finding that the trial judge gave erroneous jury instruction with regard to the requisite culpable mental state -- telling jury it was recklessness when in fact it was knowingly); State v. Goetz, 312 N.W.2d 1, 11 (N.D. 1981) (finding the judge's jury instruction to have favored accused by telling jury requisite culpable mental state was greater than actually required); State v. Warner, 564 N.E.2d 18, 48 (Ohio 1990) (approving the trial judge's decision to set the requisite culpable mental state at "recklessness"); State v. Langan, 652 P.2d 800, 804-05 (Or. 1982) (finding that the trial judge failed to instruct the jury correctly that the requisite culpable mental state of knowledge did apply to circumstantial element of "unlawful"); Alvarado v. State, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985) (ruling in an assault of a child case that the trial judge should have instructed the jury in a manner that would limit the attachment of the alleged culpability of at least knowledge to only the result element,

serious bodily injury, because this was the critical element justifying criminalization, whereas the conduct element was unspecified and hence meant any act which caused such an injury to a child.); State v. Calamity, 735 P.2d 39, 43 (Utah 1987); State v. Fontana, 680 P.2d 1042, 1047 (Utah 1984); State v. Kemp, 318 N.W.2d 13, 18-19 (Wis. 1982).

[177] In *People v. Sargent*, 970 P.2d 409 (Cal. 1999), the trial judge's instruction on culpability for crime of felony child abuse included asserting that general intent and criminal negligence must be proven, despite the fact that the only culpable mental state mentioned in the statute was "willfully." *Id.* at 412. The trial judge's instruction defined general intent and criminal negligence, but perhaps not willfully. *Id.* The trial judge's definitions of these concepts were not specifically attached to one or more of the specific objective elements in this complex crime. *Id. See also* State v. Buchanan, 549 N.W.2d 291, 293-94 (Iowa 1996) (citing to trial judge's instruction on culpability where judge expressly stated obstruction or resistance must be intentional, but instead of reviewing the trial transcript to determine if there was sufficient evidence to prove both these elements beyond a reasonable doubt, the court concluded that the state need only prove that there was resistance or obstruction in fact). In *State v. Freeman*, 267 N.W.2d 69 (Iowa 1978), the court erroneously asserted that a separate instruction on mistake of fact was required because it raised a separate and distinct defense from a lack of culpability "defense." *Id.* at 70-71. The court ignored the real problem that the trial judge failed to give an accurate statement of the requisite culpability for a theft crime, despite the fact that the defense lawyer in the case had provided such an accurate definition. *But see* Alvarado v. State, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985), discussed *supra* note 73.

[178] People v. Hering, 976 P.2d 210, 214 (Cal. 1999).

[179] People v. Sargent, 970 P.2d 409, 412 (Cal. 1999).

[180] State v. Jefferies, 446 S.E.2d 427, 432 (S.C. 1994).

[181] In *State v. Tedesco*, 397 A.2d 1352 (Conn. 1978), the accused was charged with the felony of falsely certifying as to the administration of an oath related to the permittee's application for renewal of a liquor license. *Id.* at 1354. The court allowed testimony that the accused certified a signature of a "backer" which was forged. *Id.* at 1357-58. The court failed to specify if the latter conduct was a crime, and if it was a crime whether it was a misdemeanor or a felony. The court failed to recognize that the conduct elements were different, and hence the appropriate culpability could well be different. The court admitted testimony of the backer without evaluation of whether it suggested anything about the accused's intent to deceive with regard to the administration of the oath. *See also* FED. R. EVID. 404(b).

[182] With regard to the national constitutional mandate that the prosecution bear the burden of persuasion for every element of every crime, see Holley, *supra* note 4 at 234-35n.16 and authorities cited therein. *See also* State v. Jennings, 722 P.2d 258, 262 (Ariz. 1986) (giving defendant an "opportunity" to prove that he did not "know" his license was suspended); Spitz v. Municipal Court, 621 P.2d 911, 913-14 (Ariz. 1980) (giving defendant an opportunity to show that he followed legislative "checking" procedures so that he reasonably did not know that buyer of liquor was under specified age).

[183] *See supra* notes 8-17 and accompanying text. For a commentator reaching a similar conclusion, see Pilcher, *supra* note 4, at 48.

[184] *See supra* notes 18, 111-27 and accompanying text.

[185] *See supra* notes 21-30, 31-59 and accompanying text.

[186] *See supra* notes 60-67 and accompanying text.

[187] *See supra* notes 61, 68 and accompanying text.

[188] *See supra* notes 69-75 and accompanying text.

[189] *See supra* notes 72-73 and accompanying text.

[190] *See supra* notes 68-71 and accompanying text.

[191] *See supra* notes 70, 122-23, 132-33, 140, 158-65 and accompanying text.

[192] *See supra* notes 22, 62, 76-77 and accompanying text.

[193] *See supra* notes 78-83 and accompanying text.

[194] *See supra* notes 85-89 and accompanying text.

[195] *See supra* notes 91-92 and accompanying text.

[196] *See supra* notes 93-96 and accompanying text.

[197] *See supra* notes 97-99 and accompanying text.

[198] *See supra* notes 9-17, 63, 102-10 and accompanying text.

[199] *See supra* notes 103-10, 147-48 and accompanying text.

[200] *See supra* notes 124-38 and accompanying text.

[201] *See supra* notes 127-38 and accompanying text.

[202] See discussion *supra* note 4, notes 88-90, 94 and accompanying text.

[203] *See supra* note 65 and accompanying text.

[204] *See supra* notes 66, 161-62 and accompanying text.

[205] *See supra* notes 139-42 and accompanying text.

[206] *See supra* notes 136, 159-60, 163-69, 177 and accompanying text. Not making culpability evaluations for each objective element constitutes avoidance of the constitutional mandate that the state must prove beyond a reasonable doubt each culpability concept assigned to each objective element.

[207] *See supra* notes 71, 116, 137, 139, 154-62 and accompanying text.

[208] *See supra* notes 100, 151-52 and accompanying text.

[209] *See supra* note 101 and accompanying text.

[210] *See supra* notes 147-52 and accompanying text.

[211] *See supra* note 149 and accompanying text.

[212] *See supra* notes 21-30 and accompanying text.

[213] *See supra* notes 176-80, 204-05 and notes cited therein.

[214] *See supra* notes 158-65 and accompanying text.

[215] *See supra* notes 139-41 and accompanying text.