Washington and Lee Law Review

Volume 81 | Issue 1 Article 6

Winter 2024

Mandatory Sentences as Strict Liability

William W. Berry III
University of Mississippi School of Law, wwberry@go.olemiss.edu

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William W. Berry III*

Abstract

Strict liability crimes—crimes that do not require a criminal intent—are outliers in the world of criminal law. Disregarding criminal intent risks treating the blameworthy the same as the blameless.

In a different galaxy far, far away, mandatory sentences—sentences automatically imposed upon a criminal conviction—are unconstitutional in certain contexts for the exact same reason. Mandatory death sentences risk treating those who do not deserve death the same as those that might.

Two completely separate contexts, two parallel rules of law. Yet courts and commentators have failed to see the similarities between these two worlds, leaving an analytical black hole. Indeed, equity in criminal sentencing may depend upon recognizing the connections between these parallel universes.

This Article aims to fill this analytic gap, proposing a rethinking of mandatory sentences in light of the way criminal law treats strict liability crimes. Specifically, the Article argues that courts should reconceptualize mandatory sentences as a type of strict liability. To that end, it proposes a series of possible statutory and constitutional limits on mandatory sentences.

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* Montague Professor of Law and Associate Dean for Research, University of Mississippi School of Law. The author thanks Corinna Lain, Chris Green, Eric Berger, Brian Krumm, Sara Gosman, Federica Paddeu, and Brendan Plant for helpful conversations on structuring the argument of the paper. The author also thanks Emmy Thrower for her capable research assistance. Finally, many thanks to Karen Glover for tracking down numerous sources.

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INTRODUCTION

What's good for the goose is good for the gander.
Ancient Proverb

Strict liability crimes—crimes that do not require a criminal intent—are outliers in the world of criminal law.[1] Generally, the law imposes criminal liability only where a person has some form of criminal intent. In some form or fashion, to be guilty one must have a guilty mind.[2] Indeed, even when a statute omits a criminal intent element, the Supreme Court often reads an intent requirement into the statute to avoid the imposition of strict liability.[3] The Court does this, it

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1. *See* Frances Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 n.2 (1932)

> "The general rule of English law is, that no crime can be committed unless there is *mens rea*." Williamson v. Norris, [1899] 1 Q. B. 7, 14, *per* Lord Russell, C. J. "It is a sacred principle of criminal jurisprudence, that the intention to commit the crime, is of the essence of the crime, and to hold, that a man shall be held criminally responsible for an offense, of the commission of which he was ignorant at the time, would be intolerable tyranny." Duncan v. State, 7 Humph. 148, 150 (Tenn. 1846).

2. *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978) ("[I]ntent generally remains an indispensable element of a criminal offense."); *see also* Staples v. United States, 511 U.S. 600, 606 (1994) ("[O]ffenses that require no *mens rea* generally are disfavored . . . .").

3. *See* Ruan v. United States, 597 U.S. 450, 457–58 (2022) (requiring the Government to prove beyond a reasonable doubt that the defendant acted knowingly and intentionally where the statute did not include a specific criminal mens rea element); Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019) (applying the "longstanding presumption" that Congress intends to require a defendant to possess a culpable mental state for each element of an alleged criminal act); Morissette v. United States, 342 U.S. 246, 263 (1952) ("[M]ere omission from [a criminal statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced."); Elonis v. United States, 575 U.S. 723, 734 (2015) (explaining that Congress's omission of the "intent" element from a criminal statute should not be read as the elimination of the need to prove intent because of "the basic principle that 'wrongdoing must be conscious to be criminal'" (citation omitted)); *Staples*, 511 U.S. at 606 ("We have . . . suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime."); Liparota v. United States, 471 U.S. 419, 425 (1985) (refusing to accept the government's argument that a showing of mens rea was not required); United States v. X-Citement Video, Inc., 513 U.S. 64, 73 (1994) (refusing to "follow the most grammatical reading of the statute" because "our cases interpreting criminal statutes . . . includ[e] broadly applicable scienter

has explained, because criminal intent can be what separates criminal acts from innocent ones.[4] Disregarding criminal intent risks treating the blameworthy the same as the blameless.[5]

In a different galaxy far, far away, mandatory sentences[6]—sentences automatically imposed upon a criminal conviction—are unconstitutional in certain contexts for the exact same reason.[7] In capital cases and juvenile life without parole ("JLWOP") cases, the Supreme Court has read an individualized sentencing requirement into the Eighth Amendment.[8] So, in these serious cases—cases where a person's life is at stake or, in the juvenile context, life without parole is a consequence—courts must always consider the culpability of the defendant.[9] As the Court has explained, failure to consider

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requirements, even where the statute . . . does not contain them"); *U.S. Gypsum Co.*, 438 U.S. at 436 ("We start with the familiar preposition that the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." (internal quotation omitted)).

4. *See Rehaif*, 139 S. Ct. at 2197 ("Applying the word 'knowingly' to the defendant's status . . . helps to separate wrongful from innocent acts. . . . Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful."); *see also X-Citement Video*, 513 U.S. at 72 (explaining that the common law instructs a presumption in favor of applying a scienter recruitment to each of the statutory elements that criminalize otherwise innocent conduct); *Liparota*, 471 U.S. at 426 (same).

5. *See Rehaif*, 139 S. Ct. at 2197 (acknowledging that judging conduct alone without considering wrongful intent may impose criminal sanctions on an otherwise innocent mistake); *see also X-Citement Video*, 513 U.S. at 72–73 (explaining the presumption of a mens rea intent requirement where the language of the statute is silent avoids criminalizing otherwise innocent conduct for violations punishable by substantial prison sentences and fines).

6. For purposes of this Article, all references to mandatory sentences include mandatory minimum sentences.

7. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (barring mandatory death sentences); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (same); Miller v. Alabama, 567 U.S. 460, 489 (2012) (barring mandatory juvenile life without parole ("JLWOP") sentences); Montgomery v. Louisiana, 577 U.S. 190 (2016) (applying *Miller* retroactively).

8. *See infra* Part II.B.

9. *See Woodson*, 428 U.S. at 286–87 ("[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender . . . ."); *Miller*, 567 U.S. at 479 (imposing a requirement on courts to consider a child's "diminished culpability and heightened capacity for change" before imposing a sentence of life without parole); Lockett v. Ohio, 438

individualized characteristics of the defendant and his conduct, in these most serious of cases, risks treating those who do not deserve death or JLWOP the same as those that might.[10]

Two completely separate contexts, two parallel rules of law. Yet courts and commentators have failed to see the similarities between these two worlds, leaving an analytical black hole in the understanding of how and why these parallel universes exist, and what one might learn by recognizing the connections between them. How the treatment of strict liability crimes might speak to the appropriate limits on mandatory sentences is a question that has entirely escaped notice.

Indeed, equity in criminal sentencing may depend upon this relationship. The Court has been aggressive and consistent in safeguarding the sanctity of the criminal intent requirement, at least with respect to federal statutes.[11] But in the mandatory sentencing context, its protections have been robust only with respect to death and JLWOP sentences.[12] The sentencing process ignores the culpability of the defendant in other mandatory sentencing contexts, giving piecemeal protection that protects some but not others.[13]

This Article aims to fill this analytic gap, proposing a rethinking of mandatory sentences as a kind of strict liability. This analysis seems particularly needed in light of the largely ignored commonalities between limits on strict liability and on mandatory sentences.

The reasons why mandatory sentences amount to a genre of strict liability relate to what such sentences foreclose.

U.S. 586, 605 (1978) (emphasizing consideration of mitigating factors in capital punishment cases); *see also infra* Part II.B.

10. *See* cases cited *supra* notes 7, 9 (examining crimes where capital punishment and mandatory life sentences constitute cruel and unusual punishment). This Article operates within the confines of the Court's current jurisprudence. I have argued elsewhere for the abolition of both the death penalty and JLWOP under the Eighth Amendment. *See generally* William W. Berry III, *Evolved Standards, Evolving Justices?*, 96 WASH. U. L. REV. 105 (2018).

11. *See supra* note 3 and accompanying text.

12. *See* cases cited *supra* note 7.

13. *Compare Woodson*, 428 U.S. at 286–87 (finding an overly broad mandatory death sentence statute unconstitutional), *and Miller*, 567 U.S. at 479 (denying a mandatory JLWOP sentence), *with* Harmelin v. Michigan, 501 U.S. 957, 995 (1991) (denying relief under the Eighth Amendment for the imposition of a mandatory life without parole sentence).

Mandatory sentences remove consideration of the culpability of the defendant in imposing punishment. At their core, culpability and intent are corollary principles.

As such, the Article argues that the same limits on strict liability crimes should apply to mandatory sentences. First, it proposes a limit on mandatory sentences based on the category of crimes in which courts allow strict liability—public welfare crimes.[14] Alternatively, the Article proposes a limit based on strict liability in practice—suggesting that mandatory sentences, as a type of strict liability, only be available for strict liability crimes.[15]

In Part I, the Article describes the justifications for the use of strict liability in criminal cases and the limits courts place on its use. Part II explores the justifications for mandatory sentences and the limits courts have placed on their use. Part III explains why courts should treat mandatory sentences as a genre of strict liability. Finally, in Part IV, the Article maps possible "strict liability" limits on the use of mandatory sentences.

I. LIMITS ON STRICT LIABILITY

Most crimes require that the government prove that the defendant committed a criminal act *and* possessed a culpable mental state, known as his mens rea.[16] This mens rea

14. *See infra* Part IV.A.1.

15. *See infra* Part IV.A.2.

16. *See* cases cited *supra* note 3. Strict liability has been an often-debated topic. In her article, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 401 n.1 (1992), Laurie L. Levenson provides various sources illustrating this debate. *See generally* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); Anthony A. Cuomo, *Mens Rea and Status Criminality*, 40 S. CAL. L. REV. 463 (1967); Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322 (1966); James J. Hippard, Sr., *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039 (1973); R. M. Jackson, *Absolute Prohibition in Statutory Offences*, 6 CAMBRIDGE L.J. 83 (1936); Phillip E. Johnson, *Strict Liability: The Prevalent View*, *in* 4 ENCYCLOPEDIA OF CRIME & JUSTICE 1518 (Sanford H. Kadish ed., 1983); Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257 (1987); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107; G. L. Peiris, *Strict Liability in Commonwealth Criminal Law*, 3 LEGAL STUDS. 117 (1983); Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067 (1983); Alan Saltzman, *Strict*

requirement is central to the classification of the crime and the punishment imposed.[17]

Crimes that do not require a mens rea are strict liability crimes.[18] Strict liability criminal statutes punish behavior irrespective of the intent of the defendant.[19] The rationale behind strict liability crimes relates to the need of the government to deter the kind of criminal behavior in question in all situations, irrespective of the reason for engaging in such behavior.[20]

These kinds of crimes include public welfare crimes, offenses where the public welfare demands punishment for

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Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process, 24 WAYNE L. REV. 1571 (1978); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933); Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337 (1989); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960); Joseph Yahuda, *Mens Rea in Statutory Offences*, 118 NEW L.J. 330 (1968).

17. Homicide is an obvious example. Homicides committed with malice aforethought are murder; homicides committed without malice aforethought—a lower mens rea—are manslaughter. *See* Howard J. Curtis, *Malice Aforethought, in Definition of Murder*, 19 YALE L.J. 639, 639 (1910). *See generally* Frederic William Maitland, *The Early History of Malice Afore Thought*, 8 L. MAG. & REV. Q. REV. JURIS. & Q. DIG. ALL REP. 406 (1883) (exploring the historical European common law roots of the definition of culpable homicide).

18. *See* 21 AM. JUR. 2D *Criminal Law* § 12 (2023) ("Strict liability allows for criminal liability absent the element of mens rea found in most crimes."). The term strict liability encompasses both offenses for which no mental state is generally required and offenses where no mens rea is required as to a particular element of the crime. *See* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.5 (3d ed. 2023).

19. *See* Jackson, *supra* note 16, at 83 (explaining that the law imposes criminal liability regardless of whether the offender had any mens rea or intent for certain criminal acts that have been determined to be particularly important to prevent); *see also* Singer, *supra* note 16, at 356 ("[T]he premise of strict liability is that the defendant is held guilty no matter how careful and morally innocent he or she . . . has been."); Saltzman, *supra* note 16, at 1577 ("Strict criminal liability is often referred to as liability without *mens rea*.").

20. One reason the Court disfavors strict liability crimes is a fear of overdeterrence. *See, e.g.*, Ruan v. United States, 597 U.S. 450, 459 (2022) ("A strong scienter requirement helps to diminish the risk of 'overdeterrence,' *i.e.*, punishing acceptable and beneficial conduct that lies close to, but on the permissible side of, the criminal line." (citing United States v. U.S. Gypsum Co., 438 U.S. 422, 431 (1978))).

transgression.[21] Unlike traditional common law crimes, public welfare crimes justify the use of strict liability based in part on tort law considerations.[22] In cases of dangerous goods, for instance, manufacturers remain in the best position to bear the risk and prevent the harm.[23] Using strict liability, legislatures can ensure uniformity in conduct in such situations.[24]

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21. *See* Bowes Sayre, *supra* note 16, at 68–69 (arguing that, in the twentieth century, increased social complexities and crowded conditions encouraged greater government regulation and enforcement in various industries for the benefit of the public). Public welfare offenses include the sale of unsafe food or drugs, driving faster than the speed limit, the sale of alcohol to minors, and the improper handling of dangerous chemicals or waste. *See* Levenson, *supra* note 16, at 419 (providing examples of strict liability public welfare offenses aimed at addressing the harms brought about by the Industrial Revolution); Bowes Sayre, *supra* note 16, at 55 ("Convictions may be had for the sales of adulterated or impure food, violations of the liquor laws, infractions of anti-narcotic acts, and many other offenses based upon conduct alone without regard to the mind or intent of the actor."); *see also, e.g.*, United States v. Int'l Mins. & Chem. Corp., 402 U.S. 558, 559 (1971) (bringing a suit for a company's transportation of dangerous liquids or products in violation of regulations); United States v. Johnson & Towers, Inc., 741 F.2d 662, 663 (3d Cir. 1984) (bringing a suit for a company's dumping of hazardous wastes in violation of regulations); United States v. Catlett, 747 F.2d 1102, 1103 (6th Cir. 1984) (bringing a suit for the killing of protected animals under Migratory Bird Treaty Act); United States v. Y. Hata & Co., 535 F.2d 508, 509 (9th Cir. 1976) (challenging a conviction under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–399i); People v. Dillard, 201 Cal. Rptr. 136, 136 (Ct. App. 1984) (prosecuting the carrying of a loaded firearm).

22. *See* Genevra Richardson, *Strict Liability for Regulatory Crime: The Empirical Research*, 1987 CRIM. L. REV. 295, 296 ("[S]trict liability is justified . . . as it furthers deterrence and aids the enforcement of the regulatory requirements."); OLIVER WENDELL HOLMES, THE COMMON LAW 57–59 (1881) (theorizing on the social welfare justifications for strict liability); ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 52 (1921) ("[Strict liability] statutes are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals.").

23. *See* Levenson, *supra* note 16, at 419–20 (explaining that strict liability shifts the burden of care to the manufacturer because they are in the best position to prevent mistakes and ensure quality control for potentially high-risk products and services); *see also* Wasserstrom, *supra* note 16, at 737 (noting that strict liability offenses can persuade against engaging in certain kinds of inherently dangerous enterprises and activities).

24. *See* Saltzman, *supra* note 16, at 1584 (considering how legislatures establish standards of reasonable care depending on standards of liability); *see also* Levenson, *supra* note 16, at 420–21 (noting that legislatures may be better equipped than juries to determine the appropriate standard of care in certain complex cases).

In other situations, such as speeding or parking in a spot reserved for individuals with disabilities, the concept of public welfare seeks to prohibit the act, period.[25] These bright-line rules exist to dissuade individuals from engaging in the proscribed behavior.[26] One's intent in engaging in the behavior does not matter.[27]

With the exception of these public welfare crimes, the Supreme Court disfavors strict liability crimes, often choosing to infer a mens rea even where a statute does not contain one.[28] The Court reasons that one's intent usually matters—a premeditated act warrants a more serious punishment than a negligent one.[29]

Thus, strict liability crimes only require proof of a criminal act to establish guilt.[30] As explored below, the elimination of the intent requirement—the mens rea—has clear advantages, but these advantages have limits.[31]

American strict liability crimes apparently originated with nineteenth century cases allowing the conviction of a bartender for selling liquor to a habitual drunkard without knowledge of the buyer's nature and cases allowing for convictions of selling

25. *See* Levenson, *supra* note 16, at 422 (distinguishing driving over the posted speed limit as a common strict liability public welfare crime).

26. *See* Wasserstrom, *supra* note 16, at 737 ("[I]t seems reasonable to believe that the presence of strict liability offenses might have the added effect of keeping a relatively large class of persons from engaging in certain kinds of activities.").

27. *See* Levenson, *supra* note 16, at 419 (emphasizing that defendants violate strict liability crimes regardless of their intent or negligent conduct).

28. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 250 (1952) (reading a mens rea standard into a federal statute); United States v. U.S. Gypsum Co., 438 U.S. 422, 438 (1978) (explaining that statutes without a mens rea have a "generally disfavored status" and indicating an interpretive presumption in favor of a mens rea, even when a statute is silent).

29. Again, homicide law is instructive. Premeditated homicides can receive the death penalty; negligent homicides might qualify as misdemeanors. *See, e.g.*, MODEL PENAL CODE § 210 (classifying levels of homicide based upon the degree of criminal intent).

30. *See* Jackson, *supra* note 16, at 88; Wasserstrom, *supra* note 16, at 733.

31. As Professor Kadish explained, "If a principle is at work here, it is the principle of 'tough luck.'" Kadish, *supra* note 16, at 267.

adulterated milk even though the defendant did not know of the adulteration.[32]

This was a departure from the common law tradition of requiring that all crimes have an element of criminal intent.[33] Blackstone famously stated that for an action to constitute a crime, there must be a "vicious will."[34] And Oliver Wendell Holmes echoed the same sentiment, explaining that "even a dog distinguishes between being stumbled over and being kicked."[35]

A. *The Limited Justification for Strict Liability*

When the state does not have to prove criminal intent to convict an individual of a crime, as in the case of strict liability, it only has to prove beyond a reasonable doubt that the individual committed the criminal act or acts required to establish the crime.[36]

The act in question must satisfy the basic requirement that the individual committed it voluntarily.[37] In some cases,

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32. *See, e.g.*, Barnes v. State, 19 Conn. 398, 404 (1849) (upholding a lower court's holding "that knowledge of one's character . . . is not essential, to subject the [tavernkeeper] to the penalty of the law," while reversing the conviction on other grounds); Commonwealth v. Farren, 91 Mass. 489, 491 (1864) (upholding a conviction for selling adulterated milk); Commonwealth v. Nichols, 92 Mass. 199, 200 (1865) (same); Commonwealth v. Waite, 93 Mass. 264, 265 (1865) (same); *Morissette*, 342 U.S. at 256 (citing these cases). *See generally* Bowes Sayre, *supra* note 16.

33. *See* Jackson *supra* note 16, at 83 ("In all common law crimes . . . some culpable mental element, or mens rea, is required.").

34. 4 WILLIAM BLACKSTONE, *Of the Persons Capable of Committing Crimes*, *in* BLACKSTONE'S COMMENTARIES 482, 482 (Marshall D. Ewell ed., 1882).

35. HOLMES, *supra* note 22, at 3. The idea is that the criminal is someone who "cho[se] freely to do wrong." United States v. Cordoba-Hincapie, 825 F. Supp. 485, 493 (E.D.N.Y 1993) (quoting Roscoe Pound, *Introduction* to FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW xxix, xxxvii (1927)).

36. *See* Jackson, *supra* note 16, at 88; Wasserstrom, *supra* note 16, at 733.

37. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.02, at 93 (4th ed. 2006) ("Subject to a few limited and controversial exceptions, a person is not guilty of a crime unless her conduct includes a voluntary act."); WAYNE LAFAVE, CRIMINAL LAW § 3.2, at 208 (3d ed. 2000) ("[I]t is clear that criminal liability requires that the activity in question be voluntary."); MICHAEL S. MOORE, ACT AND CRIME 35–37 (1993) (exploring the voluntary act requirement); PAUL ROBINSON, FUNDAMENTALS OF CRIMINAL LAW 250 (2d ed. 1995) ("With the exception of the special case of liability for an omission, the criminal law requires an act before liability may be imposed."); Gideon Yaffe,

omissions can count as acts.[38] But whether an act or omission, it is easy to establish in most cases whether someone did or did not engage in a particular behavior.

For the prosecutor, the much more difficult part in non-strict liability cases is proving criminal intent.[39] In rare cases, individuals verbalize their criminal intent.[40] In most cases, however, juries must impute a particular intent to an individual in light of their behavior.[41] In other words, a person's actions, coupled with other circumstantial evidence, must demonstrate the requisite intent required to be guilty of a crime.[42]

With strict liability crimes, proof of the act is enough for conviction.[43] This makes the case much easier to prosecute.[44] There are fewer elements to prove, and the direct evidence can

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The Voluntary Act Requirement, *in* THE ROUTLEDGE COMPANION TO THE PHILOSOPHY OF LAW 174, 175 (Andrei Marmor ed., 2012) ("For legal purposes, a voluntary act is a *willed bodily movement*.").

38. *See, e.g.*, MODEL PENAL CODE § 2.01(1) (classifying omissions as acts); *see also* Sanford H. Kadish, *Act and Omission, Mens Rea, and Complicity: Approaches to Codification*, 1 CRIM. L.F. 65, 70–71 (1989) (describing different approaches to codifying crimes of omission). Crimes of possession also fall into this category. *See, e.g.*, Markus Dirk Dubber, *The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process*, *in* DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW 91, 96–97 (R.A. Duff & Stuart Green eds., 2005) (describing the prominent role possession offenses have in the police's effort against crime in New York).

39. *See* Levenson, *supra* note 16, at 403 ("Convictions are more easily obtained if the prosecution need not prove a culpable mental state.").

40. *See, e.g.*, *The Smoking Gun Tape*, WATERGATE.INFO, at 06:21, https://perma.cc/ZWR3-AX5W (last visited Jan. 22, 2024) (recording of Nixon ordering the FBI to abandon its investigation of the Watergate break-in).

41. *See, e.g.*, Howard Ross & J. E. Hall Williams, *The Law Commission: Imputed Criminal Intent*, 30 MODERN L. REV. 431, 431–32 (1967) (exploring this concept in the law of homicide).

42. *See* Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 421–22 (2007) (discussing the difficulty of proving mens rea).

43. *See* Jackson, *supra* note 16, at 88 ("[T]he prosecution need prove only the commission of the act prohibited . . . .").

44. *See generally* Levenson, *supra* note 16.

establish these elements in most cases.[45] The act, or failure to act, is the only question—did the defendant do it or not?[46]

Another direct consequence results from the ease of prosecution. Defendants have a strong incentive to plead guilty to strict liability crimes.[47] This is particularly true where any trial penalty exists at all, such that the consequence of rejecting a plea bargain and going to trial is likely to be a more severe sentence.[48] A defendant guilty of a strict liability crime will typically have no real case to make at trial.[49]

In the strict liability context, the justification or excuse for engaging in the act simply does not matter.[50] The mental state of the defendant is not at issue. Even if the defendant had a good reason for engaging in the proscribed conduct, the defendant is guilty.[51] As such, a defendant has a strong incentive to plead guilty in strict liability cases.[52]

In addition to the advantages of ease of prosecution and the concurrent efficiency that can result from quick plea bargains,

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45. *See id.* at 403 (providing that in strict liability cases, the state is relieved of its burden of having to prove intent, "the most difficult issue to prove").

46. *See* Wasserstrom, *supra* note 16, at 733 ("[S]trict liability offenses might be tentatively described (although not defined) as those in which the sole question put to the jury is whether the jury believes the defendant to have committed the act proscribed by the statute."); Levenson, *supra* note 16, at 420 ("The sole question for the trier of fact is whether the defendant committed the proscribed act.").

47. *See* RICHARD L. LIPPKE, THE ETHICS OF PLEA BARGAINING 43 (2011) ("Defendants who are guilty as charged and who know it do us no favors by insisting on trial adjudication. Even if there is some residual value in putting the state's evidence to the test in such cases, it might seem that it is too meager to justify the burden and expense of trials.").

48. *See id.* at 38 ("Trial penalties [in strict liability cases] consist of added charges or increases in sentences which are intended to discourage exercise of the right to trial or punish defendants for having done so.").

49. *See* Jackson, *supra* note 16, at 88 ("[T]he prosecution need prove only the commission of the act prohibited . . . .").

50. *See* Levenson, *supra* note 16, at 417 ("[T]he strict liability doctrine traditionally rejects even a reasonable mistake of a fact or circumstance material to a finding of guilt.").

51. *See id.* at 402–03 ("In ignoring the defendant's intent, the strict liability doctrine even allows for punishment of individuals who, because of deception, unwittingly commit prohibited acts.").

52. *See id.* at 404 ("The strict liability doctrine affords both an efficient and nearly guaranteed way to convict defendants.").

strict liability has other advantages for the state related to the proscribed conduct itself. With respect to the strict liability crime, the state has more direct control over the conduct in question because of the ease of prosecution.[53] Simply by providing a police presence or surveillance, the government can significantly limit the acts in question to the extent that they take place in public.[54]

Similarly, strict liability can serve as a tool to deter the criminal acts in question. The careful policing of such acts and the subsequent surety of prosecution can enhance the ability to deter the crime.[55] The deterrent effect will relate, in part, to the undesirability of the punishment for the act, but to the extent that the quantity and quality of punishment can deter, removing any intent requirement will enhance the deterrent effect of the prohibition.[56]

B. *When and Why the Court Limits Strict Liability*

Given the inherent advantages of strict liability criminal statutes, one might think that such crimes are generally desirable in a state's criminal justice code. In fact, the opposite is true. The United States Supreme Court has consistently denounced strict liability interpretations of federal statutes.[57]

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53. *Cf. id.* at 422 ("By affording no leniency for defendants causing harm, the legislature affirms society's interest in being protected from certain conduct.").

54. *Cf. id.* at 424–25 ("The interests in efficient punishment and maximum deterrence of certain conduct is seen as outweighing the risk that a nonculpable person will be punished.").

55. *See* Wasserstrom, *supra* note 16, at 731–32.

56. I remain personally skeptical of the deterrent effect of punishments in many cases. It is also not clear the degree to which increasing punishment will have anything more than a marginal deterrent effect over the lower punishment. *See* Levenson, *supra* note 16, at 427 ("[T]he strict liability doctrine violates utilitarian theories of criminal punishment because an individual who has no basis for believing he is engaging in unlawful conduct will not be deterred from engaging in that behavior.").

57. *See, e.g.*, Ruan v. United States, 597 U.S. 450, 457–58 (2022) ("[W]hen we interpret criminal statutes, we normally start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state." (internal quotation omitted)); Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019) ("[There is] a presumption that criminal statutes require the degree of knowledge sufficient to make a person legally responsible for the consequences of his or her act or

The Court's view of the need for proof of criminal intent prior to criminal conviction has caused it to read mens rea requirements into statutes even though there is no accompanying statutory language supporting such a reading.[58]

A classic example of this approach came in *Morissette v. United States*.[59] In *Morissette*, the Court held that strict liability is not appropriate for crimes other than public welfare offenses, even if the statute does not mention any requisite mental state.[60] The government charged Morissette with violating 18 U.S.C. § 641, which proscribes the conversion of government property.[61] Morissette found spent bomb casings while he was hunting on government property, and sold them for salvage for eighty-four dollars.[62] He claimed that he thought the property was abandoned.[63]

The statute did not include a mens rea—its text proscribed the embezzlement, stealing, or purloining of government

omission." (internal quotation omitted)); Elonis v. United States, 575 U.S. 723, 734 (2015) ("The fact that the statute does not specify any required mental state, however, does not mean that none exists."); United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994) ("Our reluctance to simply follow the most grammatical reading of the statute is heightened by our cases interpreting criminal statues to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."); Staples v. United States, 511 U.S. 600, 605–06 (1994) ("[W]e have noted that the common-law rule requiring *mens rea* has been followed in regard to statutory crimes even where the statutory definition did not in terms include it." (internal quotation omitted)); Liparota v. United States, 471 U.S. 419, 426 (1985) ("[T]he failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law."); United States v. U.S. Gypsum Co., 438 U.S. 422, 437–38 (1978) ("While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, the limited circumstances in which Congress has created and this Court has recognized such offenses attest to their generally disfavored status." (citation omitted)); Morissette v. United States, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion.").

58. *See Ruan*, 597 U.S. at 557–58; *X-Citement Video, Inc.*, 513 U.S. at 70.

59. 342 U.S. 246 (1952).

60. *See id.* at 276.

61. *Id.* at 248. 18 U.S.C. § 641 states that "[w]hoever embezzles, steals, purloins, or knowingly converts" government property has committed a felony and is subject to imprisonment and fines.

62. *Morissette*, 342 U.S. at 247.

63. *See id.* at 248–49.

property.[64] Looking to the long tradition of requiring intent in larceny-type offenses, the Court decided that the statute implicitly contained an intent requirement.[65] With respect to common law crimes, the Court found that it should infer an intent unless Congress explicitly excludes it.[66] As a result, a jury would have to find that Morissette knew he was stealing government property to be guilty under the statute.[67]

The *Morissette* Court distinguished two prior decisions that had read federal statutes as strict liability statutes.[68] It explained that those statutes were public welfare statutes—a category of crimes with a different character.[69] Unlike common law crimes, public welfare crimes "are in the nature of neglect where the law requires care, or inaction where it imposes a duty."[70]

The Court's view of the importance of mens rea has even led it to read a mens rea requirement into a public welfare offense.[71] In *Staples v. United States*,[72] the Court considered whether the

64. *See* 18 U.S.C. § 641.

65. *See Morissette*, 342 U.S. at 261–62. The Court also noted that Congress had not converted any common law crimes into strict liability crimes in codifying them in legislation. *See id.* at 265 ("[W]e have not found . . . any instance in which Congress has expressly eliminated the mental element from a crime taken over from the common law."); *see also U.S. Gypsum Co.*, 438 U.S. at 436 (applying similar reasoning and explaining that "the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence").

66. *See Morissette*, 342 U.S. at 273 (explaining that without "any affirmative instruction from Congress to eliminate intent," the statute is presumed to include a requisite mental state).

67. *See id.* at 275–76.

68. *See* Balint v. United States, 258 U.S. 250, 254 (1922) (refusing to read a mens rea requirement into the Harrison Narcotics Tax Act, Pub. L. No. 63-223, 38 Stat. 784 (1914) (current version at 21 U.S.C. § 812)); *see also* United States v. Behrman, 258 U.S. 280, 289 (1922) (same).

69. *See* Morissette v. United States, 342 U.S. 246, 254–55 (1952) ("[Public welfare offenses] do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property or public morals."); *see also* Bowes Sayre, *supra* note 16, at 68–69 (exploring the strain on the court system caused by increased social regulation).

70. *Morissette*, 342 U.S. at 255.

71. *See* Staples v. United States, 511 U.S. 600, 606 (1994).

72. 511 U.S. 600 (1994).

National Firearms Act[73] contained a mens rea requirement with respect to the kind of gun one possessed.[74] Caught in possession of a sawed-off shotgun, Staples claimed that he was unaware that the gun had been converted into an automatic weapon, which would trigger a registration requirement as a "machinegun."[75]

Even though it had previously determined the same statute was a public welfare offense,[76] the Court held that the statute as applied to Staples required the reading in of a mens rea requirement.[77] In order to be guilty of possession of a machinegun without registration, Staples had to understand the nature of the gun such that he would be apprised of the registration requirement.[78]

While the National Firearms Act might be a public welfare statute for purposes of possessing grenades, according to the

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73. 26 U.S.C. §§ 5801–5872. The act prohibits the possession of firearms, including machineguns, not properly registered. *See id.* §§ 5861(d), 5845(a).

74. *See Staples*, 511 U.S. at 602 ("Petitioner contends that, to convict him under the Act, the Government should have been required to prove beyond a reasonable doubt that he knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machine gun.").

75. *See id.* at 603–04.

76. *See* United States v. Freed, 401 U.S. 601, 609–10 (1971) (holding that the National Firearms Act was a strict liability public welfare statute not requiring knowledge of a registration requirement for possessing grenades).

77. *See Staples*, 511 U.S. at 608–15 (reasoning that the question in this case is whether the defendant knew of the particular characteristics that would make his weapon a statutory firearm).

78. *See Staples*, 511 U.S. at 609 ("[O]ur determination that a defendant need not know that his weapon is unregistered suggests no conclusion concerning whether [the statute] requires the defendant to know of the features that make his weapon a statutory 'firearm' . . . ."). It is important to distinguish between Staples' lack of knowledge about the type of gun he possessed and the maxim *ignorati facit excusat* (ignorance of the law is no excuse). *See* JOHN G. HAWLEY & MALCOLM MCGREGOR, THE CRIMINAL LAW 26–30 (5th ed. 1908); ROLLIN M. PERKINS, PERKINS ON CRIMINAL LAW 822–23 (1957); GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 288–89 (2d ed. 1961). Staples was not claiming ignorance of the registration requirement; rather, he was claiming he could not have known about it if he did not know whether the gun that he possessed was a machinegun. *See Staples*, 511 U.S. at 603 ("According to petitioner, his alleged ignorance of any automatic firing capability should have shielded him from criminal liability for his failure to register the weapon.").

Staples Court, it was not in terms of possessing guns.[79] The Court argued that unlike typical public welfare statutes that prohibit "deleterious devices or products or obnoxious waste materials,"[80] the Firearms Act allowed for the possession of guns, which have a long tradition of private ownership and "can be owned in perfect innocence."[81] The Court also cited the significant penalty for violation of the statute—a ten year sentence—as a reason to support reading the statute like a common law statute with an intent requirement instead of a public welfare statute.[82]

While one can read *Staples* as a narrow decision reflecting differences in views about gun ownership, the Court's willingness to read in a mens rea in this context underscores the deeper tradition of requiring a mental state for serious crimes.[83] The Court has made clear that there is not "a precise line . . . for distinguishing between crimes that require a mental element and crimes that do not," but it has established that mens rea is the rule to which strict liability crimes are the exception.[84]

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79. *See Staples*, 511 U.S. at 610 (explaining that possession of hand grenades is obviously not innocent, while possession of guns can be entirely innocent).

80. *Id.* (quoting United States v. Int'l Mins., 402 U.S. 558, 565 (1971)).

81. Staples v. United States, 511 U.S. 600, 611 (1994). This sentiment is consistent with the Court's recent Second Amendment jurisprudence. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (recognizing a right to bear arms while striking down a D.C. statute); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (broadening the right to bear arms while striking down a Chicago statute); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 70 (2022) (further broadening the right to bear arms while striking down a New York statute).

82. *See Staples*, 511 U.S. at 616 ("Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*."); *see also* Tenement House Dep't v. McDevitt, 109 N.E. 88, 90 (N.Y. 1915) (justifying the absence of a mens rea on the minor penalty in a public welfare statute prohibiting a landlord from having a nuisance upon his land); People *ex rel.* Price v. Sheffield Farms-Slawson-Decker Co., 121 N.E. 474, 477 (N.Y. 1918) (same).

83. *See Staples*, 511 U.S. at 619 ("[W]e conclude that the background rule of the common law favoring *mens rea* should govern interpretation of [the statute] in this case.").

84. *Id.* at 620 (internal quotation omitted); *see id.* at 607 n.3 (regarding strict liability crimes, stating that "we have interpreted statutes defining public welfare offenses to eliminate the requirement of *mens rea*; that is, the requirement of a 'guilty mind' with respect to an element of a crime").

Over the past few decades, there have been a number of examples of the Court applying its presumption in favor of a mens rea to *all* elements of a statute, not just the phrase modified by the mens rea term.[85] This is even true where the phrase in question does not immediately follow the mens rea provision.[86] As with the common law tradition of rejecting strict liability, the Court's barometer for reading in a mens rea relates to the degree to which such a requirement can establish culpability and separate innocent conduct from criminal conduct.[87]

In the October 2021 term, the Court continued this practice in *Ruan v. United States*.[88] *Ruan* involved two doctors, Xiulu Ruan and Shakeel Kahn, who were convicted of improperly

85. *See, e.g.*, Rehaif v. United States, 139 S. Ct. 2191, 2200 (2019) (construing the statute at issue to require both "that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm"); United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) ("[W]e conclude that the term 'knowingly' in § 2252 extends both to the sexually explicit nature of the material and to the age of the performers."); Liparota v. United States, 471 U.S. 419, 433 (1985) ("We hold that in a prosecution for violation of § 2024(b)(1), the Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations.").

86. *See* Ruan v. United States, 597 U.S. 450, 457 (2022) (holding that, where a statute criminalized "except as authorized . . . for any person knowingly or intentionally . . . to manufacture, distribute, or dispense . . . a controlled substance," the terms "knowingly" and "intentionally" applied to the term "authorized"); *Rehaif*, 139 S. Ct. at 2194, 2200 (holding that the term "knowingly," appearing in one subsection of a statute that provided penalties for violating a second subsection, applied to the status element of the second subsection); *X-Citement Video, Inc.*, 513 U.S. at 68, 78 (interpreting a statute that penalized those who "knowingly transport[ed]" or received videos "involv[ing] the use of a minor engaging in sexually explicit content" such that the term "knowingly" applied to the transport/receipt and the "age of the performers"); *Liparota*, 471 U.S. at 420, 433 (interpreting a statute that proscribed "knowingly [using food stamps] . . . in any manner not authorized" such that "knowingly" modified both the use of food stamps and the use being "not authorized").

87. *See Ruan*, 597 U.S. at 461 ("[T]he statutory clause in question plays a critical role in separating a defendant's wrongful from innocent conduct. . . . [W]e conclude that the statute's *mens rea* applies to that critical clause.").

88. 597 U.S. 450 (2022). The Court joined *United States v. Ruan*, 966 F.3d 1101 (11th Cir. 2020), with *United States v. Kahn*, 989 F.3d 806 (10th Cir. 2021), *cert. granted*, 142 S. Ct. 457 (2021).

prescribing opioids.[89] The statute makes it a crime to knowingly prescribe controlled substances "[e]xcept as authorized."[90] The question before the Court was whether the "except as authorized" element had a mens rea requirement; in other words, whether the statute required the doctors to possess knowledge that their prescriptions were unauthorized for them to be guilty under the statute.[91]

Consistent with its prior cases, the Court again eschewed strict liability in favor of an intent requirement.[92] It held that the government had to establish subjective knowledge on the part of the doctors that their prescriptions deviated from the standard of professional practice.[93]

As before, the Court emphasized the importance of criminal intent: "[C]onsciousness of wrongdoing is a principle 'as universal and persistent in mature systems of criminal law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'"[94] This presumption of scienter means that the Court reads into the statute a mens rea, even though the statute is silent, in order to separate wrongful conduct from otherwise innocent conduct.[95] Here, the Court viewed the question of whether the

89. *See Ruan*, 597 U.S. at 455 (noting that both Ruan and Kahn were convicted of "unlawfully dispensing and distributing drugs in violation of § 841").

90. 21 U.S.C. § 841(a). The applicable regulations provide that a prescription is authorized when prescribed "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a) (2023).

91. *See Ruan*, 597 U.S. at 455 (noting that the issue was whether it is "sufficient for the Government to prove that a prescription was *in fact* not authorized, or must the Government prove that the doctor *knew* or *intended* that the prescription was unauthorized?").

92. *See id.* at 444 ("We hold that the statute's 'knowingly or intentionally' *mens rea* applies to authorization.").

93. *See id.* ("After a defendant produces evidence that he or she was authorized to dispense controlled substances, the Government must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so.").

94. *Id.* at 457 (quoting Morissette v. United States, 342 U.S. 246, 250 (1952)).

95. *See id.* at 458 ("Applying the presumption of scienter, we have read into criminal statutes that are *silent* on the required mental state—meaning statutes that contain no *mens rea* provision whatsoever—that *mens rea* which

doctors *knew* about the lack of authorization as the key fact which determined whether their behavior was criminal.[96]

C. *Where Strict Liability Persists*

Despite the general disfavoring of strict liability crimes by courts and legislatures, these crimes still persist in most jurisdictions. The public welfare distinction from the Court's decision in *Morissette* explains most of these offenses, but further investigation is instructive.[97]

1. Statutory Rape, DUIs, and Felony Murder

In addition to public welfare crimes, three categories of more serious crimes often fall within the scope of strict liability crimes.[98] Statutory rape offenses, for instance, are often strict liability crimes.[99] The act of having intercourse with a minor when one is above a certain age does not require knowledge of the minor's age to constitute a crime.[100] Legislatures in many jurisdictions care so much about deterring this kind of sexual activity that they punish it under all circumstances irrespective of the knowledge of the participants about their respective ages.[101]

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is necessary to separate wrongful conduct from otherwise innocent conduct." (internal quotation omitted)).

96. *See id.* at 459 ("Applying § 841's 'knowingly or intentionally' *mens rea* to the authorization clause thus 'helps advance the purpose of scienter, for it helps to separate wrongful from innocent acts.'" (citations omitted)).

97. *See* Morissette v. United States, 342 U.S. 246, 256 (1952) (noting the characteristics of public welfare offenses and stating that courts have construed such "statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime").

98. Some courts and commentators label one or more of these crimes as "public welfare" crimes, but I have separated them out here, as they have elements that reflect common law crimes.

99. *See generally* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313 (2003).

100. *See, e.g.*, TENN. CODE ANN. § 39-13-506(b)–(b)(1) (2023) ("Statutory rape is the unlawful sexual penetration of a victim by the defendant or of the defendant by the victim when: the victim is at least thirteen (13) but less than fifteen (15) years of age and the defendant is at least four (4) years . . . older than the victim . . . .").

101. *See, e.g.*, Commonwealth v. Robinson, 438 A.2d 964, 966 (Pa. 1981) (stating a perpetrator engaging in sexual intercourse "does so at his own

A second common category of strict liability crimes involves driving under the influence ("DUI") of alcohol.[102] The same rationale that justifies strict liability in statutory rape cases supports its application in DUI cases. The state has a strong interest in deterring DUIs as they threaten the lives of those committing the DUI, other drivers, and pedestrians.[103] One's criminal intent is thus, as with other strict liability crimes, irrelevant and not required to prove guilt.

The third common category of strict liability crimes are felony murders.[104] These crimes are not purely strict liability, as felony murder statutes require some level of intent on the part of the defendant with respect to the underlying felony.[105] But with respect to the homicide, felony murder statutes are strict liability.[106] As long as one intended to commit the underlying felony, one is responsible for any homicide that occurs during the felony even where one did not kill or intend to kill.[107]

Felony murder is an example of the deterrence logic of strict liability crimes taken to an extreme.[108] The argument is that the

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peril"); Levenson, *supra* note 16, at 423–34 (noting strict liability places the risk of borderline behavior—conduct that is morally questionable—on the defendant).

102. *See, e.g.*, Begay v. United States, 553 U.S. 137, 145 (2008) (explaining that most DUI crimes are strict liability offenses), *abrogated on other grounds by* Johnson v. United States, 576 U.S. 591 (2015).

103. *See, e.g.*, Fuenning v. Superior Court, 680 P.2d 121, 126 (Ariz. 1983) (noting, with respect to the state's DUI statute, "the compelling state interest in reducing the terrible toll of life and limb on our highways").

104. *See generally* Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 BUFF. CRIM. L. REV. 399 (2000) [hereinafter Binder, *Felony Murder and Mens Rea Default Rules*].

105. Some jurisdictions limit the felonies that can underlie a felony murder conviction by providing a list of felonies or more generally circumscribing the application of felony murder to inherently dangerous felonies. *See generally* GUYORA BINDER, FELONY MURDER (2012).

106. *See* Binder, *Felony Murder and Mens Rea Default Rules*, *supra* note 104, at 400.

107. *See id.* at 406 ("In its simplest form, the felony murder rule holds that an individual is guilty of murder, regardless of actual attitude or intent toward killing, if in the course of committing a particular felony he causes another's death." (citation omitted)).

108. *See* Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 966, 966 n.3 (2008) [hereinafter Binder, *The Culpability of Felony Murder*] (setting forth an extensive list of criticisms of the felony murder rule). *But see* Kenneth W. Simons, *When Is Strict Liability Just?*, 87 J.

risk of death in the commission of a felony justifies ignoring the culpability of the defendant with respect to the homicide.[109]

2. The Limits of the Model Penal Code

The Model Penal Code's proposed reforms included placing limitations on strict liability statutes consistent with the Supreme Court's presumption against crimes without a scienter requirement. Specifically, the Model Penal Code ("MPC") provides both that when a statute omits a mens rea requirement for a statutory element, that element is presumed to include some level of criminal intent, and that explicit mens rea terms apply to all material elements of a statute.[110]

Professor Darryl Brown's excellent *Duke Law Journal* article documents the scope of state limits on strict liability crimes.[111] He found that only twenty-four states use one or both of these two presumptions against strict liability—reading in a mens rea and applying the mens rea term to all material

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CRIM. L. & CRIMINOLOGY 1075, 1121–24 (1997) (defending the felony murder rule).

109. *See* Simons, *supra* note 108, at 1122 ("[K]nowingly creating a risk of death in the context of another criminal act is more culpable behavior than knowingly creating a risk of death in the context of an innocent or less culpable act.").

110. *See* MODEL PENAL CODE § 2.02(3) ("When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto."); *id.* § 2.02(4) (noting that an explicit culpability term applies to all material elements "unless a contrary purpose plainly appears"). In addition to these principal provisions, other provisions of the Model Penal Code also address culpability requirements and their effect on liability. *See id.* § 2.02(1) (stating that guilt requires at least proof of negligence for each material element); *id.* § 2.03(2), (3) (stating that, to establish causation, a result must be "within the purpose or the contemplation of the actor" or "within the risk of which the actor . . . should be aware"); *id.* § 2.04(2) ("[I]gnorance or mistake . . . shall reduce the grade and degree of the offense of which [the defendant] may be convicted to those of the offense of which he would be guilty had the situation been as he supposed."); *id.* § 2.05(2)(a) ("[W]hen absolute liability is imposed with respect to any material element of an offense . . . the offense constitutes [only a noncriminal] violation . . . ."); Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 290 n.9 (2012) (highlighting these provisions).

111. *See* Brown, *supra* note 110, at 323–27.

elements.[112] Even in those jurisdictions, he cites several categories of cases where courts do not follow the presumption against strict liability.[113] And legislatures have modified the MPC provisions, as well as adopted their own categories of strict liability crimes.[114] Brown concludes that in many cases some level of culpability is sufficient, even where a number of elements do not require mens rea, as long as the culpability makes the conduct in question not purely innocent.[115] Within the general presumption against strict liability crimes, then, states often have a less dogmatic approach than the Supreme Court, particularly with respect to individual elements of crimes.

II. LIMITS ON MANDATORY SENTENCES

Mandatory sentences, like strict liability crimes, face limitations. Under the Eighth Amendment,[116] the Court has held that mandatory death sentences constitute cruel and unusual punishment.[117] More recently, the Court has found that

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112. *See id.* at 289 n.8 ("[T]wenty-four states had 'general principles' or 'rules of construction' that adopted variants of MPC § 2.02(3) and § 2.02(4).").

113. *See id.* at 296, 297 (stating that, in a survey of eleven states, "drug offenses, weapons offenses, and offenses involving minors" have seen "widespread judicial endorsement of strict-liability elements in MPC jurisdictions, despite state statutes that dictate presumptions otherwise").

114. *See id.* at 317 (noting the ways in which states modify the MPC culpability presumptions, the most notable of which being when states fail "to adopt one of the two presumptions for culpability requirements"); *see also id.* at 321 (identifying the states that enacted "specific strict-liability rules").

115. *See id.* at 324–25 ("The principle is the idea that no proof of culpability is required beyond that needed to ensure that an actor is not convicted for purely innocent conduct.").

116. U.S. CONST. amend. VIII.

117. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("[W]e conclude that the death sentences imposed upon the petitioners under North Carolina's mandatory death sentence statute violated the Eighth . . . Amendment[] . . . ."); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) ("[W]e find that the death sentence imposed upon the petitioner under Louisiana's mandatory death sentence statute violate[d] the Eighth . . . Amendment[] . . . ."). The Court has explained that these sentences are "different" and thus receive heightened constitutional scrutiny. *See, e.g.*, *Woodson*, 428 U.S. at 305 (finding, due to the finality of the punishment, "that the penalty of death is qualitatively different from a sentence of imprisonment, however long"). For further discussion on this, see *infra* Part II.B.1.

mandatory juvenile life without parole sentences also violate the Eighth Amendment.[118]

With respect to the imposition of the most serious sentences—the death penalty and JLWOP, the Court has determined that criminal defendants deserve individualized sentencing consideration.[119] This is because in individual cases, mitigating circumstances might exist that make the imposition of the mandatory sentence excessive or unfair.[120]

While the Court has placed Eighth Amendment categorical limits on mandatory death and JLWOP sentences, it has not placed such limits on other mandatory sentences, even though they are likely to generate unfair outcomes based on their very nature of denying courts the ability to consider criminal culpability.[121] In short, mandatory sentences remove sentencing discretion.[122]

Part of the reason courts have not limited mandatory sentences further is the absence of an intelligible limit outside of very serious punishments that would delineate when mandatory sentences are less appropriate.[123] The Supreme

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118. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 489 (2012) (finding the mandatory sentencing schemes violated the Eighth Amendment for want of a jury's "opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles"); Montgomery v. Louisiana, 577 U.S. 190, 208 (2016) (noting that "*Miller* announced a substantive rule of constitutional law," and applying its holding to JLWOP cases retroactively); *see also* Jones v. Mississippi, 141 S. Ct. 1307, 1311–13 (2021) (finding that, under *Miller* and *Montgomery*, a state law permitting a judge to exercise discretion in imposing a life sentence without parole, as opposed to a mandatory sentence, did not violate the Eighth Amendment).

119. *See* Lockett v. Ohio, 438 U.S. 586, 605 (1978) (concluding that an individualized decision is essential in a capital case). *See generally* William W. Berry III, *Individualized Sentencing*, 76 WASH. & LEE L. REV. 13 (2019) [hereinafter Berry, *Individualized Sentencing*].

120. *See Woodson*, 428 U.S. at 291 (noting that states began to abandon mandatory death sentences to allow response to mitigating circumstances); *Miller*, 567 U.S. at 489 (clarifying that a jury must have the opportunity to consider mitigating circumstances in a juvenile capital case).

121. *See supra* notes 9–13 and accompanying text.

122. *Cf.* Harmelin v. Michigan, 501 U.S. 957, 994–96 (1991) (refusing to require an analysis of mitigating factors for a mandatory sentence).

123. Indeed, there is extensive literature questioning the use of mandatory sentences, particularly mandatory minimums. *See, e.g.*, Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 202 (1993) (discussing how prosecutors use mandatory minimums to induce defendant cooperation); John S. Martin, Jr., Speech, *Why Mandatory Minimums Make*

Court's unwillingness to expand the Eighth Amendment in light of a general deference to punishment practices of state and federal governments has meant that mandatory sentences have escaped further scrutiny.[124]

A. *The Limited Justification for Mandatory Sentences*

As with strict liability crimes, justifications exist for the use of mandatory sentences. Two corollary categories—sentencing uniformity and limits on judicial discretion—explain the

No Sense, 18 NOTRE DAME J. L. ETHICS & PUB. POL'Y 311, 317 (2004) (expressing discontent with mandatory sentencing); *see id.* at 314 ("Since the power to determine the charge of conviction rests exclusively with the prosecution or the eighty-five percent of the cases that do not proceed to trial, mandatory minimums transfer sentencing power from the court to the prosecution."); Michael Tonry, *Mandatory Penalties*, 16 CRIME & JUST. 243, 243 (1992) ("[M]andatory penalty laws shift power from judges to prosecutors . . . ."); *see also* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1965 (1992) ("[W]here the legislature drafts broad criminal statutes and then attaches mandatory sentences to those statutes, prosecutors have an unchecked opportunity to overcharge and generate easy pleas, a form of strategic behavior that exacerbates the structural deficiencies endemic to plea bargaining."); Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde*, FED. PROB., Sept. 1993, at 9, 9 (noting concerns about prosecutors interfering with "the judicial role of making individualized sentencing judgments" when mandatory minimums are involved); LOIS G. FORER, A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING 3 (1st ed. 1994) (describing an instance during the author's time as a trial judge in which the prosecutor demanded a five-year sentence, the judge denied the harsh sentence for being unconstitutional, but the appellate court remanded to the judge to impose the sentence). There is extensive literature criticizing the use of mandatory sentences, including as part of the War on Drugs. *See* JONATHAN P. CAULKINS ET AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? 124–29 (1997) (discussing the consequences and costs of applying mandatory minimum sentences to drug dealers); Joan Petersilia & Peter W. Greenwood, *Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations*, 69 J. CRIM. L. & CRIMINOLOGY 604, 615 (1978) (finding that mandatory minimum sentences can reduce crime, but they will also increase prison populations). For a discussion on public opinion and mandatory sentences, see generally Julian V. Roberts, *Public Opinion and Mandatory Sentencing: A Review of International Findings*, 30 CRIM. JUST. & BEHAV. 483 (2003).

124. *See, e.g.*, William W. Berry III, *Unusual Deference*, 70 FLA. L. REV. 315, 318 (2018) (explaining the deference given to state punishment practices).

decision to use mandatory sentences.[125] In the abstract, these justifications carry significant weight but rest on a number of implicit assumptions which are not likely to be true.

1. Sentencing Uniformity and Judicial Limits

On their face, mandatory sentences evoke a sense of justice because they impose the same punishment on individuals who commit the same crime. The simple idea is that two people who engage in the same kind of conduct deserve the same punishment.[126]

When judges or juries have discretion to sentence a particular individual, it creates an opportunity to contravene this principle.[127] Mandatory sentences cure this problem by taking discretion away from the judge to sentence one individual differently than another when guilty of the same crime. They thus, in theory, remove arbitrariness from sentencing outcomes.

Federal Judge Marvin Frankel infamously raised this complaint with respect to the imposition of federal criminal sentences in the late 1970s.[128] He argued that variations in the exercise of sentencing discretion could have the effect of undermining the rule of law.[129] After the release of Frankel's influential book, Congress adopted mandatory sentencing guidelines.[130]

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125. *See* Wallace, *supra* note 123, at 9.

126. *See id.* at 9–11 (explaining that mandatory sentencing seeks to ensure uniformity).

127. Indeed, disparities in jury sentencing outcomes, such that the outcomes were arbitrary or random, led the Supreme Court to strike down the death penalty as unconstitutional in its application in *Furman v. Georgia*, 408 U.S. 238 (1972). *See id.* at 239–40; *id.* at 249 (Douglas, J., concurring) (describing the death penalty as "arbitrarily or discriminatorily" imposed); *id.* at 276–77 (Brennan, J., concurring) ("[T]here is a substantial likelihood that the State . . . is inflicting the punishment arbitrarily."); *id.* at 309 (Stewart, J., concurring) (likening receiving the death penalty to being as arbitrary as being struck by lightning).

128. *See* Wallace, *supra* note 123, at 10 (noting Judge Frankel's outlined plan of sentencing).

129. *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972).

130. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3586); *see* Wallace, *supra* note 123, at 9 (dating the passage of the guidelines).

2. Implicit Assumptions

For mandatory sentences to reflect the maxim that the courts are punishing similarly situated defendants in the same way, a number of implicit assumptions must be true. A cursory examination of such assumptions reveals that they are unlikely to exist.

First, mandatory statutes must punish the same conduct to be consistent.[131] Statutes, however, often encompass a number of kinds of criminal conduct.[132] This means that all criminal violations of a particular statute do not deserve the same punishment. The most obvious example is felony murder, which gives the same guilty verdict to a getaway car driver for a robbery-murder as the person who pulled the trigger.[133] One person did not commit a homicidal act and did not intend to commit a homicidal act; the other person committed a homicide and intended to shoot, if not kill.[134] Statutes can thus be overinclusive by categorizing two clearly different kinds of conduct as the same crime.

Second, mandatory sentences assume that prosecutors exercise their discretion consistently.[135] Prosecutors exercise discretion about whether and how to charge a person.[136] This

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131. *See supra* Part II.A.1.

132. *See, e.g.*, Wallace, *supra* note 123, at 10 (discussing various types of conduct addressed in one statute, including possession of a firearm and burglary).

133. *See* Simons, *supra* note 108, at 1080, 1107.

134. *See id.* at 1080 (noting that a person convicted of felony-murder is held liable despite lacking the specific intent to kill).

135. There is extensive literature concerning the power shift to prosecutors caused by mandatory sentences. *See* David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J. L. & ECON. 591, 592 (2005) (stating that mandatory minimum laws curtail judicial discretion and shift power to prosecutors); Jeffery T. Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RSCH. CRIME & DELINQ. 427, 427 (2007) (discussing the "consequent displacement of discretion from judges to prosecutors" resulting from mandatory minimum laws); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity, Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 6 (2013) (explaining prosecutors' wide discretion to charge mandatory minimum offenses and stating that "restricting judicial discretion further empowers prosecutors, who tend to exercise that power in ways that perpetuate or worsen disparity").

136. *See* Starr & Rehavi, *supra* note 135, at 6.

decision controls the criminal sentence given the high percentage (90%) of criminal cases that result in a plea bargain.[137] Prosecutors often allow one participant to plead to a lesser crime in exchange for testifying against a co-conspirator.[138] The result of plea bargains is that individuals who engage in the same conduct often plead guilty to different crimes.[139]

The overlapping nature of crimes in both state and federal codes exacerbates this problem.[140] Prosecutors can charge the same conduct under a number of crimes, which, even in a mandatory sentencing scheme, would have different outcomes.[141]

It is thus unlikely that mandatory sentences will treat similar cases in similar ways. Instead, they simply move the exercise of discretion and the corresponding disparity in outcomes from judges to prosecutors.[142] Whether prosecutors or judges will exercise discretion more consistently and evenhandedly is debatable.

The difference, however, is that the public can observe the decision-making of the judge.[143] The exercise of prosecutorial discretion is largely hidden.[144] The most likely consequence of mandatory sentences is not to eliminate sentencing disparity,

137. John Gramlich, *Only 2% of Federal Criminal Defendants Went to Trial, and Most Who Did Were Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://perma.cc/C7TW-BRZY.

138. *See* Yvett A. Beeman, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 800–01 (1987) (explaining scenarios in which an accomplice receives a reduced sentence in exchange for leniency).

139. *See id*.

140. *See generally* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011).

141. *See* Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN. ST. L. REV. 1107, 1113 (2005) (showing the power of prosecutors to bring overlapping charges).

142. *See* Tonry, *supra* note 123, at 243 (stating that mandatory sentencing could shift power from judges to prosecutors).

143. *See* Wallace, *supra* note 123, at 13 (highlighting the shift of discretion by a judge in a courtroom to off the record discretion in a prosecutor's office).

144. *See id.*

but to make sentencing less transparent by reallocating it from the judge to the prosecutor.[145]

A final concern about mandatory sentences gives rise to the Court's cases in this area. When juries understand that the consequence of a guilty verdict is a mandatory sentence, jury nullification is possible and perhaps likely if the jury finds the sentence to be excessive.[146] Historically, this has been particularly true in capital cases.[147] In such cases, jurors realize that the consequence of finding a defendant guilty is a death sentence. Even though they think the defendant is guilty, such jurors will engage in jury nullification and find the defendant innocent in order to avoid the draconian consequence of the mandatory death penalty statute.[148]

B. *When and Why the Court Limits Mandatory Sentences*

The Eighth Amendment concept of placing limits on mandatory sentences through individualized sentencing requirements originated with the Supreme Court's death penalty cases of the 1970s.[149] More recently, the Court expanded this doctrine to JLWOP sentences.[150]

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145. *See id.*

146. *See, e.g.*, McGautha v. California, 402 U.S. 183, 199 (1971) (noting instances where a jury refused to convict a capital offense despite its applicability); Woodson v. North Carolina, 428 U.S. 280, 302 (1976) (highlighting a "general agreement" that juries will sometimes outright refuse to convict first-degree murder under mandatory death penalty schemes).

147. *See, e.g.*, *McGautha*, 402 U.S. at 199; *Woodson*, 428 U.S. at 302–03.

148. *See Woodson*, 428 U.S. at 302–03.

149. *See id.* at 305 (holding that a mandatory death penalty statute violates the Eighth Amendment); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (same).

150. *See* Miller v. Alabama, 567 U.S. 460, 489 (2012) (finding a statute imposing a mandatory sentence of life without parole on a juvenile to be an Eighth Amendment violation); Montgomery v. Louisiana, 577 U.S. 190, 737 (2016) (requiring that inmates convicted as juveniles and sentenced to life without parole must be given the opportunity to demonstrate "their crime did not reflect irreparable corruption"); Jones v. Mississippi, 593 U.S. 98, 119–20 (2021) (finding that a discretionary sentencing system is necessary for sentencing a juvenile defendant to life without parole).

1. The Death Penalty

In *McGautha v. California*,[151] the Supreme Court considered whether the lack of jury guidance in capital cases violated the procedural due process requirements of the Fourteenth Amendment.[152]

The Supreme Court rejected this claim in a narrow 5–4 decision.[153] The Court's reasoning related to the role of the jury in capital cases, finding that nothing in the Constitution prohibited delegating the sentencing determination to the "untrammeled discretion" of the jury.[154] Having documented the long history of jury nullification in capital cases where states imposed mandatory sentencing procedures, the Court found that allocating wide discretion to the jury was vastly preferable.[155] In particular, the Court was concerned that placing mandatory limits upon capital sentencing determinations might inhibit the jury from considering facts that could or should influence the outcome.[156]

The Court essentially reversed the substance of its decision in *McGautha* one year later in *Furman v. Georgia*,[157] where the Court held that the death penalty, as applied, violated the Eighth Amendment.[158] Part of the concern of some of the concurring opinions related to the absence of guidance for jury determinations in capital cases—essentially the same concern raised in *McGautha*.[159] Justice Potter Stewart famously likened

151. 402 U.S. 183 (1971).

152. *See id.* at 187. Specifically, the constitutional concern related to the absence of guidance provided to juries in capital cases in the Ohio and California systems. *See id.* at 196.

153. *See id.* at 221–22.

154. *Id.* at 207.

155. *See id.* at 208 (discussing how seriously jurors will take the responsibility of imposing the death penalty).

156. *See id.* ("For a court to attempt to catalog the appropriate factors . . . could inhibit rather than expand the scope of [the jury's] consideration.").

157. 408 U.S. 238 (1972) (per curiam).

158. *See id.* at 239–40 ("The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").

159. *See id.* at 248 (Douglas, J., concurring) ("[T]he seeds of the present cases are in McGautha. Juries . . . have practically untrammeled discretion to let an accused live or insist that he die."); *id.* at 309 (Stewart, J., concurring)

receiving the death penalty to being "struck by lightning,"[160] and several other justices found its imposition to essentially be arbitrary or random.[161]

In the aftermath of *Furman*, the states worked quickly to amend their capital statutes in hopes of reestablishing the death penalty.[162] Georgia and other states adopted a system of aggravating and mitigating circumstances designed to narrow the class of offenders eligible for the death penalty.[163] North Carolina and Louisiana decided instead to eliminate jury sentencing discretion altogether by adopting a mandatory death

(calling the defendant's sentence "unusual" because juries inconsistently impose death sentences); *id.* at 314 (White, J., concurring) ("[L]egislative judgment . . . loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and . . . [the jury] may refuse to impose the death penalty no matter what the circumstances of the crime."); *id.* at 298 (Brennan, J., concurring) (explaining that "virtually all death sentences today are discretionarily imposed").

160. *Id.* at 309–10 (Stewart, J., concurring); *see id.* ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.").

161. *See id.* at 242 (Douglas, J., concurring) ("[T]he Eighth Amendment . . . was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature."); *id.* at 277 (Brennan, J., concurring) ("The more significant function of the [cruel and unusual] Clause, therefore, is to protect against the danger of their arbitrary infliction.").

162. *See* Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 48 (2007) ("By Furman's one-year anniversary, twenty states had restored the death penalty—and by 1976, that number had grown to thirty-five.").

163. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 162–63 (1976). Some of these states also adopted comparative proportionality review as an additional safeguard, providing a process by which the state supreme court would review each death sentence to minimize the inconsistency in sentencing outcomes by reversing outlier cases. *See, e.g.*, *id.* at 203 (noting that the Supreme Court of Georgia "reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes").

penalty statute.[164] In these jurisdictions, first-degree murder convictions automatically resulted in a death sentence.[165]

At the end of the Court's term in the spring of 1976, the Court reviewed these new approaches to capital sentencing under the Eighth Amendment.[166] The Court upheld the Georgia approach of using aggravating and mitigating circumstances.[167] By contrast, the Court rejected both the mandatory capital sentencing schemes of North Carolina[168] and Louisiana.[169]

In *Woodson v. North Carolina*,[170] the North Carolina statute at issue imposed a mandatory death sentence for first-degree murder.[171] The statute defined first-degree murder as including premeditated murder, felony murder, as well as certain kinds of killings including poisoning, lying in wait, starving, and torture.[172]

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164. *See* Woodson v. North Carolina, 428 U.S. 280, 286–87 (1976) ("North Carolina, unlike Florida, Georgia, and Texas, has thus responded to the Furman decision by making death the mandatory sentence for all persons convicted of first-degree murder."); Roberts v. Louisiana, 428 U.S. 325, 331 (1976) ("Louisiana, like North Carolina, has responded to Furman by replacing discretionary jury sentencing in capital cases with mandatory death sentences.").

165. *See* cases cited *supra* note 164.

166. *See Gregg*, 428 U.S. at 207 (affirming Georgia's statutory approach as Constitutional); *Woodson*, 428 U.S. at 305 (striking down North Carolina's statutory approach as unconstitutional); *Roberts*, 428 U.S. at 336 (striking down Louisiana's statutory approach as unconstitutional); Jurek v. Texas, 428 U.S. 262, 276 (1976) (affirming Texas's statutory approach as constitutional); Proffitt v. Florida, 428 U.S. 242, 259–60 (1976) (affirming Florida's statutory approach as constitutional).

167. *See Gregg*, 428 U.S. at 207 ("[W]e hold that the statutory system under which Gregg was sentenced to death does not violate the Constitution.").

168. *See Woodson*, 428 U.S. at 305 ("For the reasons stated, we conclude that the death sentences imposed upon the petitioners under North Carolina's mandatory death sentence statute violated the Eighth and Fourteenth Amendments and therefore must be set aside.").

169. *See Roberts*, 428 U.S. at 336 ("Accordingly, we find that the death sentence imposed upon the petitioner under Louisiana's mandatory death sentence statute violates the Eighth and Fourteenth Amendments and must be set aside.").

170. 428 U.S. 280 (1976).

171. *See id.* at 286 (reciting North Carolina law that first-degree murder "shall be punished with death").

172. *Id.*

The *Woodson* court held that mandatory death sentences violated the Eighth Amendment.[173] Drawing on both *McGautha* and one of the dissenting opinions in *Furman*,[174] the Court first reasoned that mandatory death sentences were inconsistent with the "evolving standards of decency that mark the progress of a maturing society."[175] This was because states had largely abandoned the practice of mandatory death sentences, and the only reason that North Carolina adopted its statute was to satisfy the Court's decision in *Furman*.[176] In other words, the Court determined mandatory death sentences were unusual punishments.[177]

Second, the Court explained that North Carolina's statute did not solve the problem of unbridled jury discretion raised in *Furman*; it merely "papered over" the issue by adopting a mandatory death sentence for first-degree murder.[178] From the Court's perspective, allowing juries to determine guilt under a mandatory death statute made jury nullification likely, which created the same kind of arbitrary and random outcomes that result from jury sentencing in capital cases.[179]

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173. *See id.* at 305.

174. Chief Justice Burger's dissenting opinion in *Furman* explained as follows: "I had thought that nothing was clearer in history, as we noted in *McGautha* one year ago, than the American abhorrence of 'the common-law rule imposing a mandatory death sentence on all convicted murderers.'" Furman v. Georgia, 408 U.S. 238, 402 (1972) (Burger, J., dissenting) (citing McGautha v. California, 402 U.S. 183, 198 (1971)).

175. *Woodson*, 428 U.S. at 301 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

176. *See id.* at 298–99 ("The fact that some States have adopted [ma]ndatory measures following *Furman* while others have legislated standards to guide jury discretion appears attributable to diverse readings of this Court's multi-opinioned decision in that case.").

177. *See* William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 113 (2011) ("As he indicated in *Furman*, Justice White believed that the constitutional flaw of the then-existing death penalty statutes was not randomness, but underutilization. To him, what made a particular death sentence cruel and unusual was the rarity of similar cases receiving the same sentence.").

178. *Woodson*, 428 U.S. at 302.

179. *See id.* at 303 (stating that a mandatory death penalty statute "does not fulfill *Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death").

The third constitutional shortcoming of North Carolina's statute highlighted an important reason why mandatory sentences are problematic—they bar individualized sentencing consideration.[180] The Court explained this shortcoming as the "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[181] This means that, at least in the capital context, the Eighth Amendment requires states to use a process that accords "significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."[182]

What made the lack of individualized consideration so objectionable to the Court in *Woodson* was its consequence—the mandatory death penalty results in the execution of the criminal offender.[183] As the Court emphasized, the North Carolina mandatory death penalty statute treated "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[184]

The Court concluded its opinion by limiting the constitutional scope of its Eighth Amendment individualized sentencing approach to capital cases, even while acknowledging that such an approach constituted "enlightened policy."[185] Indeed, the Court in *Woodson* opined that the "fundamental respect for humanity underlying the Eighth Amendment" made

180. *See* Woodson v. North Carolina, 428 U.S. 280, 303–05 (1976) (finding that individualized sentencing is required under the Constitution when inflicting the penalty of death).

181. *Id.* at 303.

182. *Id.* at 304.

183. *See id.* at 305 ("Because of that qualitative difference [between death and life in prison], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

184. *See id.* at 304.

185. *Id.*

individualized sentencing a "constitutionally indispensable part of the process of inflicting the penalty of death."[186]

In *Roberts v. Louisiana*,[187] decided the same day as *Woodson*, the Court likewise barred the use of mandatory death sentences in holding that Louisiana's statute[188] violated the Eighth Amendment.[189] The Louisiana mandatory death penalty statute was narrower than the North Carolina statute in two ways—it limited the kinds of murder that counted as first-degree murder[190] and it provided more guidance to the jury about lesser-included offenses.[191]

Nonetheless, the Court found that the differences were not material.[192] Mandatory capital statutes, even if narrow, still violate the Eighth Amendment.[193] The Court explained, "The futility of attempting to solve the problems of mandatory death penalty statutes by narrowing the scope of the capital offense

186. *Id.*

187. 428 U.S. 325 (1976).

188. LA. STAT. ANN. § 14:30 (1974), *invalidated by Roberts*, 428 U.S. at 336.

189. *See Roberts*, 428 U.S. at 336 ("Accordingly, we find that the death sentence imposed upon the petitioner under Louisiana's mandatory death sentence statute violates the Eighth and Fourteenth Amendments and must be set aside.").

190. The Louisiana statute had only five categories of homicide that constituted first degree murder: killing in connection with the commission of certain felonies; killing of a fireman or a peace officer in the performance of his duties; killing for remuneration; killing with the intent to inflict harm on more than one person; and killing by a person with a prior murder conviction or under a current life sentence. LA. STAT. ANN. § 14:30, *invalidated by Roberts*, 428 U.S. at 336. Unlike North Carolina, the Louisiana statute did not have broad categories of felony murder or premeditated murder in its definition of first-degree murder. *See Roberts*, 428 U.S. at 332 (discussing the narrowness of the Louisiana statute's first-degree murder definition as compared to the North Carolina statute).

191. *See Roberts*, 428 U.S. at 333 (requiring judges to instruct juries on lesser crimes); *see also* LA. CODE CRIM. PROC. ANN., art. 814 (1975) (listing responsive verdicts that the judge should instruct to the jury); State v. Cooley, 257 So. 2d 400, 401 (La. 1972) (discussing how "manslaughter was made a lesser included offense to the charge of murder").

192. *See Roberts*, 428 U.S. at 332 ("That Louisiana has adopted a different and somewhat narrower definition of first-degree murder than North Carolina is not of controlling constitutional significance.").

193. *See id.* ("The history of mandatory death penalty statutes indicates a firm societal view that limiting the scope of capital murder is an inadequate response to the harshness and inflexibility of a mandatory death sentence statute.").

stems from our society's rejection of the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'"[194] In reaffirming its decision in *Woodson*, the Court emphasized that Louisiana's statute did not eliminate the "constitutional vice" of mandatory death statutes: the "lack of focus on the circumstances of the particular offense and the character and propensities of the offender."[195]

The Court expanded the scope of its bar on mandatory capital sentences two years later in *Lockett v. Ohio*.[196] The issue in *Lockett* was whether Ohio's statute[197] violated the rule from *Woodson* by restricting mitigating evidence at capital sentencing.[198] Specifically, the Ohio capital statute limited mitigation at sentencing to situations where (1) the victim induced the offense, (2) the offense was committed under duress or coercion, or (3) the offense was the product of mental deficiencies.[199] By limiting the available mitigating evidence, the statute essentially made an aggravated murder conviction a mandatory death sentence for offenders who did not exhibit the statutorily enumerated kinds of mitigating evidence.[200]

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194. *Id.* at 333 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

195. *Id.*

196. 438 U.S. 586 (1978); *see id.* at 606 ("The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases.").

197. OHIO REV. CODE ANN. § 2929.03 (West 1975).

198. *See Lockett*, 438 U.S. at 589 (identifying "a statute that narrowly limits the sentencer's discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors" as the issue). The facts of *Lockett* were particularly egregious. Sandra Lockett received a death sentence for agreeing to serve as the getaway driver for a robbery. *See id.* at 589–94 (noting that Lockett's coparticipant was the one who pulled the trigger of the gun sending the "fatal shot into the pawnbroker"). She had no reason to believe that the other offenders would kill, no intent to kill, and took no part in the actual killing. *See id.* at 590 ("No one planned to kill the pawnshop operator in the course of the robbery.").

199. *See* OHIO REV. CODE ANN. § 2929.04(B) (West 1975).

200. *See Lockett*, 438 U.S. at 594 ("[T]he judge said that he had 'no alternative, whether [he] like[d] the law or not' but to impose the death penalty. He then sentenced Lockett to death." (citation omitted)).

The Court held that the Ohio statute violated the Eighth Amendment.[201] It cited its prior finding from *Woodson* that the Eighth Amendment required assessment of "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[202] This concept, the Court emphasized, comes from "the fundamental respect for humanity underlying the Eighth Amendment."[203]

The statute's shortcoming was the limitation it placed on mitigating factors at sentencing.[204] It limited the consideration of mitigation evidence only to the enumerated mitigating factors and did not allow the court to consider other mitigating factors.[205]

The Court explained that the sentencing judge having "'possession of the fullest information possible concerning the defendant's life and characteristics' is 'highly relevant—*if not essential*—to the selection of an appropriate sentence.'"[206] Under the Eighth Amendment, this included all relevant mitigating evidence.[207]

In deciding *Lockett*, the Court again emphasized that the nature of the death penalty made the individualized sentencing protection important in a way that did not extend to noncapital cases.[208] The Court focused on the variety of posttrial techniques

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201. *See id.* at 604 (stating that the Eighth and Fourteenth Amendments require that the sentencer be allowed to consider all mitigating factors proffered by the defendant in "all but the rarest" capital cases).

202. *Id.* at 601 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

203. *Id.* at 604 (quoting *Woodson*, 428 U.S. at 304).

204. *See id.* at 606 ("The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases.").

205. *See id.* at 608 ("To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors."). It was not the listing of the factors per se, but the limitation on using non-listed factors that created the constitutional problem. *See id.*

206. *Id.* at 603 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

207. *See* Lockett v. Ohio, 438 U.S. 586, 608 (1978) ("To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.").

208. *See id.* at 605 ("The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.").

available to modify the imposition of the sentence in noncapital cases, such as parole, probation, and work furloughs, that in its mind, minimized the comparative seriousness of noncapital sentences.[209]

The Court again applied the *Woodson-Lockett* individualized sentencing rule in *Eddings v. Oklahoma*.[210] In *Eddings*, the trial judge considered the relevant aggravating evidence at sentencing,[211] but refused to consider the defendant's mitigating evidence, aside from his youth.[212] Specifically, Eddings had attempted to put on evidence of his family history of abuse as well as his severe psychological and emotional disorders.[213]

In assessing the decision by the trial judge to exclude mitigating evidence at sentencing, the Court held that the Eighth Amendment barred Eddings' death sentence.[214] The Court explained, "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any

209. *See id.* ("The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.").

210. 455 U.S. 104 (1982); *see id.* at 112 ("By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.").

211. *See id.* at 108 ("At the conclusion of all the evidence, the trial judge weighed the evidence of aggravating and mitigating circumstances. He found that the State had proved each of the three alleged aggravating circumstances beyond a reasonable doubt."). Eddings had murdered a police officer, which certainly made the death penalty a more likely punishment. *Id.* at 106.

212. *See id.* at 108–09 ("Turning to the evidence of mitigating circumstances, the judge found that Eddings' youth was a mitigating factor of great weight: 'I have given very serious consideration to the youth of the Defendant when this particular crime was committed.'"). Eddings was sixteen years old at the time of the crime. *Id.* at 105. Death sentences would later be prohibited for juvenile offenders under the Eighth Amendment. *See* Roper v. Simmons, 543 U.S. 551, 574 (2005) ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.").

213. *See Eddings*, 455 U.S. at 109–10.

214. *See id.* at 113 ("We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*.").

relevant mitigating evidence."[215] It further found that, in light of the age of the defendant (sixteen), evidence of Eddings' childhood was very relevant.[216] The Court concluded, "there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant."[217]

In *Smith v. Texas*,[218] the Texas trial court gave a nullification instruction with respect to mitigating evidence in a death sentencing proceeding.[219] The instruction limited the court's consideration of mitigating evidence to the nullification of the two "special issues"—aggravating factors—under the Texas statute: (1) whether the offender committed the murder deliberately, and (2) whether the offender constituted a future danger to society such that he would kill again.[220] In other words, the mitigating evidence could only be considered to the degree to which it bore on the required determinations of deliberateness or dangerousness. Smith's mitigating evidence dealt with his intellectual disabilities, including a low IQ, as well as his family background.[221]

The Court applied *Lockett* and held that the nullification instruction violated the Eighth Amendment.[222] Specifically, the Court explained, "[T]he key . . . is that the jury be able to 'consider and *give effect to* a defendant's mitigation evidence in imposing [a] sentence.'"[223]

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215. *Id.* at 113–14.

216. *See id.* at 115–16 ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.").

217. *Id.* at 115.

218. 543 U.S. 37 (2004).

219. *Id.* at 37–38.

220. *Id.* at 39.

221. *See id.* at 41 (noting that the defendant had a full IQ of 78, his father was a drug addict regularly involved with gang violence, and that defendant was only nineteen when he committed the crime).

222. *See id.* at 48.

223. *Id.* at 46 (quoting Penry v. Johnson, 532 U.S. 782, 797 (2001)). By contrast, the Court later explained that the individualized sentencing consideration requirement under the Eighth Amendment does not bear on the weighing process of aggravating and mitigating factors. *See* Kansas v. Marsh, 548 U.S. 163, 173–74, 181 (2006) (upholding Kansas's sentencing process that

2. JLWOP

In 2010, the United States Supreme Court opened the door to applying the Eighth Amendment in a more robust way to juvenile life without parole cases.[224] Two years later, in *Miller v. Alabama*,[225] the Court applied the Eighth Amendment to mandatory JLWOP sentences, broadening the individualized sentencing doctrine that originated in *Woodson* and *Lockett*.[226]

At the time of *Miller*, a number of states imposed mandatory life without parole ("LWOP") sentences for juvenile offenders.[227] In many cases, these sentencing schemes were not the original legislative design.[228] Two major developments shaped the rise of juvenile LWOP sentences—the abolition of parole[229] and the abolition of the juvenile death penalty.[230]

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instructed the jury to choose death unless the mitigating evidence outweighed the aggravating evidence).

224. *See* Graham v. Florida, 560 U.S. 48, 82 (2010) (determining that the Eighth Amendment does not permit a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime).

225. 567 U.S. 460 (2012).

226. *See id.* at 479 ("[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.").

227. *See* William W. Berry III, *The Mandate of* Miller, 51 AM. CRIM. L. REV. 327, 334–35 (2014) (discussing the backdrop for *Miller,* where in many states the legislature simply determined that a certain crime warranted a mandatory life with parole sentence, then subsequently abolished parole, resulting in a mandatory life sentence becoming a mandatory life without parole sentence).

228. *See* William W. Berry III, *Life-With-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L.J. 1051, 1055 (2015) [hereinafter Berry, *Life-With-Hope Sentencing*] ("As with many problems in our legal system, the [life without parole] epidemic resulted from a confluence of different events. It certainly is not the product of any intentional or thoughtful legislative design.").

229. *See, e.g.*, Robert P. Crouch, Jr., *Uncertain Guideposts on the Road to Criminal Justice Reform: Parole Abolition and Truth-in-Sentencing*, 2 VA. J. SOC. POL'Y & L. 419, 419 (1994) ("The federal abolition of parole and the imposition of mandatory minimum sentences have provided the government with a 'heavier hammer' to wield in prosecutions, but with uncertain results.").

230. *See* Roper v. Simmons, 543 U.S. 551, 574 (2005) ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.").

In the 1970s, many states began abolishing parole, particularly for more serious crimes like murder.[231] This "truth-in-sentencing" movement eschewed the concept of rehabilitation in favor of retribution and incapacitation.[232] The penal populism movement sought not to reform the offender, but instead to protect society from the offender.[233] Many crimes that previously carried life with parole sentences thus became life without parole sentences because parole was no longer an option.[234] This meant that sentences that were formerly fifteen years in length, as a practical matter, essentially became life sentences.[235]

Then, in 2005, the Supreme Court held that juvenile death sentences violated the Eighth Amendment in *Roper v. Simmons*.[236] The effect of this decision was to commute juvenile death sentences to juvenile life without parole sentences.[237] It

231. *See* Crouch, *supra* note 229, at 419 (noting the movement by states to abolish parole and the potential resulting impacts).

232. *See id.* at 423 ("Much of the impulse driving parole abolition and truth-in-sentencing is, rightly, the public demand that those who break the law be held accountable for their actions."); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 14 (2001) (stating that the goal of having prisons was reduced to simply incapacitation and retributive punishment).

233. *See* GARLAND, *supra* note 232, at 12 (discussing current trends in penal policy, noting, "The call for protection *from* the state has been increasingly displaced by the demand for protection *by* the state"); JOHN PRATT, PENAL POPULISM 3 (Tim Newburn ed., 2007) (arguing that penal populism is a method to buy "electoral popularity by cynically increasing levels of penal severity because it is thought there is public support for this, irrespective of crime trends").

234. *See* Berry, *Life-With-Hope Sentencing*, *supra* note 228, at 1060 ("By 2000, sixteen states had abolished discretionary parole for all crimes.").

235. *See id.* ("Prior to the move towards penal populism, a life sentence often meant that an offender served between fifteen and twenty years with the possibility of parole after that time. By abolishing parole, states turned these sentences into life without parole sentences."); Crouch, *supra* note 229, at 421 ("[I]t is certain that defendants who are convicted or accept plea agreements will serve more time than before because there is no parole. The abolition of parole guarantees that prisoners will serve their entire sentences without early release for considerations such as good behavior or overcrowding.").

236. 543 U.S. 551 (2005); *see id.* at 574 ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.").

237. *See* Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After* Roper, 47 B.C. L. REV. 1083, 1083–84

also made juvenile life without parole sentences the most severe sentence in juvenile murder cases, moving some possible death sentences to life without parole sentences.[238]

In *Miller*, the Court considered whether mandatory juvenile life without parole sentences violated the Eighth Amendment.[239] Relying on the *Woodson-Lockett* concept of individualized sentencing[240] and the *Roper-Graham* idea that juveniles are different,[241] the Court held that the Eighth Amendment requires a sentencing determination by a judge or jury before sentencing a juvenile offender to life without parole.[242]

With respect to the concept of individualized sentencing, the Court was particularly concerned that mandatory juvenile life without parole sentences "preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."[243] The consideration of such characteristics was paramount precisely because the mandatory sentence would not allow the Court to take into account what often amounts to clear and significant differences between adult and juvenile offenders.[244]

(2006) ("Today, children are not only transferred to and prosecuted in the adult system more readily than before the 1990s, but also are sentenced to its penultimate penalty—life without the possibility of parole.").

238. It also raised the question concerning whether the Court should do the same for juvenile accomplices. *See* Brian R. Gallini, *Equal Sentences for Unequal Participation: Should the Eighth Amendment Allow All Juvenile Murder Accomplices to Receive Life Without Parole?*, 87 OR. L. REV. 29, 30–31 (2008) (arguing that the current Supreme Court jurisprudence provides inadequate guidance to lower courts sentencing nonkiller juveniles convicted of murder).

239. *See* Miller v. Alabama, 567 U.S. 460, 479 (2012) ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.").

240. *See supra* Part II.B.

241. *See Miller*, 567 U.S. at 471 ("*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, 'they are less deserving of the most severe punishments.'" (citation omitted)).

242. *See id.* at 479.

243. *Id.* at 476.

244. *See id.* (describing youth as a time of immaturity and irresponsibility but noting that these "signature qualities are all transient" (internal quotations omitted)).

Two years after *Miller*, the Court revisited this issue in *Montgomery v. Louisiana*[245] in which it considered whether the decision in *Miller* applied retroactively.[246] Under the Court's retroactivity doctrine, the core question was whether the holding in *Miller*, which proscribed the imposition of mandatory juvenile life without parole sentences, constituted a substantive rule or a procedural rule.[247] Under *Teague v. Lane*,[248] new substantive rules of constitutional law apply retroactively, while new procedural rules generally do not.[249]

The Court held that the *Miller* rule was substantive for retroactivity purposes and applied to pre-*Miller* juvenile life without parole sentences.[250] The importance of this decision for the *Woodson* doctrine rests in the requirement that a sentencer give full and fair consideration to mitigating evidence.[251] As the Court held, this is a substantive consideration.[252] It requires more than a court simply allowing the offender to present mitigating evidence; it requires a court to actively consider such evidence, avoiding the pitfalls of mandatory sentences.[253] The Court explained as follows: "*Miller*, then, did more than require

245. 577 U.S. 190 (2016).

246. *See id.* at 194 ("In the wake of *Miller*, the question has arisen whether its holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided.").

247. *See id.* at 206 (contrasting procedural rules, which regulate only "the *manner of determining* the defendant's culpability," with substantive rules that forbid "criminal punishment of certain primary conduct" (citation omitted)).

248. 489 U.S. 288 (1989), *overruled in part on other grounds by* Edwards v. Vannoy, 141 S. Ct. 1547 (2021).

249. *See id.* at 310 ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."). For an argument concerning how the Court should improve its retroactivity doctrine, see William W. Berry III, *Normative Retroactivity*, 19 U. PA. J. CONST. L. 485, 491 (2016) [hereinafter Berry, *Normative Retroactivity*] (arguing that "retroactivity should relate directly to the normative impact of the new rule on guilt and sentencing determinations").

250. *See Montgomery*, 577 U.S. at 212.

251. *See id.* at 208–09 (requiring the sentencing court to take the juvenile offender's age into consideration before delivering a sentence); Berry, *Normative Retroactivity*, *supra* note 249, at 513–14 (discussing the problem of desire for finality trumping the desire for fairness in criminal proceedings).

252. *See Montgomery*, 577 U.S. at 208–11.

253. *See id.*

a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'"[254]

That then is the virtue of limiting mandatory sentences—to assess whether, in light of the evidence, a punishment remains justified with respect to the offender in the case.[255] While a punishment might seem to fit a crime in the abstract, it may not always do so in practice.[256] As such, sentencing courts must consider aggravating and mitigating evidence in determining the appropriate sentence for an offender, at least in JLWOP and death penalty cases.[257]

C. *Where Mandatory Sentences Persist*

Mandatory sentences persist most significantly in two broad categories—as mandatory minimum sentences and as life without parole alternatives to capital punishment.[258]

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254. *Id.* at 208 (citing Miller v. Alabama, 567 U.S. 460, 472 (2012)).

255. *Cf. id.* at 212 (noting that the Court's decision does not require resentencing the offenders, only reconsidering them for parole).

256. *See* Lockett v. Ohio, 438 U.S. 586, 602 (1978) (recognizing the importance of individualized sentencing in the criminal justice system).

257. *See id.* at 608 (discussing the constitutional requirement of considering mitigating factors in a capital case). Some have advocated broadening the individualized sentencing for juveniles beyond JLWOP. *See* Lindsey E. Krause, Comment, *One Size Does Not Fit All: The Need for a Complete Abolition of Mandatory Minimum Sentences for Juveniles in Response to* Roper*,* Graham*, and* Miller, 33 L. & INEQUAL. 481, 483–84 (2015) (advocating to completely abolish mandatory minimums for juveniles); *see also* Alex Dutton, Comment, *The Next Frontier of Juvenile Sentencing Reform: Enforcing* Miller's *Individualized Sentencing Requirement Beyond the JLWOP Context*, 23 TEMP. POL. & C.R. L. REV. 173, 195 (2013) (encouraging legal advocates to challenge all juvenile mandatory minimums through *Miller's* analysis).

258. Prior to 2005, mandatory sentences also existed in mandatory sentencing guideline schemes. *See, e.g.*, WILLIAM RHODES ET AL., FEDERAL SENTENCING DISPARITY: 2005–2012, at 3 (2015), https://perma.cc/Q9DJ-HU49 (PDF) ("When promulgated in 1987, the [federal sentencing] guidelines were mandatory and judges were expected to sentence within the lower and upper limits . . . . Since 2005, the guidelines have been advisory . . . ."). The Supreme Court held in a series of cases that any fact increasing the statutory maximum or minimum required proof at trial beyond a reasonable doubt, which meant that both state and federal mandatory sentencing guidelines violated the Sixth Amendment. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding

Mandatory minimum sentences have a long history, at least in the federal system.[259] They impose a minimum punishment for guilt of a particular crime.[260] Many such crimes have resulted from "tough on crime" policies implemented in response to increases (or perceived increases) in criminality.[261] These kinds of sentences continue to be ubiquitous throughout both state and federal sentencing schemes.[262]

In the context of the death penalty, many states impose mandatory sentencing alternatives for juries in capital trials.[263] In other words, a jury can sentence the perpetrator either to death or LWOP.[264] Some states include life with parole as a potential third option.[265] In most cases, though, a conviction of a

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that the Sixth Amendment required juries to find facts raising the statutory maximum sentence other than prior convictions); Alleyne v. United States, 570 U.S. 99, 116 (2013) (holding that the Sixth Amendment required juries to find facts raising the statutory minimum sentence); Blakely v. Washington, 542 U.S. 296, 305 (2004) (striking down Washington's mandatory state sentencing guidelines); United States v. Booker, 543 U.S. 220, 245 (2005) (striking down mandatory federal sentencing guidelines).

259. *See* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 9 (2010) (tracing federal mandatory minimum sentences back to the 1790s).

260. *See id.* The criticism of such sentences now extends beyond academic circles to political ones. *See id.* at 17 ("The growing opposition to mandatory minimums goes beyond the usual suspects (e.g., judges, legal scholars, criminal defenders, and civil liberties groups) and includes conservative commentators, politicians, and the general public.").

261. *See id.* at 24.

262. *See id.* at 17–18.

263. *See Sentencing Alternatives*, DEATH PENALTY INFO. CTR., https://perma.cc/P9JN-5DJA (last visited Nov. 8, 2023) (discussing the death penalty and alternative sentences); Berry, *Life-With-Hope Sentencing*, *supra* note 228, at 1067 ("Many states make LWOP a mandatory sentencing alternative, such that a jury decision not to award a death sentence in a capital murder case automatically results in an LWOP sentence.").

264. *See* Berry, *Life-With-Hope Sentencing*, *supra* note 228, at 1067.

265. *See* William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 646–48 (1999) (discussing the availability of life with parole as a death penalty alternative in some states); Sarah French Russell & Tracy L. Denholtz, *Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Noncapital Litigation*, 48 CONN. L. REV. 1121, 1137 (2016) (explaining that some states "provide sentences of life *with* parole for juveniles convicted of the most serious crimes").

capital crime results in an automatic life sentence if the jury elects not to sentence the defendant to death.[266]

III. MANDATORY SENTENCES AS STRICT LIABILITY

Having outlined the justifications for strict liability and mandatory sentences, the doctrinal limits on each, and the places where each persists, this Article now makes the case that legislatures and courts should treat strict liability and mandatory sentences the same way. It then shows how that might work in practice.

Strict liability crimes omit consideration of criminal intent.[267] Mandatory sentences omit consideration of criminal culpability at sentencing.[268] These tools operate at different parts of a criminal proceeding: strict liability in the consideration of guilt;[269] mandatory sentencing in the consideration of punishment.[270] While they expedite the consideration of the issue at hand (guilt or sentencing), courts disfavor each because they omit consideration of something important—intent or culpability.[271] Upon closer examination, though, what strict liability crimes and mandatory sentences omit is essentially the same thing.

A. *Culpability and Intent Are Essentially the Same Idea*

In most contexts, intent and culpability can be essentially the same thing, or at least corollary expressions of the same concept. The level of intent of one's action correlates directly to

266. *See* Berry, *Life-With-Hope Sentencing*, *supra* note 228, at 1067 (explaining that many states sentence capital defendants to life without parole if the jury opts out of death penalty).

267. *See* Levenson, *supra* note 16, at 402 ("Strict liability permits the conviction of a criminal defendant in the absence of mens rea.").

268. *See* Luna & Cassell, *supra* note 259, at 16.

269. *See* Levenson, *supra* note 16, at 418.

270. *See* Luna & Cassell, *supra* note 259, at 1 (explaining that mandatory minimums determine prison sentences).

271. *See, e.g.*, United States v. Jeffries, 958 F.3d 517, 530 (6th Cir. 2020) ("[T]he Supreme Court disfavors strict liability statutes."); Morissette v. United States, 342 U.S. 246, 250 (1952) (reading a mens rea requirement into a federal statute).

how culpable or blameworthy they are for the criminal act.[272] Indeed, the reason that courts disfavor strict liability crimes is that without intent, criminal defendants lack culpability.

Scholars often use the terms intent and culpability almost interchangeably.[273] And the Model Penal Code seems to equate intent and culpability.[274] The Model Penal Code terms the levels of criminal intent as "General Requirements of Culpability."[275] Specifically, it describes its limit on strict liability in terms of culpability:

> Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.[276]

It then lists the various criminal intents as "Kinds of Culpability."[277]

For practical purposes, measuring intent constitutes the same thing as measuring culpability.[278] And leaving intent out of the assessment of guilt achieves the same thing as leaving culpability out of the assessment of punishment. Mandatory sentences are thus a kind of strict liability because they omit the same important consideration—culpability/intent.

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272. *See, e.g.*, MODEL PENAL CODE § 2.02(2) (listing the various levels of criminal intent as requirements of culpability).

273. *See, e.g.*, Anthony M. Dillof, *Transferred Intent: An Inquiry into the Nature of Criminal Culpability*, 1 BUFF. CRIM. L. REV. 501, 535 (1998) (equating culpability to intent); Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 320–21 (1996) (connecting the concept of culpability to the intent of the actor); Michael S. Moore, *Intention as a Marker of Moral Culpability and Legal Punishability*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 179, 184–85 (R.A. Duff & Stuart Green eds., 2011) (marking culpability by intent); G.R. Sullivan, *Intent, Subjective Recklessness, and Culpability*, 12 OXFORD J. LEGAL STUDS. 380, 380 (1992) (referring to levels of intent as forms of culpability).

274. *See* MODEL PENAL CODE § 2.02 (using culpability and intent to describe limits on strict liability).

275. *Id.*

276. *Id.* § 2.02(1).

277. *Id.* § 2.02(2).

278. *See supra* notes 270–275 and accompanying text.

B. *Strict Liability Crimes and Mandatory Sentences Create the Same Unfairness*

A second reason that legislatures and courts should treat mandatory sentences as a genre of strict liability is that they share the exact same negative consequence with their use. Strict liability crimes foreclose consideration of one's criminal intent.[279] This means that a decision-maker considering an individual's guilt has no opportunity to consider how blameworthy that person might be for the crime in question.[280]

The possibility of some reasonable justification for the person's criminal act, including that the conduct was accidental, remains outside of the determination of guilt. The unfairness that arises in such cases relates to the failure to consider the intent of the defendant in the determination of guilt.

Similarly, mandatory sentences punish a defendant without consideration of his culpability.[281] This means that there is no consideration of aggravating or mitigating evidence in determining the sentence—the sentencing outcome is mandatory.[282]

Even when the mandatory part of the sentence is a minimum, it forecloses consideration of culpability to the extent that the determination would result in an outcome beneath the mandatory minimum sentence.[283] As a result, any evidence concerning the defendant's actions in committing the crime or the defendant's character fails to enter the calculus in the determination of the criminal sentence.[284] The unfairness that arises in such cases relates to the failure to consider the

279. *See* Levenson, *supra* note 16, at 402.

280. *See id.*

281. *See* Luna & Cassell, *supra* note 259, at 16.

282. *See* Berry, *Life-With-Hope Sentencing*, *supra* note 228, at 1057 (explaining that courts typically do not consider mitigating factors in imposing mandatory life without parole sentences).

283. *See* Luna & Cassell, *supra* note 259, at 16 ("All offenders thus receive the same minimum sentence once the basic statutory predicates are met, regardless of very real and morally significant differences.").

284. *See* Louis F. Oberdorfer, Lecture*, Mandatory Sentencing: One Judge's Perspective—2002*, 40 AM. CRIM. L. REV. 11, 16 (2003) (discussing the unfairness of mandatory sentences that do not consider defendants' personal characteristics).

culpability of the defendant in the determination of the defendant's sentence.

The similarity in unfair outcome further cements the notion that courts should treat strict liability and mandatory sentences in the same way. The judicial instinct is there, as demonstrated by the doctrine explored in the previous Part.[285]

But courts have not made the connection that mandatory sentences are of the same character as strict liability crimes and therefore deserve similar restrictions. Indeed, courts have cabined the limits on mandatory sentences to constitutional limits, and then only applicable to the scope of the Eighth Amendment (which to date stops at capital and JLWOP cases).[286]

The same statutory limits that courts apply to strict liability crimes could also apply in assessing the appropriateness of applying mandatory sentences. The key to that kind of statutory analysis lies in the articulation of a reasonable line concerning when courts can eschew mandatory sentences for the same reason that courts eschew strict liability statutes. The court's limits on strict liability provide the perfect roadmap for outlining the appropriate scope.[287]

Likewise, Eighth Amendment limits could apply as well if the court simply expanded its individualized sentencing doctrine.[288] The limits here seem arbitrary and without legitimate justification.

The final Part of this Article explores how this might work in practice. It demonstrates how courts could treat mandatory sentences as a form of strict liability.

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285. *See supra* Part II.B.

286. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (holding that a North Carolina statute imposing mandatory death sentences violated the Eighth Amendment); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (holding that a Louisiana statute imposing mandatory death sentences violated the Eighth Amendment); Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding that mandatory LWOP sentences for juveniles violated the Eighth Amendment); Montgomery v. Louisiana, 577 U.S. 190, 212–13 (2016) (applying *Miller* retroactively); Harmelin v. Michigan, 501 U.S. 957, 994 (1991) (holding that mandatory LWOP sentence did not violate the Eighth Amendment).

287. *See supra* Part I.B.

288. *See supra* Part II.B.

IV. STRICT LIABILITY LIMITS ON MANDATORY SENTENCES

As explained, courts address strict liability crimes and mandatory sentences in parallel manners. Both mechanisms contain the same kind of flaw. In the context of strict liability, courts find defendants guilty irrespective of their mens rea;[289] in mandatory sentencing cases, courts sentence defendants irrespective of their individual culpability and personal mitigating characteristics.[290] The importance of the neglected prerequisites—mens rea and culpability—has led courts in both contexts to place some limits on the use of strict liability and mandatory sentences, with more stringent restrictions on the former than the latter.[291]

To be sure, the Court's division of death and JLWOP sentences as the only ones requiring individualized consideration irrationally discounts the seriousness of LWOP sentences, life with parole sentences, and even shorter mandatory minimum sentences. With seriousness being an inadequate tool to limit mandatory sentences, strict liability can offer principled bright-line rules that promote equity in criminal sentencing in the same way strict liability does with guilt determinations.

This Part argues that the limits on strict liability crimes should apply to all mandatory sentences, not just the death penalty and JLWOP. To complete this incomplete evolution, this Article offers two alternative statutory approaches[292] before exploring a constitutional one.[293]

The first approach—the theoretical approach—uses the underlying rationale for limits on strict liability sentences as a basis for limiting such sentences.[294] The application of this principle, as explored below, means that mandatory sentences

289. *See supra* note 267 and accompanying text.

290. *See supra* notes 268, 270–275 and accompanying text.

291. *See supra* note 286 and accompanying text; Kalyani Robbins, *Paved With Good Intentions: The Fate of Strict Liability Under the Migratory Bird Treaty Act*, 42 ENV'T L. 579, 589–91 (2012) (discussing limits that the Supreme Court has applied to strict liability); Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 833 (1999) (discussing constitutional limits on strict liability).

292. *See infra* Part IV.A.

293. *See infra* Part IV.B.

294. *See infra* Part IV.A.1.

should be limited to punishments for public welfare crimes.[295] If the crime is a public welfare crime, a mandatory sentence is permissible; if it is not a public welfare crime, a mandatory sentence is not allowed.

The second approach—the practical approach—imports the actual limits on strict liability crimes as limits on mandatory sentences.[296] As explored below, the application of this approach restricts mandatory sentences to strict liability crimes.[297] If a crime is a strict liability crime, a mandatory sentence is allowed; if it is not a strict liability crime, a mandatory sentence is not allowed.[298]

A. *Statutory Limits*

The decision by courts to disfavor strict liability crimes does not emerge as a constitutional limit on strict liability. Rather, as explained, it emerges as a matter of statutory construction.[299] Courts read a mens rea element into the statute to preclude a conviction without intent.[300]

This subpart contemplates reading in similar culpability requirements to mandatory sentencing statutes. Even with mandatory minimums, the Court could require some level of culpability as a matter of statutory interpretation, just as the Court has done with strict liability statutes. And the limits on mandatory sentences could come from strict liability, as mandatory sentences are a genre of strict liability.

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295. *See infra* Part IV.A.1.

296. *See infra* Part IV.A.2.

297. *See infra* Part IV.A.2.

298. While these two categories overlap, they are different. The statute in *Staples* is an example—it is a public welfare crime with a mens rea requirement. *See* Staples v. United States, 511 U.S. 600, 618–19 (1994) (holding that a public welfare offense contained a mens rea requirement).

299. *See supra* note 28 and accompanying text.

300. *See supra* note 28.

1. Strict Liability as a Theoretical Limit on Mandatory Sentences

The Court allows the use of strict liability, generally speaking, in public welfare crimes.[301] As explored above, the Court considers these kinds of crimes to be of a different character than the traditional common law crimes now codified in state and federal statutes.[302] Specifically, public welfare crimes do not involve crimes of violence against the person or otherwise relate to the level of criminal intent of the defendant.[303]

Instead, public welfare crimes are regulatory offenses—rules put in place by the state to encourage behavior that structures particular actions in a society.[304] For instance, highways can function well if all of the drivers subscribe to the same set of rules and travel at an appropriate speed for the particular thoroughfare.[305] Similarly, reserving certain parking spaces for disabled individuals is also an important interest of society.[306]

As such, the reason that one has for breaking these rules is not important. What is important is that they broke the rules and caused the disruption in the first place.[307] That is why the criminal intent does not matter and is not part of the crime.[308]

This approach has the value of deterring individuals from breaking the rule, as the consequence is clear and unambiguous.[309] Indeed, the justification for strict liability

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301. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 255–56 (1952) (explaining that public welfare offenses are strict liability offenses).

302. *See supra* note 69 and accompanying text.

303. *See Morissette*, 342 U.S. at 255–56.

304. *See id.* (explaining that violations of public welfare regulations threaten the social order).

305. *See* Levenson, *supra* note 16, at 419 ("Public welfare offenses include . . . driving faster than the speed limit.").

306. *See* Doron Dorfman, *[Un]Unusual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. IRVINE L. REV. 557, 573–74 (2020) (explaining that disabled parking ensures that individuals with disabilities can participate in society).

307. *See supra* note 19 and accompanying text.

308. *See supra* note 19 and accompanying text.

309. *See* Wasserstrom, *supra* note 16, at 734–36 (addressing the argument that strict liability offenses have deterrence effect).

offenses relates, in part, to the desire to deter individuals from violating the regulatory norm.[310]

Even so, bright-line rules still have the problem of being unfair in the unusual case at the margins—the unusual exception to the rule.[311] The lower range of punishment for public welfare crimes helps mitigate this potential unfairness.[312]

For instance, one may have a really good reason for driving in excess of the speed limit, but if one disregards that reason to impose the punishment of a fine as part of a strict liability regime, the consequence is not particularly severe.[313] Indeed, the predictability and need for consistency in conduct often will outweigh the risk of unfairness at the margins.[314] Or at the very least, the value of the public welfare crime will make potential unfairness in rare cases a tolerable cost of such a regime—unfair to a few but advancing the greater societal good.[315]

The application of the general public welfare approach of strict liability crimes to mandatory sentences is straightforward and appealing. Given the similar character of these two constructs,[316] mandatory sentences would be limited to public welfare crimes. In other words, state legislatures and Congress could continue to use mandatory sentences, but only for public welfare offenses.

All other sentences would require an individualized sentencing consideration—a weighing of offender culpability,[317] just as all other crimes would require a consideration of mens

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310. *See id.*; Levenson, *supra* note 16, at 424–27 (evaluating the deterrence effect of the strict liability doctrine).

311. *See supra* Part III.B.

312. *See* Morissette v. United States, 342 U.S. 246, 256 (1952) (observing that the penalties for public welfare offenses are typically "relatively small"); Bowes Sayre, *supra* note 16, at 78–79 (assuming that penalties for public welfare offenses are "slight").

313. *See* Levenson, *supra* note 16, at 422 (observing that the penalty for speeding is relatively low).

314. *See id.* (establishing that rare instances of injustice can be outweighed by benefits to society).

315. *See id.* (explaining that even when speeders were not driving carelessly, "the need for public safety and the relatively minor punishment minimizes any concern about injustice").

316. *See supra* Part III.

317. *See* Berry, *Individualized Sentencing*, *supra* note 119, at 52 (describing individualized sentencing as a weighing process).

rea—a consideration of the criminal intent of the offender.[318] Because strict liability crimes principally reflect the different kind of non-common-law crime, mandatory sentences seem appropriate.[319] A mandatory fine for speeding, for instance, seems appropriate.[320] Indeed, some jurisdictions already impose mandatory sentences for public welfare offenses.[321]

As a result, the concept of strict liability crimes—cabined as public welfare crimes—provides a clear, bright-line limit on mandatory sentences. Where mens rea is required for nonpublic welfare crimes, so also should culpability assessment be required for sentencing.

The connection between criminal intent and culpability perhaps bears more explication. The level of intent bears directly on the level of the crime. In homicide crimes, for instance, states separate murder from manslaughter based on the intent—the presence or absence of malice aforethought.[322]

But in assessing the punishment for manslaughter, for instance, there are a range of homicides that fall under the "without malice" category, such that individual culpability matters.[323] Courts need to assess the culpability to impose accurate punishments for such crimes.

The Court already mandates this for murder, at least with respect to the death penalty and JLWOP.[324] There is no reason that manslaughter is any different. It is still far beyond a regulatory crime and can still encompass a wide variety of

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318. *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978) ("[I]ntent generally remains an indispensable element of a criminal offense.").

319. *See* Levenson, *supra* note 16, at 428, 457 (differentiating between strict liability doctrine and common law); *see also supra* note 22 and accompanying text.

320. *See* Levenson, *supra* note 16, at 422 (arguing that, in the case of speeding, the "risk [of injustice] is outweighed by the need for additional protection of society and expeditious prosecution").

321. *See, e.g.*, David M. Turchetta, Comment, *Modernizing Public Welfare Offenses in Massachusetts (Go to Jail–Go Directly to Jail)*, 28 NEW ENG. L. REV. 783, 783–84 (1994) (explaining that Massachusetts has imposed a mandatory sentence for a public welfare offense).

322. *See supra* note 17.

323. *See* MODEL PENAL CODE § 210.03 (providing that an individual can be guilty of manslaughter if he kills recklessly, commits homicide, or commits homicide "under the influence of extreme mental or emotional disturbance").

324. *See supra* notes 116–120 and accompanying text.

homicides, some of which deserve significant punishment, while others very little punishment.[325] But it is impossible to assess without examining culpability.

This theoretical strict liability approach would promote equity in sentencing. It would require individualized consideration of the defendant's conduct and character in cases where intent was an element of the crime. Barring mandatory sentences for such crimes would ensure that the sentence reflected the actual crime, not some legislative caricature of it.

As with strict liability crimes, Congress and state legislatures could limit mandatory sentences to public welfare offenses. And the category of public welfare offenses would create a bright line that would be simple to apply.

2. Strict Liability as a Practical Limit on Mandatory Sentences

A different approach is to use strict liability itself as a practical tool to place limits on mandatory sentences. This second approach is more practical in nature. It posits that mandatory sentences and strict liability crimes are opposite sides of the same coin. As such, mandatory sentences are only permitted for strict liability crimes.

The justifications for both strict liability crimes and mandatory sentences both relate to the need to remove discretion and inquiry to achieve a certain result, usually in the name of deterrence.[326] Strict liability crimes are valuable because they remove the intent from the equation and align the act itself with guilt.[327] For situations where intent does not really matter, there is a certainty of outcome for engaging in the behavior.[328]

This has the effect of deterring individuals from engaging in the prohibited behavior because the "why"—their reason for doing it, their intent—does not matter.[329] The consequence flows

325. *See supra* note 304 and accompanying text; *see also supra* note 323.

326. *See* Levenson, *supra* note 16, at 424–27 (discussing the deterrence effect of strict liability crimes); Schulhofer, *supra* note 123, at 200–02 (discussing the deterrence effect of mandatory sentences).

327. *See* Levenson, *supra* note 16, at 402.

328. *See id.* at 402–03.

329. *See id.* at 424–27.

directly from the act. The certainty of consequence makes others, at least in theory, less likely to engage in the behavior.[330]

Of course, courts in most cases find that intent does matter.[331] That is therefore the limit on strict liability crimes and does not extend to crimes where criminal intent relates to guilt or the level of seriousness among a group of crimes.[332]

Mandatory sentences operate in the same way. They impose an automatic punishment for a conviction of a crime.[333] Their apparent value lies in their certainty.[334] One's actual culpability does not matter; it is presumed from the guilty verdict or plea.[335] Deterrence likewise, in theory, flows.[336] One can know with a level of certainty that committing a particular crime mandates a particular consequence.

The intellectual fit between these two concepts becomes clear in this context. When the state does not care about the intent of the criminal offender, his culpability likewise seems to be less of a concern with respect to imposing a fair punishment.[337] Simply put, the act triggers the consequence.

The corollary is perhaps even more true. When the Court bars the use of strict liability in a federal statute, it does so because the criminal intent is crucial to assessing the act in question.[338] Sometimes the intent can separate a crime from an innocent act;[339] other times it can serve to distinguish a more serious crime from a less serious one.[340] Without looking at the

330. *See id.*

331. *See supra* notes 2–4 and accompanying text.

332. *See supra* notes 2–4 and accompanying text.

333. *See* Luna & Cassell, *supra* note 259, at 8–9.

334. *See id.* at 11 ("Mandatory minimums help eliminate . . . inequalities, proponents argue, by providing uniformity and fairness for defendants, certainty and predictability of outcomes, and a higher level of truth and integrity in sentencing.").

335. *See id.* at 12, 14–15.

336. *See id.* at 11 (discussing how mandatory sentences can deter criminal conduct).

337. *See supra* Part III.A.

338. *See supra* notes 28–29 and accompanying text.

339. *See supra* notes 87, 95 and accompanying text.

340. *See supra* notes 28–29 and accompanying text.

criminal intent, though, it becomes impossible to assess the guilt or innocence of the act.[341]

Similarly, courts should require individualized sentencing consideration in non-strict liability crimes. If the intent of the defendant matters as to the crime, the culpability should also matter as to the sentence.[342] To allow mandatory sentences in such situations assumes that all guilty individuals are the same, ignoring the very lesson that makes the crime in question depend on criminal intent.[343]

The Supreme Court has found that culpability does matter for the most serious punishments—the death penalty and JLWOP.[344] But this is an arbitrary line. And the Court made these decisions to ensure protection for the most serious crimes, not to foreclose similar consideration for lesser crimes.[345] Just because culpability matters for the most serious crimes does not mean that it does not also matter for less serious crimes.

Indeed, all felonies are serious matters. They have life-changing consequences for most people.[346] Every day in state custody matters. As a result, judges should determine the length of a sentence carefully. Indeed, each additional year has an exponential effect on the individual incarcerated.[347]

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341. *See supra* notes 28–29 and accompanying text.

342. *Cf. supra* note 273 and accompanying text.

343. *Cf.* Lockett v. Ohio, 438 U.S. 586, 602 (1978) (recognizing the importance of individualized sentencing in the criminal justice system).

344. *See supra* Part II.B.

345. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (explaining that culpability matters for the death penalty because of the finality of death); Miller v. Alabama, 567 U.S. 460, 465 (explaining that culpability matters for JWLOP because it is a serious penalty).

346. The collateral consequences that accompany a felony conviction can be serious in their own right. *See, e.g.*, Gabriel Chin, *Collateral Consequences of Criminal Conviction*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 1, 2 (2017) ("A conviction may make a person ineligible for public benefits, such as the ability to live in public housing or hold a driver's license."); Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1118 (2013) (examining the informal collateral consequences associated with criminal convictions, such as social stigma).

347. *See, e.g.*, Katherine Beckett & Allison Goldberg, *The Effects of Imprisonment in a Time of Mass Incarceration*, 51 CRIME & JUST. 349, 362 (2022) (citing studies that show longer sentences are associated with decreased earning potential and higher unemployment rates upon release).

Unlike criminal acts, which are observable and easily documented, criminal intent requires interpretation of the relevant facts and circumstances to impute a criminal intent to a defendant.[348] It is not as if the court can simply download the brain of the defendant to compute his intent. And yet, that determination separates the guilty from the innocent, or at the very least, the more serious crime from the less serious one.

A mandatory sentence forecloses this same kind of essential analysis with respect to the sentencing of the intent-based common law crime. Like intent, culpability is not mathematically calculated. Instead, courts determine an individual's level of culpability from the facts and circumstances of the case.[349] Foreclosing consideration of such facts and circumstances for intent-based crimes is a recipe for unfair punishment—with some over-punished and some under-punished.[350] It is more than intellectually lazy; it proscribes the use of judicial discretion in favor a predetermined outcome based on a series of assumptions that are often completely untrue.[351] In short, it is a recipe for injustice and inequity.

While everyone guilty of the same crime receives the same punishment, this approach ignores the unique characteristics of each case, and treats those who are more culpable the same as those who are less culpable.[352] To assume that a statutory definition of a crime is narrow enough to capture an identical group of perpetrators, who deserve to receive the exact same punishment, ignores the linguistic reality of the statutes, which are often very broad.[353] It also ignores the nuance involved in

348. *See* Hamdani, *supra* note 42, at 422 (discussing the use of circumstantial evidence to prove mental state).

349. *See id.*

350. *See supra* Part III.B.

351. *Cf. Woodson*, 428 U.S. at 291 (describing the use of mitigating factors to "remed[y] the harshness of mandatory statutes").

352. *See* Luna & Cassell, *supra* note 259, at 16 ("All offenders thus receive the same minimum sentence once the basic statutory predicates are met, regardless of very real and morally significant differences.").

353. *See* Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 353 (2019) ("Our [criminal] laws are overly broad: they include conduct that seems only marginally related to the problem the legislature claimed to have been addressing, and they include seemingly trivial or harmless behavior in their sweeping terms.").

criminal activity where individuals who commit the same crime may do so in such different ways as to warrant different punishments.[354] When one considers the facts and circumstances of the crime, courts can easily differentiate perpetrators in providing different punishments.[355] Mandatory sentences make such exercises of discretion impossible.

As indicated above, either the courts, through the Eighth Amendment, or legislatures, through new statutes, could mandate this application of strict liability to mandatory sentences. As with the prior proposal, this practical approach of restricting the use of mandatory sentences to strict liability crimes creates a straightforward, bright-line rule that would not be difficult to apply.

3. Strict Liability as an Invitation to Mandatory Sentence Abolition

Cabining mandatory sentences, either to cases involving public welfare crimes or to cases involving strict liability crimes, will enhance the equity in criminal sentencing. Specifically, it will eliminate the arbitrary sentencing outcomes generated by mandatory sentences by requiring consideration of individualized circumstances in either all nonpublic welfare crimes or all non-strict liability crimes. [356]

A deeper dive into the justifications for strict liability and mandatory sentences yields a final conclusion—mandatory sentences are unnecessary and states should, in the name of equity, abolish them. Outside of public welfare offenses, strict liability crimes are unnecessary to promote justice and fairness in the administration of criminal law. Prosecutors may like such statutes because it makes their job easier,[357] but requiring a

354. *See* Berry, *Individualized Sentencing, supra* note 119, at 50–52.

355. *See id.* at 52 ("In each case, there may be characteristics of the crime committed that call for increasing the punishment because of their aggravating nature or alternatively, decreasing the punishment because of their mitigating nature.").

356. *See* Luna & Cassell, *supra* note 259, at 75 (discussing the arbitrary outcomes of mandatory sentences).

357. *See* Levenson, *supra* note 16, at 403–04 (explaining that prosecutors "welcome the use of strict liability crimes" because it is easier for them to obtain convictions when they do not have to prove mens rea).

mens rea for a criminal conviction is the common practice in most cases.[358]

Indeed, as the Court has pointed out, regulatory public welfare crimes are of a different character than traditional common law crimes.[359] In some ways, these crimes blur the line between criminal law and tort law.[360] If one thinks of public welfare offenses as torts, and not really crimes at all, then strict liability ceases to exist outside of its misguided use in felony murder crimes. But even those crimes require criminal intent to commit the underlying felony.[361] So, if one reads public welfare as outside the scope of traditional crimes, then criminal law in essence forbids strict liability; it requires some level of criminal intent.

Unlike strict liability welfare crimes, there is no tort-like exception that justifies mandatory sentences. In other words, there is no category of crimes that needs mandatory sentences to achieve the basic goals of punishment.[362] The absence of culpability is in no context a tool for effective sentencing.

While there exists a legitimate reason to have public welfare strict liability crimes, there is no corollary for mandatory sentences. Without a justification for preserving a narrower category of mandatory sentences, the question becomes whether an absence of a material benefit can outweigh the inequity that typically flows from the imposition of mandatory sentences.

Without considering perpetrator culpability, mandatory sentences are both over- and under-inclusive; they are likely to yield unfair results in many cases because they are using an arbitrary statutory barometer to choose the appropriate

358. *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978) ("[I]ntent generally remains an indispensable element of a criminal offense.").

359. *See* Morissette v. United States, 342 U.S. 246, 256 (1952) (explaining that public welfare offenses, unlike common law crimes, "result in no direct or immediate injury to person or property," and "do not threaten the security of the state in the manner of treason," but are "offenses against [the state's] authority").

360. *See supra* note 22 and accompanying text.

361. *See* Binder, *The Culpability of Felony Murder*, *supra* note 108, at 975–77 (explaining that felony murder requires intent to commit a felony).

362. *See* Luna & Cassell, *supra* note 259, at 18 (arguing that mandatory sentences do not serve the goals of punishment).

punishment.[363] Even worse, the shift of power to prosecutors in cases involving mandatory sentences can skew equity even further, with prosecutors choosing sentences based on a host of other considerations.[364]

In sum, while strict liability crimes can be justified in the context of public welfare, mandatory sentences lack a parallel category of justification. As such, courts and legislatures should, in the name of equity, eliminate mandatory sentences altogether.

B. *Constitutional Limits*

An alternative approach relates to the imposition of similar limits under the Eighth Amendment. The Court could easily make such a move simply by expanding the individualized sentencing doctrine from *Woodson*, *Lockett*, and *Miller*.[365] This analysis would bar mandatory sentences because imposing such sentences without individualized consideration of the defendant's criminal activity and personal characteristics would constitute a cruel and unusual punishment.[366]

The line drawn by the Court in *Woodson* and *Roberts*, limiting the Eighth Amendment proscription on mandatory sentences to capital cases evaporated with the expansion of the rule to JLWOP cases in *Miller*.[367] The line between the more serious and less serious cases is arbitrary in the context of considering the very evidence that ought to determine the length of the sentence imposed.[368] Culpability is equally

363. *See id.* at 74–75 (describing the over-inclusive and under-inclusive problems with mandatory sentences).

364. *See id.* at 12, 15 (explaining that prosecutors have discretion in applying mandatory minimums).

365. *See supra* Part II.B. For a more complete exploration of the argument made in this subpart, see generally Berry, *Individualized Sentencing*, *supra* note 119.

366. *See* Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976) (holding that mandatory death sentences violated the Eighth Amendment because they did not allow for consideration of the defendant's personal characteristics and circumstances); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (same).

367. *See* Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding that mandatory LWOP sentences for juveniles violated the Eighth Amendment).

368. *See* Berry, *Individualized Sentencing*, *supra* note 119, at 18 (explaining that the Court's reasoning in *Woodson*, *Lockett*, and *Miller* hinged on the fact that the punishments at issue were very serious).

relevant whether the sentence is one involving death or a much shorter sentence. Courts should strive to impose criminal sentences based upon principled purposes rather than arbitrary conjectures made by legislatures.

Practically speaking, it is unlikely the Court would make such a move. In the 2020 term, it rejected an opportunity to expand the scope of JLWOP under the Eighth Amendment.[369] Expanding the Eighth Amendment to require individualized sentencing consideration for all nonpublic welfare crimes would require the Court to overrule its prior case law.[370] Courts using statutory interpretation to narrow mandatory sentencing seems to be a more likely approach.

CONCLUSION

This Article broke new ground by drawing a connection between two criminal law concepts—strict liability and mandatory sentences—that operate the same way in different spheres. In both situations, courts place significant limits on each concept. For strict liability, the limits are imposed because of the importance of criminal intent to establishing guilt. For mandatory sentences, the limits are imposed because of the importance of considering perpetrator culpability at sentencing.

After demonstrating that these universes are parallel, this Article argued that mandatory sentences are a genre of strict liability and should thus receive similar treatment from courts. This means the imposition of limits on mandatory sentences whether statutory ones or constitutional ones.

First, with respect to statutory limits, this Article advocated for applying the theoretical limits of strict liability crimes,

369. *See* Jones v. Mississippi, 593 U.S. 98, 117 (2021) (declining to require an "on-the-record explanation of the mitigating circumstance of youth by the sentencer in life-without-parole cases" (emphasis omitted)).

370. Stare decisis has not always been a strong barrier to reconsidering precedents under the Eighth Amendment. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 985, 996 (1991) (essentially overruling Solem v. Helm, 463 U.S. 277 (1983)); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (overruling Penry v. Lynaugh, 492 U.S. 302 (1989)); Roper v. Simmons, 543 U.S. 551, 578 (2005) (overruling Stanford v. Kentucky, 492 U.S. 361 (1989)); *see also* Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847, 848 (2007) (summarizing the ways in which the Supreme Court has altered its Eighth Amendment death penalty jurisprudence).

arguing that mandatory sentences should only be allowed in cases involving public welfare crimes. Second, it argued for applying the practical limits of strict liability crimes, making the case that mandatory sentences should only be allowed in cases involving strict liability crimes. This Article argued that the one fundamental difference between the two categories—a justified public welfare crime exception—meant that mandatory sentences lacked any significant justification and states should abolish them, particularly in light of the inequity that results from the imposition of mandatory sentences. Finally, this Article provided a road map of how the Eighth Amendment could likewise impose limits on mandatory sentences in noncapital, non-JLWOP cases.