

# COSTLY IGNORANCE AND STRICT LIABILITY IN CRIMINAL LAW

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*Abstract*

*Criminal law scholarship has been occupied for decades with both the justification for strict criminal liability and the seemingly incoherent application of strict criminal liability by courts. This Paper addresses the second issue—the indeterminate jurisprudence of strict liability in criminal law. Specifically, I seek to uncover the practical reasons making it probable that strict liability would replace mens rea with respect to particular elements of some offenses. By limiting punishment to informed offenders, a mens rea standard essentially assures ignorant offenders that they can engage in the prohibited conduct without being penalized. This failure, however, will be insignificant when offenders find ignorance to be too costly. If ignorance is sufficiently costly, offenders will take steps to become (or remain) informed notwithstanding the adverse incentive to do so under mens rea. The Paper thus predicts that, other things equal, strict liability is likely to govern offense elements for which ignorance is virtually costless, i.e., for which offenders would likely remain ignorant under a mens rea standard. The Paper proceeds to demonstrate the illuminating power of this costly ignorance thesis by analyzing the application of strict liability to liquor-sale to minors, statutory rape, child-pornography, regulatory offenses, criminal liability of corporate officers, and mistakes of law and fact. The Paper concludes by exploring whether doctrines other than strict liability may induce offenders to acquire information without producing the harsh and unfair consequences often attributed to strict liability.*

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## I. INTRODUCTION

In *United States v. Freed*,<sup>1</sup> the defendant was indicted for possession of unregistered grenades under section 5861(d) of the National Firearms Act.<sup>2</sup> The defendant knew that the items in his possession were grenades, but argued that he did not know they were unregistered. The Court decided that the National Firearms Act did not require proof of knowledge that a firearm is unregistered.<sup>3</sup> Thirteen years later, in *Staples v. United States*,<sup>4</sup> the defendant was indicted for unlawful possession of an unregistered machinegun under the same statute. The defendant in *Staples*, however, claimed he had not known that his rifle had been capable of firing automatically, a characteristic that made the rifle a “firearm” under the National Firearms Act. This time, the Court decided that the government is required to prove that the defendant knew that his rifle was capable of firing automatically.<sup>5</sup> *Freed* and *Staples* thus provide that ignorance regarding one element of the offense—lack of registration—will exculpate an owner from criminal liability, whereas ignorance concerning another element of the same offense—the nature of the rifle—will not prevent a conviction.

The apparently inconsistent holdings in *Freed* and *Staples* represent merely one example of the disarray characterizing criminal law scholarship and doctrine when they face one of their oldest challenges—delineating the appropriate domain of strict criminal liability. One of the most puzzling phenomena of contemporary criminal law is the

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<sup>1</sup> 401 U.S. 601 (1971).

<sup>2</sup> 26 U.S.C. 5861(d).

<sup>3</sup> See *Freed*, *supra* note 1, at 609.

<sup>4</sup> 501 U.S. 600 (1994).

<sup>5</sup> *Id.* at 613.

endurance of strict criminal liability. Strict criminal liability has been relentlessly condemned as unjust and unfair, unconstitutional, doctrinally wrong, undermining the moral power of criminal law, and an ineffective deterrent.<sup>6</sup> Yet, despite decades of harsh,<sup>7</sup> nearly unanimous criticism, strict liability continues to occupy an important place in criminal law.<sup>8</sup>

Even more perplexing, however, is the confusion surrounding the limited scope of strict criminal liability. As demonstrated by *Staples* and *Fried*, courts seem to be selective in their endorsement of strict criminal liability. Strict liability governs only certain elements of a limited set of offenses. Moreover, there is no clear guidance as to when will strict liability apply and when it will not.<sup>9</sup> On the other hand, the selective application of strict liability transcends jurisdictional boundaries, as strict liability tends to be applied somewhat consistently with respect to the same limited set of offense elements across different jurisdictions.<sup>10</sup> How can the persistence of strict liability, and its limited scope, be explained?

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<sup>6</sup> See Kenneth V. Simons, *Rethinking Mental States*, 72 B. U. L. REV. 463,507 (1992) (discussing an argument according to which defendants who are unaware of legally relevant circumstances cannot be deterred); Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322 (1966) (arguing for constitutionalization of mens rea principles); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109 (“[T]o punish conduct without reference to the actor’s state of mind is both inefficacious and unjust”); Henry Hart Jr., *The Aims of the Criminal Law*, 23 LAW & CONTMP. PROBS. 401, 422 (Winter, 1958) (arguing, in the context of strict liability, that “there can be no moral justification” for condemning the blameless).

<sup>7</sup> See, e.g., James J. Hippard, Jr., *The Unconstitutionality of Criminal Liability without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039, 1040 (1973) (strict liability crimes are “unconstitutional anomalies that the Supreme Court should have suppressed long ago”).

<sup>8</sup> See also Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 831 (1999) (“Strict liability has endured decades of unremitting academic condemnation”); John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM. CR. L. REV. 111, 116-117 (1996) (most states utilize strict liability punishments and continue to characterize strict liability offenses as crimes). *But cf.* Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 861 (1999) (arguing, in the context of strict criminal liability, that the Supreme Court has recently “reinvigorated its concern with protecting innocent persons as the bedrock of federal criminal law”).

<sup>9</sup> Cite sources expressing frustration.

<sup>10</sup> Cite cases of strict liability in Britain.

### *Costly Ignorance*

The thesis offered by this Paper can be summarized as follows. By linking criminal liability to the amount of information held by offenders, mens rea allows offenders to escape liability for their misconduct by maintaining their ignorance. At first, this might imply that mens rea is inherently incapable of preventing misconduct. The failure of mens rea, however, will be rather limited when offenders find ignorance to be too costly. If ignorance is sufficiently costly, offenders will become (or remain) informed notwithstanding the enhanced risk of criminal penalties associated with losing one's ignorance under mens rea. Mens rea would fail only when ignorance costs are sufficiently low, thereby making it worthwhile for offenders to pursue ignorance in order to engage in misconduct without being penalized. Strict liability is thus likely to replace mens rea when mens rea would inevitably fail to prevent misconduct in light of the low cost of ignorance.

Consider again the rulings in *Fried* and *Staples* in light of this explanation, which I shall label the *costly ignorance* thesis. Absent strict liability for failure to register, owners of firearms derive no benefit from learning about the registration status of their firearms and thus have no reason to inquire into this matter. Put differently, ignorance as to the registration status of a firearm is costless. Thus, limiting criminal liability to owners who know their firearms to be unregistered would utterly fail to make owners register their firearms. Strict liability, in contrast, would induce all owners to take the appropriate step to verify the registration status of their firearms. Unlike its registration status, a firearm's capacity to fire automatically is a matter for which ignorance costs are likely to be relatively high. Firing a rifle without knowing the number of shots produced by pulling the trigger is unsafe and might result in injury to the owner. Owners,

therefore, have a clear incentive to inquire about the character of their firearm. Moreover, it is very unlikely that owners would avoid such inquiry for the sole purpose of being in a position to deny truthfully any knowledge that might subject them to penalty. Thus, although adopting a knowledge requirement with respect to the character of firearms will create some adverse incentives to acquire information, this distortion is unlikely to result in firearm owners escaping criminal liability by remaining ignorant.

The Paper makes several contributions to the existing understating about the role of strict liability in criminal law. First, the Paper systematically analyzes the adverse incentives to acquire information associated with mens rea. The basic observation that a criminal offense based on mens rea rewards ignorance and discourages potential offenders from acquiring information is rather intuitive. Oddly, however, no serious effort has been made to study this fundamental failure of mens rea, uncover its causes, and explore its implications for criminal law. Rather, the negative informational effect of mens rea has been recognized only in the limited contexts of the wilful ignorance doctrine and the treatment of mistakes of law.<sup>11</sup> As this Paper shows, however, this inherent flaw of mens rea accounts not only for the persistent attractiveness of strict liability, but also for its limited scope.

Second, the Paper develops the costly ignorance thesis to rationalize the selective endorsement of strict liability. Recognizing the inherent flaw of mens rea only intensifies the mystery surrounding the limited domain of strict liability. If mens rea performs so

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<sup>11</sup> See *infra* note 148 (wilful ignorance). In the mistake-of-law context see Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 385 (1998) (“The inevitable drawback of any rule excusing criminal liability for a lack of knowledge of the law is that such a rule celebrates ignorance of the law while making knowledge of it the best and fastest ticket to prison cell”); OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 48 (1881) (“To admit the excuse at all would be to encourage ignorance where the law maker has determined to make men learn and obey”).

poorly, one would expect criminal law to abandon it altogether. Instead, mens rea has served for centuries as the predominant standard of criminal liability. The second insight, therefore, is that ignorance, although rewarded by mens rea, is often costly for potential offenders. When ignorance costs are sufficiently high, offenders are likely to be aware of the relevant facts notwithstanding the adverse incentive to do so associated with mens rea.<sup>12</sup> Thus, other things being equal, strict liability and negligence are likely to govern offense elements for which ignorance is likely to be costless, *i.e.*, elements with respect to which offenders are likely to remain ignorant under a mens rea standard of criminal liability.

Third, the Paper applies the costly ignorance thesis to provide testable predictions concerning the selective endorsement of strict liability and explain many aspects of current doctrine, such as the apparent inconsistency between the holdings of *Fried* and *Staples*, which have thus far eluded satisfactory explanations.

Finally, this Paper highlights the role of several doctrines less problematic than strict liability from a fairness perspective as a substitute to mens rea when ignorance is costless and mens rea is thus likely to fail. Specifically, I explore the role of negligence and non-negligence defense, regulation (rule-based negligence), and willful ignorance.

The Paper's goal is rather modest in scope. It neither advocates greater reliance on strict criminal liability nor questions the numerous normative justifications offered in the criminal law literature in support of the dominance of mens rea. Furthermore, the

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<sup>12</sup> As Part II.D. *supra* explains, however, the presence of ignorance costs does not eliminate the distortions produced by mens rea. Rather, sufficiently high ignorance costs would alleviate those distortions and reduce their practical significance.

### *Costly Ignorance*

Paper does not purport to devise a comprehensive framework outlining the optimal choice between mens rea and strict liability in criminal law. Accordingly, the Paper does not offer policymakers prescriptions as to when it would be desirable to substitute strict liability for mens rea. Rather, I seek to unravel the mystery surrounding the indeterminate jurisprudence of strict liability by uncovering the reasons making it probable that strict liability would replace mens rea with respect to a particular element of an offense. As Part III demonstrates, notwithstanding the Paper's limited scope, the insights produced by the costly ignorance thesis make significant inroads in explaining the selective endorsement of strict liability. Moreover, as will be shown below,<sup>13</sup> understanding the reasons underlying the emergence of strict liability is an important step in devising alternatives perceived to be less problematic than strict liability.

The predominant justification of strict criminal liability posits that strict liability is adopted where courts cannot cope with the heavy informational burden of proving, beyond a reasonable doubt, defendants' subjective mental state.<sup>14</sup> The paradigmatic scenario of the criminal offense depicts a fully informed offender who decides to commit the prohibited conduct. Those who seek to rationalize strict criminal liability usually stick to that paradigmatic scenario and argue that mens rea is undesirable where *courts* are not fully informed, *i.e.*, where courts find it too costly to determine whether defendants committed the offense with the requisite mental state. This Paper, by contrast, shows that mens rea may be abandoned in favor of strict liability not only when courts are not fully informed, but also when the typical *offender* is not fully informed. Contrary to the assumptions underlying the paradigmatic scenario described above, criminal law

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<sup>13</sup> See Part V *infra*.

<sup>14</sup> See *infra* Part I.A.

targets not only fully informed criminals but also genuinely ignorant offenders,<sup>15</sup> who must be induced to obtain information. Since it links liability to the amount of information held by defendants, mens rea is inherently incapable of inducing ignorant offenders to become informed, and may even encourage offenders to insulate themselves from socially valuable information.<sup>16</sup> Unlike mens rea, strict liability (and negligence) encourages actors to become informed when it is socially desirable to do so.

The Paper proceeds as follows: Part I outlines the justifications offered thus far in support of strict criminal liability. While some of these rationales do account for the superiority of strict liability over mens rea, all of them, including those offered by the law-and-economics literature, overlook the perverse effect of mens rea on actors' informational incentives, and fail to account for the entire range of offenses where strict liability is prevalent.

Part II constructs the costly ignorance thesis to explain the limited scope of strict liability. First, I analyze the failure of mens rea to control misconduct when offenders are ignorant, and show that strict liability is superior to mens rea under these circumstances

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The costly ignorance thesis predicts the conditions under which strict liability is likely to replace mens as a means of social control. Part III tests this prediction by reviewing selected aspects of the notoriously perplexing jurisprudence of strict criminal

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<sup>15</sup> See also David Luban, *Contrived Ignorance*, 87 GEO. L. J. 957, 959 (1999) (defining "deniability" as the capacity to deny guilty knowledge "truthfully").

liability. It will be shown that the costly ignorance thesis sheds light on the emergence of strict liability for statutory rape, liquor-sale to minors, child pornography, and the liability of senior corporate officers as well as on the different treatment of mistakes of law and of fact.

Strict liability is not the only alternative to mens rea. Part IV briefly discusses several doctrines that may be adopted when the costly ignorance thesis predicts that mens rea would fail. These alternatives include strict liability, negligence, non-negligence defense, regulation (rule-based negligence), and wilful ignorance. The purpose of this discussion is to provide preliminary intuitions about the costs and benefits associated with each alternative. Part V concludes.

Mens rea, strict liability, and negligence are terms of art that often denote different concepts.<sup>17</sup> To clarify the arguments pursued below, it is essential to define the way in which this Paper uses these terms. First, all liability standards apply to a particular element of an offense and not to the offense as a whole.<sup>18</sup> For example, strict liability may govern the age-of-the-victim element of statutory rape, but not necessarily other elements of that offense. Second, all liability standards refer to the degree to which offenders are informed, or exercise effort to become informed, about the nature of their conduct, or the circumstances accompanying it. Third, the Paper confines itself to efforts

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<sup>16</sup> Surprisingly, the observation that mens rea discourages investment in information, though mentioned in other contexts, has never been relied upon to justify strict liability. *See infra* text accompanying notes 11, and 148-153.

<sup>17</sup> *See* MODEL PENAL CODE §§ 2.02(2) (distinguishing purpose, knowledge, and recklessness); Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 685-687 (1982) (describing different conceptions of mens rea). For different meanings of negligence, see Simons, *Rethinking Mental States*, *supra* note 6, 547 (noting that negligence might refer to a mental state, unreasonable beliefs, or to the individual's unreasonable conduct). *See also* Douglas N. Husak, *Varieties of Strict Liability*, 8 CAN. J.L. & JURISPRUDENCE 189 (1995) (distinguishing between seven different meanings of strict liability).

to verify existing facts rather than to efforts to learn about the future outcome of one's conduct.<sup>19</sup> Finally, I use the terms mens rea, knowledge, and awareness interchangeably. Under mens rea, therefore, an individual must be aware of the existence of a particular element of the offense in order to be convicted. Under negligence, an individual will be held liable only when he fails to exercise due level of effort to obtain information. Under strict liability, an individual will be held liable for committing the prohibited behavior regardless of the amount of information she holds, or her effort to obtain that information.<sup>20</sup>

## II. EXISTING JUSTIFICATIONS

This Part reviews the justifications offered thus far for the emergence of strict criminal liability. I discuss only justifications providing affirmative reasons for the adoption of strict criminal liability. I will not present arguments aimed at exploring the proper *limits* of strict criminal liability – when would strict criminal liability be fair,<sup>21</sup> just,<sup>22</sup> or constitutional.<sup>23</sup> Likewise, this Part will not discuss the rules of interpretation

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<sup>18</sup> By focusing on the requisite mental state for specific elements, the Paper implicitly adopts the element-analysis approach to criminal law. *See generally* Robinson & Grall, *Id.* (analyzing the importance of the element-analysis concept to a rational and just system of criminal law).

<sup>19</sup> The crime of felony murder, for example, is beyond the scope of the paper. Felony murder consists of causing a death during the commission of a felony where no showing of a subjective mental state is required with regard to the element of causing death. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 126-127 (2d ed. 1995).

<sup>20</sup> The Paper employs these standards somewhat differently than the economic literature analyzing tort standards. Within the economic analysis of torts, strict liability and negligence usually refer to the amount of effort exercised to prevent a future harm. In our context, however, these standards refer to the amount of informational effort exercised by the offender.

<sup>21</sup> *See, e.g.,* Michael Davis, *Strict Liability: Deserved Punishment for Faultless Conduct*, 33 WAYNE L. REV. 1363 (1987) (retribution justifies strict liability with minor penalties because of the unfair advantage of faultless conduct).

<sup>22</sup> *See, e.g.,* Kenneth W. Simon, *When is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075 (1997) (exploring circumstances under which strict liability may be partially defended on retributive grounds).

<sup>23</sup> *See, generally,* Alan C. Michaels, *Constitutional Innocence*, *supra* note 8 (offering a theory to distinguish between constitutional strict liability and unconstitutional strict liability); Louis D. Bilionis,

courts employ to determine whether a given statutory offense imposes strict liability or mens rea.<sup>24</sup>

A. *Difficulty of Proof*

The predominant explanation for the emergence of strict criminal liability focuses on the difficulty of proving mens rea. Under mens rea, the prosecution must prove beyond reasonable doubt that the defendant committed the offense with the requisite subjective mental state. Under a mens rea standard concerning the consent element in rape, for instance, the prosecution has to prove that the defendant was aware of the victim's lack of consent.<sup>25</sup> Subjective mental states are inherently difficult to prove, and the prosecution can often rely only on circumstantial evidence to support its case. Given the daunting task of proving defendants' knowledge, strict liability may be superior to mens rea in two important respects.

*Administrative Cost.* Strict liability relieves the system from the large administrative costs associated with mens rea. Under strict liability, all the prosecution has to prove is the existence of the elements of the *actus reus* – the acts committed by defendants and the accompanying circumstances.<sup>26</sup> Thus, the administrative costs

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*Process, the Constitution, and Substantive Criminal Law*, 96 Mich. L. Rev. 1269 (1998) (arguing that constitutional objections to strict liability overlook institutional and process considerations).

<sup>24</sup> Those considerations usually focus on elements such as the magnitude of the sanctions, legislative intent, and whether the offense is derived from the common law. *See Note, Mens Rea in Federal Criminal Law*, 111 HARV. L. REV. 2402, 2402-14 (1998) (reviewing how the Supreme Court has interpreted mens rea requirements in federal criminal statutes); DRESSLER, *supra* note 19, at 126; Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENV. L. 1165 (1995) (suggesting an analytical framework to determine the requisite mental state under environmental statutes).

<sup>25</sup> *See, e.g., Regina v. Morgan*, [1976] A.C. 182.

<sup>26</sup> I do not discuss the relationship between strict liability and the requirement of voluntary conduct. *See generally* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 249-50 (6<sup>th</sup> ed. 1995) (discussing the involuntary act defense to strict liability offenses); Larry Alexander, *Reconsidering the Relationship among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, in *CRIME, CULPABILITY AND REMEDY* 84 (Ellen Frankel Paul et al., ed. 1990) (same).

associated with verifying defendants' thoughts – investigative, prosecutorial, and judicial time and effort – are eliminated,<sup>27</sup> and enforcement authorities and courts can perform their tasks effectively at a low cost. Because overall administrative costs equal the number of trials multiplied by the administrative cost per trial, strict liability tends to be superior to mens rea when we expect an exceptionally large number of cases to reach the court,<sup>28</sup> or when we expect the administrative cost per case to be high.<sup>29</sup>

*Error.* The subjective nature of mens rea, combined with the heavy standard of proof of the criminal process, increases the probability of an error in favor of defendants.<sup>30</sup> Systematically erring in favor of defendants decreases the expected liability cost of potential offenders, thereby reducing their level of compliance efforts, and diluting the deterrent effect of the criminal sanction.<sup>31</sup> Under strict liability, in contrast, the risk of systematically erring in favor of defendants is much lower than under mens rea.

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<sup>27</sup> See Alexander *id.*, 88; Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 69 (1933).

<sup>28</sup> See Sayre, *id.*

<sup>29</sup> See, e.g., *Ex Parte Marley*, 175 P.2d 832, 835 (Sct Cal. 1946) (“[T]here are many acts ... where the ability of the state to establish the element of criminal intent would be so extremely difficult if not impossible of proof, that in the interest of justice the legislature has provided that the doing of the act constitutes a crime, regardless of knowledge or criminal intent on the part of the defendant.”).

<sup>30</sup> See, e.g., *State v. Buttrey*, 651 P.2d 1075, 1077 (Or. Sct. 1982) (“Strict liability statutes have been passed because of the difficulty in proving intent, knowledge, recklessness or negligence.”); Miles Smith & Anthony Pearson, *The Value of Strict Liability*, (1969) CRIM. L. R. 5, 12 (reporting a survey among British food and drug authorities, which found enforcers believe that defendants would easily mislead courts if strict liability was not imposed).

<sup>31</sup> See Steven S. Nemerson, Note, *Criminal Liability without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517, 1543 (1975) (strict liability deters those who believe that their fault is unprovable in court); HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 64 (1968) (describing this phenomenon as the utilitarian justification of strict liability). Also, systematic errors in favor of defendants may induce offenders to present courts with false excuses in order to increase the likelihood of error in their favor. Presenting these false excuses increases the average administrative cost per case. See PACKER *id.*

The difficulty-of-proof justification, however, is incomplete. Mens rea is undeniably more difficult and more costly to prove than strict liability. But what are the conditions under which these costs justify the departure from the deep-rooted reliance on mens rea as a prerequisite to criminal liability?<sup>32</sup> Advocates of the difficulty-of-proof justification have provided various responses to that question: when penalties are exceptionally low,<sup>33</sup> when the social interest protected by the offenses is particularly important,<sup>34</sup> or when most offenders are aware of the requisite facts.<sup>35</sup> Based on these differing, perhaps even contradictory,<sup>36</sup> responses, the difficulty-of-proof rationale might account for the emergence of strict liability for offenses, such as minor traffic violations, where the number of violations is relatively large, and, therefore, requiring the prosecution to prove defendants' subjective mental state would probably paralyze courts and enforcement authorities. However, the difficulty-of-proof rationale does not explain the emergence of strict liability for offenses, such as child pornography and statutory rape, where sanctions are relatively harsh and the number of trials is not expected to be

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<sup>32</sup> See John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1084 (1999) (noting that all strictures on prosecutors obstruct prosecutorial efficiency).

<sup>33</sup> See Sayre, *supra* note 27, at 70 (“The penalties for strict liability offenses are so slight that courts can afford to disregard the individual in protecting the social interest.”).

<sup>34</sup> This argument implies that the social cost of underdeterrence is very high due to large magnitude of the expected social harm. See, e.g., *State v. Buttrey*, 651 P.2d 1075, 1079 (Or. Sct. 1982) (rationalizing strict liability for driving under suspension on the grounds that “The legislature was so concerned with the risk to person and property that it wanted to make certain conduct punishable as a crime, without fault.”); Nemerson, *supra* note 31, at 1557 (arguing that strict liability is imposed where an offense threatens wide spread and serious harm).

<sup>35</sup> See Nemerson, *supra* note 31, at 1543 (difficulty-of-proof justifies strict liability when most people who commit the offense are “at fault”). This argument, however, doesn’t specify the conditions under which most actors are expected to be at fault.

<sup>36</sup> The “low penalties” argument stands in sharp contradiction with the argument according to which strict liability is desirable where the social harm associated with the offense is particularly large. If the social interest at stake is exceptionally large, and assuming some correlation between social harm and the magnitude of sanctions, why are sanctions for strict liability crimes set so low?

especially large.<sup>37</sup> The costly ignorance thesis offered by this Paper, by contrast, does illuminate the role of strict liability for offenses of that type.

*B. Level of Activity, Informational Cost and Extraordinary Care*

The level-of-activity justification focuses on the offender's decision to engage in the activity associated with the criminal offense.<sup>38</sup> Unlike mens rea (and negligence), strict liability imposes liability even on actors who lack the capacity to obtain the information characterizing their conduct as unlawful. Thus, people who believe they are unable to obtain such relevant information, and for which the expected liability cost exceeds the expected gains from engaging in the underlying activity, would decline to engage in this activity, or reduce their level of activity.<sup>39</sup> Since these actors are incapable of engaging in the activity with the due level of care, their decision not to undertake the activity is socially desirable. If a person believes she cannot ensure the correct labeling

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<sup>37</sup> On the significance of the distinction between the difficulty-of-proof rationale and the informational-incentives thesis see text accompanying notes 103-104 *infra*.

<sup>38</sup> The connection between strict liability and the control of level of activity has been recognized by the economic literature as one of the advantages of strict liability over negligence. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW*, 24 (1987). Note, however, that the application of that argument to criminal law has focused on the decision to engage in an activity rather than on the level of engagement. See *infra* text accompanying notes 45-47. Most of the sources discussed below do not explicitly describe their arguments as "level of activity" arguments. For clarity of exposition, I took the freedom of grouping all arguments that focus on the effect of strict liability on private decisions to engage in particular activities under the "level of activity" category.

<sup>39</sup> Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1222 (1985) ("[W]e introduce a degree of strict liability into criminal law as into tort law when a change in activity level is an efficient method of avoiding social cost."); James B. Brady, *Strict Liability Offenses: A Justification*, 8 CRIM. L. BULL. 217, 222-24 (1972) (a person who knows about the existence of strict liability and does not regard himself as capable of meeting the high standard of care imposed might well choose not to enter the field); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 736-7 (1960) (strict liability offenses might have the added effect of keeping a relatively large class of persons from engaging in certain kind of activity).

Posner also refers to strict liability for minor offenses but argues that they are not crimes in the functional sense as they are punished by small and nonstigmatizing fines, and question the need for public enforcement of offenses of this type. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, 260 (5<sup>th</sup> ed.,

of drugs, for instance, she arguably should not be appointed as the manager of a drug-distributing firm.<sup>40</sup>

As a matter of economic theory, the level-of-activity explanation may explain the emergence of strict liability. The problem, however, lies in the way in which the literature has applied the level-of-activity justification to criminal law. From an economic perspective, the criterion for identifying activities the level of which should be regulated is the dangerousness of the activity.<sup>41</sup> The criteria offered by the literature to identify such activities, however, are surprisingly indeterminate. Some commentators have simply assumed that certain activities are undesirable without providing explanations;<sup>42</sup> some refer to moral notions to identify those activities,<sup>43</sup> and others rely on the constitutional protection of an activity to determine whether it should be regulated.<sup>44</sup> Moreover, all commentators adopt a binary view, according to which the activity is either undesirable, and thus should be regulated, or desirable, and thus must

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1998). According to Posner, offenses committed inadvertently should not be criminally prohibited, as they do not constitute “pure coercive transfers”. See Posner, *id.* at 1221.

<sup>40</sup> This example draws on the facts of *United States v. Dotterweich*, 320 U.S. 277 (1943) (convicting the president of a corporation for the shipping mislabeled drugs).

<sup>41</sup> See SHAVELL *supra* note 41, at 24 (regulating the level of activity becomes important when the magnitude of the losses caused by the activity is high); A Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law* 23-25 (Discussion Paper No. 235, 5/98, John M. Olin Center for Law, Economics and Business, Harvard Law School) (applying that rationale to public enforcement of law).

<sup>42</sup> See Posner, *supra* note 39, at 1222 (stating that we do not count the avoidance of that activity as social cost and not explaining why is that so); See also Philip E. Johnson, *Strict Liability: The Prevalent View*, in 4 *ENCYCLOPEDIA OF CRIME & JUSTICE* 1518, 1520-21 (Sanford H. Kadish ed., 1983) (arguing that strict liability may decrease the level of “productive” business activity without clarifying the distinction between productive and unproductive activities).

<sup>43</sup> See, e.g., Dan M. Kahan, *Is Ignorance of Fact an Excuse Only for the Virtuous?*, 96 *MICH. L. REV.* 2123 (1998) (arguing for moral norms as the basis for the introduction of strict liability); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 *CORNELL L. REV.* 401, 424 (1993) (strict liability may be imposed when the defendant’s conduct is “morally questionable”).

<sup>44</sup> See Michaels, *supra* note 8, at 834 (arguing that strict liability is constitutional only when the intentional conduct covered by the statute could be made criminal by the legislature).

not be regulated.<sup>45</sup> Such an approach is theoretically problematic,<sup>46</sup> and practically difficult to apply.<sup>47</sup>

A different explanation focuses on the cost of obtaining information. Under that rationale, strict liability is desirable only where the cost of obtaining information is relatively low.<sup>48</sup> Imposing strict liability in other cases would overdeter offenders by inducing them to take socially wasteful steps to obtain relevant information, or by discouraging them from engaging in socially desirable activities.<sup>49</sup> Under that argument, the only factor that affects the choice between mens rea and strict liability is the cost of obtaining information. However, the following parts will show that other factors, such as

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<sup>45</sup> See, e.g., Kahan, *supra* note 43, at 2126 (distinguishing between conduct generating licit utility and conduct generating illicit utility); Wasserstrom, *supra* note 39, at 737-8 (distinguishing between “socially beneficial” and “undesirable” activities).

<sup>46</sup> The distinction between desirable and undesirable behavior is problematic for the following reasons. First, if the activity is undesirable – why not explicitly prohibit it? Second, under the idealized assumption that sanctions are set to equal social harm, the influence of strict liability on actors’ level of activity will always be optimal, regardless of the classification of the activity as desirable or undesirable. See discussion of chilling effects under strict liability – *infra* text accompanying notes 130-131. Another problematic aspect of the distinction is illustrated by Kahan, *supra* note 43, at 2126. Kahan’s assumption is that any reduction in “licit-utility activity” due to strict liability is undesirable; but why is that so? Why can’t we accept some reduction in the level of “licit-utility activities” in order to prevent the social harm protected by the criminal offense?

<sup>47</sup> See also Daniel Yeager, *Kahan on Mistakes*, 96 MICH. L. REV. 2113, 2122 (1998) (criticizing Kahan for failing to provide his theory with moral content).

<sup>48</sup> See Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741, 792 (1993) (objective liability standards, such as negligence and strict liability, may be optimal when the “marginal cost of self-characterizing information is bounded at a low level”). Parker also approves of strict liability for “public welfare” offense, which are confined to highly regulated activities and punishable only by modest monetary fines. See *supra* at 786-787 (explaining that under these conditions, the risk of excessive investment in information is negligible).

<sup>49</sup> Parker’s thesis relies on two critical empirical claims: (1) criminal sanctions are upwardly biased. See Parker *id.* 756-757 (discussing the public informational problem faced by the institutions charged with enforcement and with setting sanctions’ magnitude.); (2) the informational cost (to the policy maker) of specifying the optimal sanction is higher than the social cost associated with no incentives to obtain information. See Parker, *id.*, at 776. These assumptions are not only empirically questionable, but also trivialize the social value of information whereas, as will be argued in the following parts, inducing actors to obtain information may be an important function of criminal law. To the extent that obtaining information is socially desirable, one cannot simply assume that the social cost of ignorance would always be lower than the cost of specifying the “correct” sanction. Parker admits that mens rea does not induce actors to obtain information but argues that this function is served by tort law. See *id.* at 777, n. 101.

the effectiveness of informational efforts, the presence of ignorance costs, and the social value of information may also determine the likelihood of adopting strict liability.

It has also been argued that strict liability induces actors to exercise extraordinary care.<sup>50</sup> Although the intuition underlying it is appealing, the extraordinary-care rationale evidently lacks theoretical basis. By definition, the due level of care denotes the limit above which additional care is undesirable. It is not clear why anyone would be interested in inducing offenders to exercise care above that level.<sup>51</sup> Moreover, the extraordinary-care justification also fails to explain when it would be desirable to require actors to exercise extraordinary care, and when due care is sufficient.<sup>52</sup>

To summarize, the predominant rationales of strict criminal liability are the difficulty of proving mens rea and the need to control undesirable activities. Both explanations provide only incomplete justifications as they fail to cover the full range of offenses and offense-elements governed by strict liability. By focusing exclusively on the effect of each standard on offenders' effort to obtain information, the following parts explore the conditions under which mens rea would inevitably fail, thereby encouraging regulators and courts to adopt objective liability standards.

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<sup>50</sup> See Alexander, *supra* note 26, at 88 (strict liability will induce "innocent" actors to exercise extraordinary care); Wasserstrom, *supra* note 39, at 736 (pointing to the possibility that strict liability might induce a person to exercise greater caution).

<sup>51</sup> See PAUL H. ROBINSON, *CRIMINAL LAW*, 254 (1997) (criticizing the goal of extraordinary care as questionable); Simon, *supra* note 22, at 1132-3 (same).

<sup>52</sup> Mark Kelman offers a different perspective on the role of strict liability. See Mark Kelman, *Strict Liability: An Unorthodox View*, in 4 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1512, 1516-7 (Sanford Kadish, ed., 1983). He argues that strict liability operates to broaden the time frame within which the individual's conduct is evaluated. Expanding the time frame induces actors to take precautionary steps previous to their engagement in the conduct underlying the offense. This time-frame argument essentially points to an insight of the economic analysis of tort law according to which strict liability induces actors to exercise multidimensional care. See SHAVELL *supra* note 38, at 9.

### **III. MENS REA AND THE COST OF IGNORANCE**

This Part constructs the analytical framework underlying the costly ignorance thesis. Section A uncovers a key flaw of mens rea: by linking liability to the amount of information held by defendants, mens rea rewards ignorance and allows potential offenders to engage in misconduct as long as they are unaware of at least one requisite element of the offense. Section B posits that this flaw of mens rea cannot account for the limited scope of strict liability. Thus, in the remainder of this Part, I explain why, notwithstanding this failure of mens rea, strict liability has remained limited in scope. First, in section C, I explore the effect of ignorance costs on the effectiveness of mens rea as a means of preventing misconduct. Then, in section D, I outline the circumstances under which ignorance is expected to be costly for offenders.

#### *A. Mens Rea and Rewards to Ignorance*

This section shows that mens rea discourages potential offenders from obtaining socially valuable information characterizing their conduct.<sup>53</sup> Strict liability, in contrast, provides potential offenders with optimal incentives to obtain information of this type. The underlying intuition is rather straightforward: under mens rea, acquiring information exposes offenders to a greater risk of criminal liability, whereas genuine ignorance enables them to enjoy the benefits associated with the prohibited conduct while effectively shielding themselves from the risk of criminal liability. Ignorance, therefore, is the best strategy under any subjective awareness requirement.

**1. The Age Verification Example**

Consider a typical offense involving strict liability – the sale of alcohol to a person under the age of 21.<sup>54</sup> Departing for the paradigmatic scenario of the criminal offense, the discussion below assumes that, *ex ante*, sellers do not know the age of each customer who wishes to purchase alcohol.<sup>55</sup> Accordingly, sellers must exercise some degree of costly effort to ensure that underage customers would not purchase alcohol. Sellers thus face two related decisions: first, whether to take the necessary effort to verify a potential customer's age; second, based on whatever information they have, whether to sell an alcoholic beverage to a customer. This section compares the performance of *mens rea* and strict liability in preventing sellers from selling alcoholic beverages to minors.

In order to demonstrate the effect of strict liability and *mens rea* on the sale of alcohol to minors, it will be useful to rely on the following numerical example. Purchasing an alcoholic beverage by a minor produces a social harm of 1,000. Regardless of the age of the buyer, each sale of an alcoholic beverage produces a net profit of 200 to the seller. The cost of age-verification per customer is fixed at 20, representing, for example, the time spent on requiring customers to present age documentation.<sup>56</sup> Age-verification effort is fully effective, that is, sellers who decide to engage in age-verification will detect all underage customers, and will not mistakenly find adult customers to be underage. The probability of a customer being a minor is 0.05.

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<sup>53</sup> On the analytical distinction between the social and the private value of information see Jack Hirshleifer, *The Private and Social Value of Information and the Reward to Incentive Activity*, 61 *AM. ECON. REV.* 561 (1971).

<sup>54</sup> See discussion in part III.A. *infra*.

<sup>55</sup> This assumption is discussed in section C *infra*.

<sup>56</sup> For simplicity, I assume that the cost of verification is fixed and identical for all potential customers. In fact, however, the cost of age verification, and the probability that a potential customer is under 21, are likely to decrease with the size of the difference between the actual age of the customer and 21.

The penalty for selling alcohol to a minor is a fine of 1,000, the social harm associated with the consumption of alcohol by a minor.<sup>57</sup> Assume that sellers who are unaware of their customers' age sell them liquor, and that sellers who know their customers are underage refuse to sell them alcohol.<sup>58</sup> Finally assume that all sellers who allow underage customers to purchase alcohol are detected, brought to trial, and ultimately convicted.<sup>59</sup>

First, consider the social interest in acquiring information about the age of potential customers, *i.e.*, how much effort should sellers undertake to inquire about the age of their customers?<sup>60</sup> From society's perspective, requiring customers to present age documentation is desirable only when the cost associated with this practice does not exceed the social value of the information acquired through age verification. The value

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<sup>57</sup> Whether the magnitude of sanctions does in fact equal expected social harm (and whether they ought to equal social harm) is a matter of empirical (and theoretical) debate. *See, e.g.*, Parker, *supra* note 48, at 756-757 (asserting that economic theories of crime fail to recognize that sanctions are upwardly biased); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on The Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. REV. 193, 225-228 (1991) (arguing that criminal law does not aim at pricing behavior, and thus sanctions should not equal social harm). The essence of the argument developed in this Paper is unaffected by the positions one holds in that debate. Under *mens rea*, the social value of information will ever exceed the private value of information, regardless of the mechanism that determines the magnitude of sanctions. Only when sanctions are sufficiently greater than the socially optimal level, one might agree with Parker that under investment in information is preferred to over investment. *See* Parker, *The Economics of Mens Rea*, *supra* note 48, at 776-777.

<sup>58</sup> The last two assumptions imply that, without information, it would be socially desirable for the sale to take place, *i.e.*, that the social harm associated with the consumption of alcohol by a minor, discounted by the probability that a customer is a minor, is smaller than the benefit derived from each sale. If this assumption does not hold, it would be socially desirable to avoid all sales unless there is information indicating that the buyer is over 21. *Cf.* Steven Shavell, *Liability and the Incentive to Obtain Information about Risk*, 21 J. LEGAL STUD. 259 (1992) (studying a model in which actors exercise moderate level of care when they have no information about risk.)

<sup>59</sup> An additional, somewhat technical, assumption is that sellers are risk neutral. This assumption has no implications for the analysis of *mens rea* in this section, but is important for the analysis of strict liability.

<sup>60</sup> The analysis adopts a unilateral perspective with respect to effort to acquire information, *i.e.*, the analysis assumes that it is optimal only for sellers to exercise effort to verify customers' age. The analysis thus assumes that law should not provide customers with incentives to disclose relevant information to sellers. This assumption is reasonable for offenses of paternalistic nature, such as statutory rape and liquor sale to minors, where victims are essentially interested in the commission of the offense. Where it would be optimal for victims to reveal their type, the analysis might differ. On the role of criminal law in providing

of verifying customers' age, in turn, equals the difference between social welfare when age information is obtained and social welfare in the absence of age verification. Table 1 presents the social value of age verification in our example.

**TABLE 1: SOCIAL VALUE OF AGE VERIFICATION**

<i>Verification</i>	<i>Seller Profit</i>	<i>Expected Harm</i>	<i>Net Welfare</i>
Yes	$0.95 \times 200 = 190$	None	190
No	200	$0.05 \times 1000 = 50$	150

In the absence of age verification, all customers, including minors, buy alcohol. Social welfare without verification thus equals sellers' profit per sale, 200,<sup>61</sup> minus the expected harm produced by selling alcohol to a minor, *i.e.*, the harm associated with the consumption of alcohol by a minor discounted by the probability that each customer is a minor. Under age verification, in contrast, the expected harm associated with the consumption of alcohol by minors will be zero, since minors will not be able to purchase alcohol. Since sellers will make a sale only in 95% of the cases, however, their expected profit will also decrease to 190. The social value of age verification thus equals 40. Since the cost of age verification is only 20, it is clearly desirable that sellers to verify their customers' age.

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incentives for *victims* see Omri Ben Shahar & Alon Harel, *Blaming the Victim: Optimal Incentives for Private Precautions against Crime*, 11 J. LAW ECON. & ORG. 434 (1995).

<sup>61</sup> For simplicity, I assume that the private benefit to sellers is included in the social welfare function. This assumption does not affect the conclusion regarding the influence of mens rea on private informational incentives. On whether offenders' gains are included in social welfare, see e.g., Jeff L. Lewin & William N. Trumbull, *The Social Value of Crime?*, 10 INT'L REV. L. & ECON. 271 (1990). I also assume that sellers capture the full benefits of sales, *i.e.*, that the private benefit of buyers, whether minor or not, equals zero.

## 2. *Age Verification under Mens Rea*

Now consider the effect of mens rea on the decision of sellers to engage in age verification. Under a mens rea standard, sellers will be liable for selling alcohol to minors only if they make a sale to a minor while knowing that the purchaser is younger than 21. In order to focus the analysis on the effect of mens rea, I assume that courts will be fully informed, *i.e.*, courts will never make mistakes in determining whether a seller, at the time of a sale, was aware of her customer young age. Will sellers exercise the effort necessary to verify customers' age?

Obviously, the answer is negative. Under a mens rea standard, sellers have no reason to ask customers about their age. If they maintain their ignorance concerning customers' age, sellers will be able to maximize the number of sales (and therefore their profits) without being exposed to the risk of criminal liability. If they do require customers to present age documentation, sellers will detect all underage customers. Once sellers become aware that a customer is underage, the threat of criminal liability will deter them from consummating a sale to this customer.<sup>62</sup> Sellers' expected profits under age verification would undoubtedly be lower than their expected profits under conditions ensuring their ignorance with respect to customers' age. The effect of mens rea on sellers' decision to verify customers' age with respect to the numerical example introduced above is summarized in Table 2.

**TABLE 2: AGE VERIFICATION UNDER MENS REA**

<i>Verification</i>	<i>Seller Profit</i>	<i>Expected Sanction</i>	<i>Expected Benefit</i>
Yes	$0.95 \times 200 = 190$	None	190

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<sup>62</sup> This is under the assumption that sellers are fully deterred by the expected sanction, *i.e.*, that the benefit per transaction is strictly smaller than social harm ( $B < H$ ).

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No	200	None	200
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From sellers' perspective, age verification produces a *loss* of 10. When age information is acquired, sellers will refuse to sell alcohol to minors, since the fine for doing so, 1000, exceeds the profit, 200. Thus, under age verification, sellers' expected profit would be only 190. In contrast, the expected profit for a seller that remains ignorant of customers' age would be 200, because such seller could sale alcohol to minors as his ignorance prevents him from facing criminal liability. The value of age information to sellers, therefore, equals the *forgone* benefits from selling alcohol to minors discounted by the probability of a customer being underage. Put differently, the value of age verification under mens rea is negative. Sellers, therefore, will have no reason to verify customers' age under a mens rea standard.

What accounts for the distorted incentives to acquire information produced by the mens rea standard? The negative effect of mens rea on sellers' willingness to engage in age verification is explained by the link between the information held by sellers and their expected liability. Obtaining information about customers' age subjects sellers to a greater risk of criminal liability whereas ignorance allows sellers to capture the profits associated with the regulated activity while effectively shielding themselves from the risk of criminal liability. Ignorance, therefore, is the best strategy under any subjective awareness requirement.

The distorted incentives to acquire information produced by mens rea are not merely a matter of theoretical concern. As the discussion thus far has demonstrated, the fact that sellers attach negative value to age verification implies that sellers will exercise no effort to verify the age of their customers even though such an effort is socially

desirable. This in turn implies that a prohibition on the sale of alcohol to minors accompanied by a mens rea standard would be ineffective. Sellers will take no steps to verify customers' age, and alcohol sales to minors will continue undisturbed despite the criminal liability imposed on those who knowingly sale alcohol to customers under the age of 21.

Moreover, the negative value that sellers attach to age verification implies that sellers not only will decline to spend resources on age verification, but also may choose to invest resources in order to secure their ignorance.<sup>63</sup> To illustrate the implications of this risk, assume that all minors are very young looking, and thus a quick look is sufficient to realize they are underage. Under these circumstances, one may argue that a mens rea standard will successfully prevent the sale of alcohol to minors. But, expecting their inability to remain ignorant when making a sale with their customers present, sellers might take steps to distance themselves from the presence of customers, by hiring employees to perform the sale just for the sake of maintaining ignorance or by selling alcohol online, for example.<sup>64</sup>

### **3. *Age Verification under Strict Liability and Negligence***<sup>65</sup>

Unlike mens rea, strict liability induces offenders to exercise the socially desirable level of informational effort. Under strict liability, sellers will be liable for every purchase of alcohol by a minor regardless of their knowledge about, or the effort they

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<sup>63</sup> This type of effort is different than effort exercised by informed individuals to mislead courts to believe they were uninformed. *See supra* Part II.A.

<sup>64</sup> Indeed, probably to block that evasive channel, Congress has considered considering legislation to ban the sale of firearms online. *See* H.R. 3020, 106<sup>th</sup> Congress (1999) (making illegal the sale of firearms over the internet).

<sup>65</sup> The discussion in this section draws on Shavell, *supra* note 58 (when the sanction equals social harm the investment in information under strict liability and negligence will be optimal). *See also* Louis Kaplow & Steven Shavell, *Private versus Socially Optimal Provision of Ex Ante Legal Advice*, 8 J.L. ECON. & ORG. 306 (1992) (similar argument regarding investment in legal information).

exercise to verify, their customers' age. When sellers are held strictly liable, they bear the full social harm resulting from selling firearms to minors. Since sellers internalize the social cost associated with the purchase of alcohol by minors, the value they attach to age verification will equal the expected decrease in social harm resulting from age verification.<sup>66</sup> Consequently, sellers will be induced to exercise the optimal level of effort to verify the age of their customers. Table 3 summarizes the effect of strict liability on sellers' decision to engage in age verification under our numerical example.

**TABLE 3: AGE VERIFICATION UNDER STRICT LIABILITY**

<i>Verification</i>	<i>Seller Profit</i>	<i>Expected Fine</i>	<i>Net Benefit</i>
Yes	$0.95 \times 200 = 190$	None	190
No	200	$0.05 \times 1000 = 50$	150

Without verification, sellers will sell alcohol to all customers, resulting in a profit of 200. Sellers, however, will also face an expected fine of 50. Sellers' net expected benefit would thus equal 150. Under age verification, sellers will make fewer sales, resulting in an expected profit of 190, but will also face no fine. Thus, the net benefit for sellers that engage in age verification is equal to the social value of information, 40. This means that strict liability provides sellers with optimal incentives to engage in age verification.

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<sup>66</sup> Note that this requires another simplifying assumption: that sellers accurately perceive the likelihood of a customer being underage. Relaxing that assumption may result in either overdeterrence or underdeterrence in terms of private decisions to obtain information. *See also* Louis Kaplow, *Optimal Deterrence, Uninformed Individuals, and Acquiring Information about whether Acts are Subject to Sanctions*, 6 J. L. ECON. & ORG. 93 (1990) (studying optimal magnitude of sanctions taking into account differences in perceptions as to the likelihood of acts being harmful).

To be sure, strict liability will induce offenders to exercise the socially optimal level of effort to acquire information only when the expected sanction equals social harm.<sup>67</sup> Setting sanctions higher than social harm induces over investment in information, and setting sanctions lower than social harm induces under investment in information. Yet, whatever the distortions produced by the failure to set penalties to equal social harm turn out to be, strict liability is undoubtedly superior to mens rea insofar as providing offenders with incentives to acquire information is concerned.

Under negligence, sellers can be convicted only when their effort to verify the age of the customer is below the due level of effort.<sup>68</sup> Assuming courts are fully informed and thus make no errors in setting the due level of age verification, the outcome under negligence would be the same as the one under strict liability.<sup>69</sup> When their effort to verify customers' age is below the socially desirable level, sellers will face a penalty that equals social harm. Thus, sellers will be induced to spend resources on age verification up to the socially desirable level. Sellers will not increase their level of verification effort above the socially optimal level because increasing the effort above the desirable level will not further decrease their liability costs.<sup>70</sup>

This section has relied on several simplifying assumptions, including the assumption that both courts and individuals are fully informed. Relaxing these assumptions does not undermine the basic argument pursued in this section: mens rea induces actors to remain ignorant, whereas objective standards of liability induce actors

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<sup>67</sup> Or, when actors are risk averse, the expected social harm adjusted to risk aversion. *See* Shavell, *supra* note 58.

<sup>68</sup> The socially desirable level of effort is the one for which the marginal cost of effort equals the marginal social value of the information obtained.

<sup>69</sup> *Id.* The precise informational requirements of negligence are specified in Part IV.B. *infra*.

<sup>70</sup> Under negligence, failure to verify age will result in expected liability cost of 50 (0.05x1,000). Sellers, then, will verify the age of their customers.

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to obtain information.<sup>71</sup> Moreover, this basic argument does not rely on a strong assumption about the deterrent effect of criminal law either. Our assumption has been that offenders are genuinely ignorant to begin with. If that is the case, they cannot be found liable under a mens rea standard. As long as strict liability has some deterrent effect on some actors, it would be superior to mens rea in inducing actors to obtain information.

#### *B. What Needs to Be Explained*

The previous section has highlighted a fundamental flaw of mens rea – its inherent failure to induce offenders to acquire valuable information. The previous section has also shown that this failure of mens rea renders it ineffective as a means of social control. Under mens rea, a potential offender can easily eliminate the risk of criminal liability by maintaining her ignorance concerning the elements underlying the offense. Hence, a mens rea standard for selling alcohol to minors, for example, will inevitably fail to prevent the sale of alcohol to minors.

Uncovering this flaw, however, only intensifies the mystery surrounding the limited role of strict liability in criminal law. If criminal liability can indeed be easily evaded by maintaining ignorance, mens rea standards will inevitably fail to prevent criminal behavior. If that indeed is the case, why is strict liability adopted only with respect to a limited set of offenses? Moreover, if mens rea is incapable of controlling misconduct, what accounts for the traditional, centuries-old dominance of mens rea in criminal law doctrine? In the remainder of this Part, I explain why, notwithstanding its

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<sup>71</sup> Relaxing most assumption implies that strict liability may result in either over investment or under investment in information compared to the socially desirable level of informational effort. But even when strict liability results in suboptimal level of effort to obtain information, this suboptimal level would

failure highlighted in the previous section, mens rea remains an effective means of social control.

C. *Costly Ignorance and Mens Rea*

The thesis advanced in this Paper is that, notwithstanding the rewards to ignorance under mens rea, offenders will not maintain their ignorance where ignorance is too costly. In this section, I explore how ignorance costs alleviate the distortions created by the reliance of mens rea on the information held by defendants as a basis for their conviction. In the next section, I review the circumstances under which ignorance is likely to be costly.

The analysis in section A has relied on the assumption that offenders are uninformed with respect to the age of their customers.<sup>72</sup> Under this assumption, the prohibition on the sale of alcohol to minors must achieve two related goals: first, induce sellers to acquire information concerning customers' age; second, deter sellers who know their customers to be underage from selling alcohol to these customers.<sup>73</sup> As section A has demonstrated, mens rea, being incompatible with the former goal, will necessarily fail to prevent the sale of alcohol to minors.

In reality, however, the assumption that offenders are ignorant *ex ante*, and that they will maintain their ignorance in the face of criminal liability based on mens rea, does not always apply. Ignorance is often costly. To avoid the cost of ignorance, potential offenders will make an effort to become informed (or decline taking steps that would

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be greater than the level of informational effort under mens rea (as long as, on average, courts convict more informed actors than uninformed ones.) See also *supra*, notes 57 and 66.

<sup>72</sup> See *supra* text accompanying notes \_\_\_\_.

<sup>73</sup> The analysis in section A has also relied on the implicit assumption is that age verification is socially desirable. Under this assumption, society's interest is that sellers be provided with incentives to engage in age verification. On the importance of this assumption, see discussion in Part III.D.3 *infra*.

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secure their ignorance). If the cost of ignorance is sufficiently large, offenders will decide to become informed notwithstanding the risk of criminal liability associated with the information they acquire. Accordingly, where ignorance costs are sufficiently large, the adverse effect of mens rea on offenders' decision to obtain information may lose its practical significance. In practical terms, when ignorance is sufficiently costly, offenders are likely to be aware of the requisite elements of the offense notwithstanding the enhanced risk of criminal liability associated with such awareness under a mens rea standard. Thus, when ignorance is sufficiently costly, the mens rea standard will be effective in preventing undesirable misconduct. By contrast, where the cost of ignorance is sufficiently low, actors will find ways to ensure their ignorance, thereby undermining the effectiveness of mens rea.

To be sure, I do not posit that, in the presence of ignorance costs, the mens rea standards will supply offenders with optimal incentives to acquire information. As will be explained below, mens rea will always involve some distortions with respect to offenders' incentives to acquire information. I do argue, however, that when ignorance is sufficiently costly, the practical significance of the distorted incentives produced by mens rea would likely be limited.

To demonstrate the effect of ignorance costs, it will be useful to consider again the example involving the sale of alcohol to minors. The previous section assumed that, absent legal intervention in the form of strict liability or negligence, sellers derive no benefit from verifying the age of their customers. Under that assumption, mens rea, which imposes liability only on sellers who know their customers to be underage, has failed to prevent the sale of alcohol to minors. Now assume that sellers derive a gain

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when they inquire about the age of their customers, *i.e.*, that ignorance with respect to customers' age is costly.<sup>74</sup> For example, assume that an advertising agency pays sellers 50 for collecting personal data, including age, about each of their customers. Under the assumption that sellers get paid only for accurate information, they have a clear incentive to learn about their customers' age. Put differently, ignorance with respect to each customer's age becomes costly for sellers. From sellers' perspective, the incentives to acquire information concerning customers' age mitigate the clear disincentive to acquire information under the *mens rea* standard. If the costs of ignorance concerning customers' are sufficiently high, sellers would inquire about the age of their customers notwithstanding the risk of criminal liability associated with that information. Table 4 summarizes the effect of *mens rea* on sellers' incentives to engage in age verification under the assumption that the cost of ignorance with respect to customers' age is 50.

**TABLE 4: IGNORANCE COST AND AGE VERIFICATION**

<i>Verification</i>	<i>Sale Profits</i>	<i>Expected Fine</i>	<i>Verification Gains</i>	<i>Net Benefit</i>
Yes	$0.95 \times 200 = 190$	None	50	240
No	200	None	None	200

Under that assumption, sellers' expected benefit under age verification equals 240. Without age verification, sellers' expected benefit is 200. The value attached by sellers to age verification would thus equal 40 (240 - 200). Since the value of age

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<sup>74</sup> The gain from age verification can be of two types. First, as illustrated by the example discussed in the text, private gains may arise independently of the probability that the customer is underage. Second, private gains may also depend on the probability that the customer is a minor. Gains of the latter type

verification exceeds its cost, 20, sellers will take the steps to verify customers' age notwithstanding the risk of criminal liability.

This example illustrates two important insights concerning the interaction of mens rea with ignorance costs. First, when ignorance costs are sufficiently high, offenders will take the necessary steps to become informed even when such steps would make them more likely to become criminally liable under a mens rea standard. As the alcohol example shows, sellers will inquire about customers' age even under mens rea as long as they have good enough reasons to do so. Second, it is important to note that the divergence between the private value and the social value of information is not eliminated by the introduction of ignorance costs. In our numerical example, the value attached by sellers to age verification is 40, whereas the societal value of age verification is 90.<sup>75</sup> Yet, under the present example, the divergence bears no practical consequences, as sellers would engage in age verification notwithstanding the adverse incentives to do so under the mens rea standard.<sup>76</sup>

To summarize, when ignorance is costless for offenders, imposing liability only on informed offenders would be, at best, ineffective. However, as the cost of ignorance increases, the social cost associated with the distorted incentives to obtain information under mens rea decreases, since potential offenders are likely to be aware of the requisite

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would arise when the benefit to the seller of conducting age verification depends on her detecting minors, such as where a customer wants to identify minors in order to require them to pay in cash only.

<sup>75</sup> Assuming that private informational gains are included in social welfare, the social value of information consists now of both the expected decrease in social harm and the private gains from information. The social value of the information in this example, therefore, equals the gain derived by sellers from acquiring information about customers' age, 50, plus the net decrease in harm associated with the sale of alcohol to minors,  $0.05(1,000-200)$ . The social value of age verification thus equals 90. In contrast, the private value of age verification is 40. The difference between the social value and the private value remains the same. This is explained by the fact that under the awareness requirement, the individual bears the social harm only when he is informed about the age of the customer.

element of the offense notwithstanding the adverse consequences of such awareness. Thus, when ignorance is sufficiently costly for offenders, the practical effect of the distortions produced by mens rea would be negligible.<sup>77</sup> Stated differently, mens rea would be effective in preventing misconduct when the cost of ignorance for offenders is sufficiently high.

*D. Predicting Strict Liability*

The previous section has shown that when ignorance is costly, mens rea may turn out to be successful in deterring unlawful conduct notwithstanding its fundamental flaw of rewarding ignorance. In contrast, when ignorance is costless for offenders, relying on mens rea will inevitably fail to prevent the undesirable misconduct. Strict liability, therefore, is likely to emerge and govern only offense elements for which the cost of ignorance is relatively low. In this section, I outline plausible factors that determine the cost of ignorance, and thereby the extent to which mens rea is likely to be effective. The goal of this section is not to provide an exhaustive list of all circumstances under which ignorance is likely to be costly. Rather, my aim is to demonstrate that it is often possible, using no more than common sense, to predict the offense elements for which ignorance is costly.

*1. Gains from Information*

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<sup>76</sup> This is because the example assumes that the cost of age verification is a discrete variable, i.e., the individual has to choose between age verification and ignorance. For an analysis of the implications of a continuous informational cost function *see* footnote 77 *supra*.

<sup>77</sup> Note that the existence of sufficiently large pre-existing informational incentives does not imply that all offenders would be informed, particularly when the informational cost function is continuous and full information can never be obtained. It does imply, however, that the amount of information obtained under mens rea is close to the socially optimal amount. Under the assumption that the marginal effectiveness of informational effort is declining, the difference between the amount of information actually obtained under mens rea and the socially optimal amount of information would be of little significance.

### *Costly Ignorance*

From the perspective of a potential offender, ignorance of a particular fact will often be costly when information about this fact is valuable. Offenders have various reasons for obtaining relevant information independently of the criminal sanction. To begin, possessing information about particular facts may provide potential offenders with pecuniary gains. Assuming gasoline is substantially more expensive than (unbottled) water, a gas-station owner would lose money if she mistakenly discharged gasoline, instead of water, to the street. Thus, the cost of ignorance with respect to the nature of the material discharged by gas stations owners to the street is likely to be substantial.<sup>78</sup> Likewise, assuming drunk drivers are substantially more likely than sober drivers to be involved in car accidents, a car-owner that lets her friend use her car has a clear incentive to verify that the friend using the car is sober. Stated differently, the cost of ignorance with respect to such fact, *i.e.*, the risk of damaging the car, can be substantial.

Ignorance costs may also be the result of civil law rules. Consider the offense of receiving stolen property. Assume that property law grants absolute ownership to original owners, who may demand even a purchaser in good faith to return the property. Under this assumption, a person that purchases a stolen painting, for example, risks the loss of the painting as well as the purchase price. As the cost of ignorance with respect to the ownership of paintings is substantial, potential buyers are likely to inquire about the ownership history of paintings they consider buying.

Ignorance will also be costly when it adversely affects personal safety. Consider again the example of allowing a friend to use a car. If the owner of the car intends to ride it while her friend drives, whether the driver is sober or drunk will affect her personal

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<sup>78</sup> See *United States v. Ahmad* 101 F.3d 386 (5<sup>th</sup> Cir. 1996) (defendant arguing that he believed the material discharged to be water rather than gas).

safety. Similarly, people who use a firearm have a clear interest in learning whether their rifle is automatic or semiautomatic because firing a rifle without knowing it is automatic is unsafe and might result in injuries.<sup>79</sup>

Another plausible source of ignorance costs is social norms. Offenders who internalize a social norm that attaches significance to the existence of particular facts are likely to exercise effort to acquire information about these facts. Likewise, if a norm attaches no significance to the existence of a particular fact, an offender internalizing this norm will have no motivation to verify the existence of that fact. It has been argued, for example, that the phenomenon of date rape may be the outcome of a social norm that values sexual activity per-se regardless of victims' consent.<sup>80</sup> If a norm indeed attaches no significance to the consent of a partner to sexual intercourse, a person who is subject to that norm will be less likely to verify whether the victim consents to his actions. Stated differently, under this norm, ignorance with respect to victims' consent is costless. Thus, to the extent that the attribution of date rape to such social norm is correct, adopting a mens-rea-based standard as to victims' consent will not prevent date rapes.<sup>81</sup>

Finally, there is a spectrum of offense elements for which it is apparent that ignorance costs are likely to be high, perhaps prohibitive, although formulating the precise source for the large magnitude of these costs in economic terms may be difficult. Individuals, for example, do not need to exercise costly effort to become aware of their

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<sup>79</sup> See the discussion of the Staples decision, *supra* text accompanying notes \_\_\_\_.

<sup>80</sup> See e.g., Katharine K. Baker, *Sex, Rape and Shame*, 79 B.U.L. REV. 663, 669-670 (1999) (explaining date rape as a result of a social norm which values the quantity of sexual activity by young males regardless of their partners' consent).

<sup>81</sup> The discussion excludes two types of cases: intentional offenders and accidental knowledge. Intentional offenders, such as thieves, can be classified as ones for which ignorance costs are high, as offenders of this type invest in acquiring information to facilitate the successful completion of their crimes. Accidental knowledge refers to cases where offenders learn about particular facts by chance, without

bodily movements. Rather, it is likely to assume that the cost of one's becoming ignorant of his bodily movements is prohibitive.<sup>82</sup> Likewise, a man is expected to know that a particular woman is not his wife,<sup>83</sup> and it is reasonable to assume that the cost of avoiding this knowledge is prohibitive.

## **2. *Optimal Ignorance***

The analysis thus far has focused on the cost of ignorance as indicative of the extent to which offenders are likely to be aware of the elements underlying an offense notwithstanding the adverse consequences of such awareness under mens rea. Thus, it has been predicted that strict liability would govern offense elements for which the cost of ignorance is likely to be relatively low. This prediction, however, is incomplete. Strict liability is indeed superior to mens rea in inducing offenders to acquire information. But where there is no social interest that offenders acquire information, the rewards to ignorance under mens rea are not perceived as a flaw, and may even become an advantage.

Assume that ignorance is costless, and offenders thus have no reason to exercise effort to gather information. Assume also that the cost of acquiring information exceeds the information's social value. However, for actors who happen to be aware of the circumstances that make the conduct prohibited, it is socially desirable to refrain from engaging in the conduct underlying the offense. By definition, mens rea targets only

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exercising effort to acquire that information. By definition, we cannot identify in advance offenses, or offenses elements, about which offenders will obtain information accidentally.

<sup>82</sup> See, e.g., Peter W. Low, *The Model Penal Code, The Common Law, and Mistakes of Fact: Recklessness, Negligence or Strict Liability*, 19 RUTGERS L.J. 539, 553 (1988) (as a practical matter, defendants will always know the nature of their conduct).

<sup>83</sup> See MODEL PENAL CODE § 213.1(a) (rape is committed by a male who has sexual intercourse with a female "not his wife").

actors who happen to be aware of the relevant facts and eliminates any social costs that might be associated with strict liability.

Consider the liability for the use of counterfeit dollar bills.<sup>84</sup> Assume that the available technology makes verifying the authenticity of bills very costly, \$10 per a \$1 bill. Assume also that the probability that a given bill is counterfeit is 0.01, and that the social harm associated with the use of counterfeit bills is 100. Under these assumptions, the cost of information about the authenticity of bills (10) clearly exceeds the social value of such information ( $0.01 \times 100 = 1$ ). Thus, there is no social interest in providing each person that receives or uses a dollar bill with incentives to inquire about the authenticity of each bill he uses. That is, we prefer people *not* to verify the authenticity of the paper money they use. Nonetheless, we might want to deter people who happen to know the money they hold is counterfeit from using it. A mens rea standard achieves this desired deterrent effect while excluding uninformed individuals from the scope of the offense.<sup>85</sup>

To be sure, determining when ignorance is desirable is a daunting task, which involves an onerous informational burden. The considerations to be taken into account include not only the social value of information, but also the cost of acquiring information, and the amount of information produced by exercising effort to acquire information. Yet, to the extent it is determined that ignorance is desirable, the distorted

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<sup>84</sup> See MODEL PENAL CODE §§ 224.1.(c) (adopting a knowledge, or purpose to defraud, requirement for uttering forged money).

<sup>85</sup> There is a tendency to argue that strict liability is imposed when the cost of acquiring information is low. See Parker, *supra* note 48, at 792 (objective liability standards, such as negligence and strict liability, may be optimal when the “marginal cost of self-characterizing information is bounded at a low level”). Although this argument partially captures the intuition underlying the observation that strict liability is unnecessary when ignorance is socially desirable, it overlooks the additional considerations that determine whether there is a social interest requires offenders to acquire information.

incentives to acquire information mens rea are of little concern.<sup>86</sup> Accordingly, strict liability is unlikely to govern offense elements for which ignorance is optimal.

### **3. *Taking Stock: Predicting the Boundaries of Strict Liability***

This Part has introduced the concept of ignorance costs and studied its implications for the role of mens rea in criminal law doctrine. In this section, I rely on the analysis thus far to predict the offense-elements that are particularly likely to be governed by strict liability. In the next Part, I explore the extent to which this prediction is consistent with the current jurisprudence of strict criminal liability.

Mens rea provides potential offenders with incentives to maintain their ignorance, which in turn allows them to engage in the prohibited conduct while evading criminal liability. Offenders, however, might find ignorance to be costly. When ignorance is sufficiently costly, offenders are likely to possess the knowledge necessary for conviction, and mens rea would be thus effective in preventing misconduct. When ignorance is costless, in contrast, mens rea would be ineffective at best. Thus, other things equal, strict liability is likely to govern offense elements for which ignorance is costless. Costless ignorance, however, does not necessarily mean that strict liability would replace mens rea. If ignorance is socially undesirable, mens rea may apply notwithstanding the fact that the typical offender is likely to be uninformed.<sup>87</sup>

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<sup>86</sup> The argument of this part is independent of the magnitude of sanctions. Even where sanctions are set to their optimal magnitude, so that the risk of overdeterrence is non-existent, there is little sense in imposing legal liability for a clearly desirable behavior, i.e., the failure to acquire information.

<sup>87</sup> Interestingly, the difficulty-of-proof rationale and the costly ignorance thesis may supplement each other. Defendants' arguments that they were ignorant will be more credible when pre-existing incentives to obtain information are low. Thus, courts are more likely to err in favor of defendants when pre-existing incentives to obtain information are low. Nonetheless, there might be cases, such as online sales of liquor, under which actors are clearly ignorant. The difficulty-of-proof rationale does not justify strict liability for those cases, but the costly ignorance rationale does.

The predictions offered by the costly ignorance thesis are somewhat loose and incomplete. To begin, providing a full account of the choice between mens rea and other standards of criminal liability lies beyond the scope of this Paper. Instead, the discussion has focused on merely one aspect of the costs of mens rea, namely, its adverse effect on offenders' ignorance. Moreover, the analysis has focused on an individual, typical offender while lawmakers face a population of offenders with varying ignorance costs, information costs, and other characteristics. Finally, these predictions assume a degree of knowledge about the distribution of ignorance costs and the social desirability of obtaining information across the population of potential offenders. Nevertheless, as the next Part will demonstrate, the predictions offered by the costly ignorance thesis shed an important light on the notorious ambiguity surrounding the jurisprudence of mens rea and strict liability under U.S. criminal law.

#### **IV. THE JURISPRUDENCE OF STRICT LIABILITY**

This Part examines the limited scope of strict criminal liability in light of the predictions offered by the costly ignorance thesis. Clearly, a single theory, including the costly ignorance thesis, cannot predict the outcome of all cases in which the choice between strict liability and mens rea was at stake.<sup>88</sup> Yet, as the discussion below will demonstrate, the costly ignorance thesis does succeed in unraveling much of the confusion surrounding the selective endorsement of strict criminal liability.

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<sup>88</sup> The discussion below proceeds along the doctrinal debate about the choice between strict liability and mens rea. Inducing offenders to acquire information, however, can also be achieved through negligence standards. This Part, however, does not attempt to explain why the failure of mens rea usually results in the adoption of strict liability rather than negligence. One plausible explanation of this phenomenon lies in the institutional frameworks: interpreting a given statute as imposing negligence requires an explicit statutory language. Strict liability, by contrast, is sometimes inferred from the mere silence of the legislator concerning the requisite mental element. *See, e.g., Morissette v. United States*, 342

### *Costly Ignorance*

Section A examines “traditional” strict liability offenses, such as statutory rape and liquor sale to minors. Section B discusses the limited scope of strict liability imposed on senior corporate officers. Section C analyzes the relatively recent emergence of strict liability with respect to “public welfare” offenses, and the distinction between mistake of fact and mistake of law.

#### *A. Sex, Alcohol, and Young Age*

Two early examples of strict criminal liability are statutory rape<sup>89</sup> and liquor sales to minors.<sup>90</sup> These offenses are strict liability offenses in the sense that ignorance as to the young age of the victim, in statutory rape, or the buyer, in liquor sale, does not exculpate from criminal liability. Statutory rape and alcohol-sale to minors continue to serve as paradigmatic examples of strict liability offenses.<sup>91</sup>

Drawing on the level-of-activity argument,<sup>92</sup> some commentators have argued that the strict liability imposed with respect to the age element of statutory rape and liquor

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U.S. 246, \_\_\_ (1952) (discussing whether Congress’ silence as to mental element should be interpreted as the adoption of strict liability or mens rea).

<sup>89</sup> See Sayre, *supra* note 27, at 73-4 (discussing strict liability concerning the age-element in statutory rape).

<sup>90</sup> See Richard Singer, *The Resurgence of Mens Rea: III-The Rise and Fall of Strict Criminal Liability*, 30 B.C.L. REV 337, 365 (stating that the cases on liquor-sales to minors “turn out to be the critical decisions that establish strict liability” in the U.S.).

<sup>91</sup> For statutory rape, see *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 46 A.L.R.5<sup>th</sup> 499 (1997) (the majority of jurisdictions whose higher courts have considered the issue have declined to allow a reasonable- mistake defense to statutory rape); *Garnett v. State*, 632 A.2d 797 (Md. 1993) (the prohibition on sexual intercourse with underage persons constitutes a strict liability offense); *Commonwealth v. Moore*, 269 N.E.2d 636 (Ma. 1971) (same). *But see State v. Guest*, 583 P.2d 836, 838-40 (Ala. 1978) (mistake of age defense is constitutionally mandated).

For liquor sales, see *Funari v. City of Decatur*, 563 So.2d 54 (Ala. Crim. App. 1990) (no mental element is necessary to convict for selling liquor to minors); *Sanctuary, Inc. v. Smith*, 733 P.2d 839 (Kan. App. 1987) (same); *City of West Allis v. Megna*, 133 N.W.2d 252 (Wis. 1965) (proof of knowledge of tavern keeper that patron is underage is not required for conviction); *But see, e.g., State v. Sleeth*, 664 P.2d 883, 888 (Kan. App. 1983) (knowledge of minority is required for penal conviction of club-owner for sale of liquor to minors).

<sup>92</sup> See discussion in Part I.B. *supra*.

sale to minors reflects society's moral disapproval of the underlying activities: consumption of alcohol, and sexual relationships with underage women.<sup>93</sup> This explanation, however, is incomplete. Although it might be correct in describing society's moral attitudes towards liquor consumption and sexual relationship with young women, this account fails to explain why the social hostility towards those activities has manifested itself only through the mental state required with respect to the age element of these offenses. Stated differently, under this argument, one would expect strict liability to govern *all* elements of these offenses and not merely victims' age.

Focusing on ignorance costs, however, does provide the missing explanation. Consider first the offense of liquor sales to minors. From sellers' perspective, the cost of ignorance with respect to customers' age is virtually zero. Sellers' main concern is that customers pay for the alcoholic beverages they purchase, and sellers thus derive no benefit from acquiring information about the age of their customers.<sup>94</sup> Moreover, sellers will usually be required exercise effort to ascertain costumers' age.<sup>95</sup> But since sellers attach no value to age-verification, they would initiate no effort to that end: they would ask for neither driver licenses nor any other age documentation. As ignorance is costless,

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<sup>93</sup> See Kahan, *supra* note 43, at 2123-4 (against the background of moral norms, the critical element is lack of parental consent and not the age of the female. Accordingly, defendants' mistake as to victims' age does not undermine the immoral character of their behavior); Singer, *supra* note 90, at 369 (strict-liability for liquor offenses was supported by the prohibitionist movement).

<sup>94</sup> One can think of several sources of pre-existing informational incentives for sellers to verify age. For example, sellers might be afraid of parents of underage customers. Similarly, sellers might be subject to a social norm under which the sale of liquor to underage customers is undesirable. Whether incentives of this type indeed exist is a matter of empirical concern. Note, however, that if all sellers faced such incentives there was no need for legal intervention to begin with. Similarly, as long as some sellers do not face such pre-existing informational incentives, mens rea would inevitably fail to control their behavior.

<sup>95</sup> Sellers, however, would not need to exercise effort to learn about the age of very young-looking customers. Two points can be made concerning customers of this type. First, when ignorance costs are sufficiently low, sellers may invest in avoiding knowledge even with respect to very young-looking customers. See text accompanying notes 63-64 *supra*. Second, we need ask ourselves whether we want to limit the offense only to very young customers and forgo any attempt to induce actors to obtain information

limiting liability to sellers who are aware of customers' young age would inevitably fail to prevent the sale of alcohol to minors. Granted its expected failure, mens rea is likely to be abandoned in favor of strict liability with respect to the age element of this offense.

This reasoning also applies to the offense of statutory rape. Individuals who engage in sexual intercourse with young partners evidently derive no benefit from acquiring information concerning the precise age of their partner. Put differently, for potential defendants, ignorance with respect to a partner's age is virtually costless.<sup>96</sup> Under these circumstances, making the awareness of a partner's age a precondition to criminal liability would ultimately fail to deter statutory rape.<sup>97</sup> Strict liability, in contrast, would induce individuals to take the socially desirable steps to verify their partner's age, and prevent those who then learn that their prospective partner is underage from committing the offense.

The above reasoning also sheds lights on the offenses relating to the production and distribution of child-pornography. These offenses tend to involve strict liability with respect to performers' age.<sup>98</sup> Since producers and distributors of sexually explicit materials usually derive no benefit from knowing the age of the performers they employ, the cost of ignorance with respect to performers' age is virtually zero.<sup>99</sup> Thus, a criminal

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about a broader set of underage customers. Where acquiring information about customers' age is socially desirable, limiting the scope of liability to very young customers makes little sense.

<sup>96</sup> Actors would have pre-existing informational incentives in two cases. First, actors might internalize a social norm under which sexual intercourse with partners below a specified age is discouraged. For actors of this type, however, there is no need to create the crime of statutory rape. *See* note 94 *infra*. Second, actors may derive some illicit pleasure merely from the fact that their partner is below the legal age. The question, however, is whether these are the typical actors.

<sup>97</sup> Interestingly, Sayre seems to apply this line of reasoning to justify strict liability regarding the age element of sex-offense victims, but only in a footnote. *See* Sayre, *supra* note 27, at 74, n. 68 ("Were ignorance as to the girl's age allowed as a defense, any defendant by keeping in discreet ignorance as to his victim's age, could evade punishment").

<sup>98</sup> *See* discussion in text accompanying notes 100-102 *supra*.

<sup>99</sup> Again, this is under the assumption that they don't sell the materials to an audience who is willing to pay a higher price for sexually explicit materials depicting minors. In that case, producers and

offense relying on mens rea and aiming at eliminating the production and distribution of sexually explicit materials depicting minors would simply be ineffective. Strict liability with respect to performers' age, on the other hand, would motivate producers and distributors to verify the age of performers depicted in sexually explicit materials. The costly ignorance thesis clearly sheds light on the attractiveness of strict liability in this area. Motivated by concerns for the chilling effect of strict liability on freedom of speech, however, courts have been careful to apply strict liability in this area on a limited basis.<sup>100</sup>

Child-pornography cases demonstrate an additional element of the costly ignorance thesis. As explained earlier,<sup>101</sup> strict liability is unlikely to be adopted when ignorance is socially desirable. The large costs associated with acquiring information concerning performers' age may indicate that obtaining such information is not socially desirable. Thus, other things equal, high costs of acquiring information may prevent strict liability from being adopted even where ignorance is costless. Consistent with this prediction, courts have invoked the large expected cost of inquiring about performers' age to distinguish between producers and distributors of sexually explicit materials. Under the assumption that producers, who have direct contact with performers, can cheaply verify performers' age, courts have endorsed strict liability for producers.

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distributors have an incentive to obtain information regarding the age of actors because minor actors enable them to increase their profits. The question is whether the sole aim of the prohibition on child pornography is to target those who hire children because they are children.

<sup>100</sup> See *United States v. X-Citement Video*, 513 U.S. 64 (1994) (interpreting the statute to require knowledge of minority by distributor in order to avoid constitutional problems). *State v. Zarnke*, 589 N.W.2d 370, 376 (Wis. Sct. 1999) (the government must prove some level of scienter as to the performer's minority to convict in distributing pictures of minors' sexual activity.). The constitutional concerns rely on the "chilling effect" of strict liability. See *Smith v. California*, 361 U.S. 147 (1959) (invalidating a strict liability offense of possessing an obscene book on the grounds that strict liability concerning the obscenity element would effectively restrict the possession of non-obscene books.) The chilling effects of strict liability are critically examined in Part IV.A.2 *infra*.

Courts, however, have refused to allow strict liability to apply to distributors of sexually explicit materials.<sup>102</sup>

Finally, the Supreme Court's decision in the *X-Citement* case, which involved strict liability for distributing child pornography, illustrates the substantive difference between the costly ignorance thesis and the difficulty-of-proof justification for strict criminal liability. Relying on the difficulty-of-proof justification, the dissent in *X-Citement* argued that requiring mens rea with respect to performers' age would provide children with inadequate protection.<sup>103</sup> This reasoning in turn triggered criticism arguing that mens rea in child pornography offenses is no more difficult to prove than mens rea in any other offense.<sup>104</sup>

The costly ignorance thesis, in contrast, does explain how this offense differs from others. Critics might be correct in their argument that convincing a jury that a distributor was in fact aware that a performer was underage is not exceptionally difficult. But, if ignorance with respect to performers' age is indeed costless for distributors of sexually explicit material, the easiness with which knowledge can be proved is irrelevant as defendants are likely to be genuinely ignorant as to performers' age. Thus, mens rea standards would be ineffective even under the ideal conditions of fully informed courts and juries.

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<sup>101</sup> See discussion in Part III.D.2 *supra*.

<sup>102</sup> See *Gilmour v. Rogerson*, 117 F.3d 368, 372-3 (8<sup>th</sup> Cir. 1997) ("In this information age, a prudent photographer or movie producer may readily and independently confirm the age of virtually every young-looking model."); *State v. Peterson*, 535 N.W.2d 689 (Minn. C. App. 1995) (relying on the distributing/producing distinction to hold that strict liability imposed on an employer of a minor nude dancer is constitutional).

<sup>103</sup> See *United States v. X-Citement Video*, 513 U.S. 64, 85 (1994) (Scalia A., dissenting) ("knowledge of the performers' age by the dealers who specialize in child pornography, and by the purchasers who sustain that market, is obviously hard to prove.").

<sup>104</sup> See *Wiley Jr.*, *supra* note 32, at 1088 (arguing that the *X-Citement Video* case itself illustrates that evidence of mens rea can be straightforward to gather).

*B. Responsible Corporate Officers*

Two of the Supreme Court decisions that endorse strict criminal liability have dealt with the liability of corporate officers for regulatory violations committed within the corporate framework.<sup>105</sup> This tendency to impose strict liability on corporate officers for corporate misconduct is best illuminated by the costly ignorance thesis.

Senior corporate officers have the discretion to decide which types of corporate activities to monitor personally and which monitoring responsibilities to delegate to their subordinates.<sup>106</sup> Managerial liability based on mens rea produces a divergence between the social value of managerial monitoring and managers' private value of monitoring, thereby distorting managerial monitoring decisions. However, to the extent that managers face sufficiently high ignorance costs with respect to a particular activity, this distortion would have little practical significance. By contrast, mens rea would inevitably fail when senior officers face criminal liability for activities with respect to which ignorance is costless for managers. Imposing strict liability on corporate managers ameliorates that problem, and induces managers to monitor activities for which their ignorance costs are low. Thus, strict managerial liability is likely to be imposed where criminal law seeks to induce corporate officers to supervise activities characterized by relatively low ignorance costs.

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<sup>105</sup> See *United States v. Park*, 421 U.S. 658 (1975) (imposing strict liability on the president of a corporation for adulteration of food by storing it in buildings where rodents contaminated it); *United States v. Dotterweich*, 320 U.S. 277 (1943) (strict liability on the president of corporation for mislabeling of drugs). For a discussion of the various interpretations of the holdings in these cases see Kathleen F. Brickey *Criminal Liability of Corporate Officers for Strict Liability Offenses: Another View*, 35 VAND. L. REV. 1337 (1982); Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses – A Comment on Dotterweich and Park*, 28 UCLA L. REV. 463 (1981).

<sup>106</sup> For recent economic models studying the optimal allocation of authority within organization and the considerations affecting it, see George Baker et al., *Informal Authority in Organizations*, 15 J.L. ECON. & ORG. 56 (1999); Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*,

Indeed, under the responsible corporate officer doctrine, strict liability is imposed on corporate officers mostly with respect to regulatory offenses relating to activities with low ignorance costs, such as the sanitary conditions at a firm's warehouse.<sup>107</sup>

*C. Common-Law Crimes vs. Regulatory Offenses*

Strict liability is a relatively recent phenomenon. Most common-law crimes required, and still do require, some type of mens rea for conviction.<sup>108</sup> Strict liability emerged in the nineteenth century, mainly in the area of regulatory offenses.<sup>109</sup> This section argues that the costly ignorance thesis can also explain the relatively recent introduction of strict liability into criminal law.

The difficulty-of-proof rationale suggests the following explanation to the recent emergence of strict criminal liability. The expansion of criminal law to encompass minor regulatory offenses substantially increased the number of criminal trials and thus the burden on prosecutors and courts. Mens rea, the traditional standard of criminal liability, increases the burden on courts and prosecutors who are were required to prove defendants' subjective awareness beyond reasonable doubt. Strict criminal liability emerged to alleviate that burden, especially with respect to minor regulatory offenses. As

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105 J. POL. ECON. 1 (1997); Roy Radner, *Hierarchy: The Economics of Managing*, 30 J. ECON. LIT. 1382 (1992).

<sup>107</sup> This example is based on the facts underlying *United States v. Park*, 421 U.S. 658 (1975).

<sup>108</sup> See Singer, *supra* note 90, at 338, n. 4 ("The common law doctrine of mens rea was generally accepted for at least three centuries prior to the onset of strict liability crimes."); WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., *SUBSTANTIVE CRIMINAL LAW*, VOL. 1 297 (1986) (judges have generally defined common law crimes in terms which require some proscribed bad state of mind). Two notable exceptions are bigamy – see Sayre, *supra* note 27, at 74-75 (discussing case law under which women can be convicted for bigamy regardless of their honest and reasonable belief in their first husband's death) - and statutory rape – see *infra* note 89.

<sup>109</sup> Professor Sayre coined the influential term "public welfare" offenses to denote offenses of this type. See Sayre, *supra* note 27, at 56.

noted earlier,<sup>110</sup> this difficulty-of-proof explanation fails to explain the full range of offenses governed by strict liability.

The costly ignorance thesis provides a fuller explanation. In general, common-law crimes, such as burglary, assault, and blackmail, are ones under which the cost of ignorance is likely to be sufficiently high. Since offenders were expected to be aware of the nature of their conduct and the existence of the requisite circumstances,<sup>111</sup> the perverse informational effects of mens rea did not significantly undermine its effectiveness as a means of social control. Hence, the common law did well without relying on problematic alternatives, such as strict liability.<sup>112</sup>

Consider theft, for example. Most people are aware of the nature of their conduct – taking - and the fact that the item taken belongs to another person whose consent is required. Therefore, there was no apparent need to impose strict liability to regulate theft. The decision of the Supreme Court in *Morrisette v. United States*<sup>113</sup> is consistent with that analysis. The cost of ignorance with respect to ownership of property is relatively high, and thus the likelihood of an individual believing that an item has no owner is very low. Accordingly, strict liability regarding the ownership element has little

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<sup>110</sup> See *supra* text accompanying notes 32-37.

<sup>111</sup> See, e.g., Peter W. Low, *The Model Penal Code, The Common Law, and Mistakes of Fact: Recklessness, Negligence or Strict Liability*, 19 RUTGERS L.J. 539, 553 (1988).

<sup>112</sup> That argument does not apply to the result element in offenses in which such an element is required. The result element, death, for example, describes the future outcome of the individual's conduct. Actors do not necessarily perceive accurately the future outcomes of their conduct. This difference may account for the early introduction of criminal negligence in homicide cases. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND \*192 (1765-1769).

<sup>113</sup> 342 U.S. 246 (1952) (holding that conviction for theft of government property requires knowledge as to the government ownership of the property).

social value.<sup>114</sup> Similar reasoning applies to circumstances underlying other common-law crimes, such as burglary and robbery.

As the criminal law began to expand in scope, it reached activities for which it was not obvious that actors would be fully informed. Public welfare offenses - offenses regarding food quality, pollution, workers' safety, and traffic violations - often involve circumstances of which actors have no reasons to be aware.<sup>115</sup> Manufacturers need exercise effort to learn about the safety conditions in their factories, and but for their fear of strict criminal liability, they have no strong reasons to do so.<sup>116</sup> Effectively controlling these behaviors requires criminal law to develop mechanisms to induce actors to obtain information, and strict liability is one of those mechanisms.<sup>117</sup>

To emphasize, the fact that a particular offense is defined as a regulatory crime, or as a "public welfare" offense, does not necessarily imply that actors perceive ignorance to be costless. In principle, each offense requires an independent estimation of the

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<sup>114</sup> Strict liability may be desirable in the unique facts underlying *Morissette*, *id.* (reversing the conviction of a person who took used bomb casings from a government reservation, under the alleged belief they had been abandoned, because the trial court ruled no mental element was necessary for conviction.) Property used as target for military practice can be easily confused with abandoned property. Thus, the law needs to provide actors with incentives to verify the ownership of property found on those premises. Nonetheless, the statute at stake in *Morissette* was not aimed merely at this sub-category of actors but targeted all types of government property. Put differently, *Morissette* is not the typical offender of that offense.

<sup>115</sup> The traditional account traces the emergence of strict liability offenses to the industrial revolution. *See* Sayre, *supra* note 27, at 69-70. *But see* Singer, *supra* note 108, at 368-9 (arguing that strict liability offenses are not the "children of the industrial revolution", and that they emerged in the U.S. with "morals" offenses relating to sex, liquor, and the upbringing of minors).

<sup>116</sup> Manufacturers would have incentives to learn about the safety conditions of in their factories under a regime of negligence-based, or strict, tort liability. *See* Ingeborg Paulus, *Strict Liability: Its Place in Public Welfare Offences*, 20 CRIM. L. Q. 445, 451 (1978) (strict liability was adopted to ameliorate harsh abuses and to equalize to some extent certain disadvantages suffered by those without access to civil litigation). Manufacturers would also have incentives to learn about the safety conditions if their employees had sufficient power to effectively pose a demand for safety. Under such a scenario, however, there seems to be little need for state regulation of safety conditions.

<sup>117</sup> One problematic common-law offense is rape. There is a controversy over the requisite mental element regarding the consent element in rape. *See, e.g.* KADISH & SCHULHOFER, *supra* note 26, at 322-32 (discussing different approaches to the issue). This debate can be interpreted as a debate over the social

distribution of ignorance costs with respect to its elements to determine whether offenders should be induced to obtain information. Environmental offenses, for example, lie at the core of the public welfare category. Nonetheless, it has been held that when bringing charges for discharging pollutants the prosecution is required to prove defendants' knowledge of the type materials discharged.<sup>118</sup> This holding is consistent with the intuition that actors usually have sufficient reasons to be aware of the type of materials they discharge.

Finally, the costly ignorance thesis sheds a new light on the traditional distinction between mistake of law and mistake of fact. More specifically, the thesis may explain the wide acceptance of the maxim that ignorance of law is not an excuse even among those who strongly disapprove of strict criminal liability.<sup>119</sup>

The accepted distinction between mistake of fact and mistake of law as defenses can be explained by an implicit assumption about the cost of ignorance as to facts, and the cost of ignorance as to law. As mentioned earlier,<sup>120</sup> since common-law offenses are ones for which ignorance costs are likely to be significant, the informational advantage of strict liability over mens rea is of little practical value. Conversely, unlike the nature of one's conduct and the circumstances accompanying it, legal rules need to be learned. The learning process is costly whereas, absent regulation, the cost of ignorance is zero. Thus, it has been commonly understood that recognizing the mistake-of-law defense would

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need to employ criminal law to induce actors to verify their partners' consent and the effectiveness of such an effort.

<sup>118</sup> *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996) (holding that the offense of knowingly discharging pollutants under the Clean Water Act requires knowledge of the nature of the material discharged). The defendant in that case was charged for discharging oil. To his defense, he claimed he had believed the material discharged to be water.

<sup>119</sup> See also Wasserstrom, *supra* note 39, at 735 (arguing that efficacy-based arguments against strict liability should lead to the adoption of a complete mistake-of-law defense).

<sup>120</sup> See *infra* text accompanying notes 108-116.

render ignorance the best strategy. Indeed, the rationale offered for the rejection of the mistake-of-law defense often explicitly focused on the perverse incentives to acquire information about the law under such a rule.<sup>121</sup>

## V. DOCTRINAL ALTERNATIVES

The analysis so far has considered strict liability as the sole alternative to mens rea when ignorance is costless and mens rea would thus fail to control misconduct. Assuming that ignorance is costless, this Part examines a spectrum of doctrinal alternatives to mens rea. In addition to strict liability, these alternatives include negligence, non-negligence defense, rule-based negligence, and wilful ignorance. The purpose of this review is twofold: first, to highlight some of the tacit doctrinal tools through which criminal law provides offenders with incentives to gather information when ignorance is costless; second, to provide a roadmap that reviews, from an economic perspective, the central strengths and weaknesses of each alternative in addressing circumstances under which ignorance is costless.

Section A reviews the costs associated with strict liability. Section B discusses negligence, including non-negligence defense. Section C highlights the role played by

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<sup>121</sup> See GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 289 (2<sup>d</sup> ed. 1961) (the rule that ignorance of law is not a defense is aimed at compelling people to learn the standard of conduct required of them); OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 48 (1881) (“To admit the excuse at all would be to encourage ignorance where the law maker has determined to make men learn and obey.”). *But Cf.* Dan M. Kahan, *Ignorance of Law is an Excuse – but Only for the Virtuous*, 96 MICH. L. REV. 127, 129-30 (1997) (legal treatment of the mistake-of-law defense is best viewed as an attempt to discourage individuals from learning law’s content for the sole purpose of exploiting loopholes).

The costly ignorance thesis may find it difficult to explain the recent tendency to recognize mistake of law defense for regulatory offenses. *See, e.g.*, *Liparota v. United States*, 471 U.S. 419, 435 (1985) (conviction for violation of food-stamps regulations requires knowledge of illegality of conduct). *But see* Davies, *supra* note 11, at 395 (suggesting that “the courts’ concerns about ‘overcriminalization’ and the federalization of crime” may best explain that tendency); Note, *Mens Rea in Federal Criminal Law*, *supra* note 24, 2416 (arguing that federalism concerns may covertly “animate the Court’s federal mens rea jurisprudence”).

directly regulating potential offenders' effort to acquire information. Section D concludes by discussing the willful ignorance doctrine. This Part does not discuss alternatives, such as licensing and other administrative remedies, which lie beyond the boundaries of criminal law.

### A. *Strict Liability*

The nature of the incentives provided by strict liability has been discussed earlier.<sup>122</sup> This section will outline the social costs of strict liability. These costs can be divided into the social cost of sanctions, chilling effects, and offending public sensibilities.<sup>123</sup>

#### 1. *Social Costs of Sanctions*

The economic analysis of public enforcement recognizes two types of sanctions' costs: risk bearing, and the cost of imprisonment.<sup>124</sup> Although mens rea does not necessarily eliminate costly sanctions,<sup>125</sup> the social cost of sanctions under strict liability

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<sup>122</sup> See Part I and Part II.A *supra*.

<sup>123</sup> From a retributive perspective, strict liability is often criticized as punishing and condemning the morally blameless. See, e.g., Wiley Jr., *supra* note 32, at 1033 (strict liability implies "that the criminal law punishes a person with no assurance that the person is morally culpable").

<sup>124</sup> See A. Mitchell Polinsky and Steven Shavell, *The Optimal Tradeoff between the Probability and the Magnitude of Fines*, 69 AM. ECON. REV. 880 (1979) (modeling the effect of risk-aversion on optimal enforcement policy); Louis Kaplow, *A Note on the Optimal Use of Nonmonetary Sanctions*, 42 J. PUBLIC ECON. 245 (1990) (studying the use of nonmonetary sanctions in light of their social cost). Imprisonment costs consist of the operation cost of jails and the disutility suffered by prisoners. One difference between risk bearing and imprisonment is that risk-bearing cost is avoided when actors can fully insure themselves against the risk of criminal fines. Unless stated otherwise, the following discussion applies to both types of costs. I do not discuss another type of cost, namely, reputational cost, for two reasons. First, it is empirically unclear whether strict liability offenses are associated with reputational effects. Second, it is doubtful that a private reputational cost constitutes a social cost as well.

<sup>125</sup> When the probability of conviction is lower than one, actors who are undeterred by the criminal sanction will bear risk even under mens rea. Similarly, imprisoning undeterred actors may be a net social waste. See Steven Shavell, *The Optimal Use of Nonmonetary Sanctions as a Deterrent*, 77 AM. ECON. REV. 584 (1987) (noting that imposing costly sanctions is undesirable when the offender's act could not possibly have been deterred given the probability of apprehension).

is likely to exceed the cost of sanctions under mens rea mainly due to the inherent incompleteness of efforts to obtain information.

Mens rea targets only informed actors who face a decision to commit the prohibited conduct. Strict liability, by contrast, targets also actors who face a decision whether to exercise effort to obtain information. By expanding the scope of actors targeted by the offense, social costs are increased in two ways. First, like the sanction under mens rea, the sanction under strict liability may fail to deter some actors, rendering any cost of sanctioning them a social waste. More importantly, however, when the socially desirable level of informational effort does not fully eliminate mistakes, some actors would be convicted although they exercised the socially desirable level of informational effort.<sup>126</sup>

Consider again the alcohol sale example. Assume that the socially optimal level of informational effort requires all sellers to ask their customers to present a driver license. First, assume that this measure discovers all minors who attempt to purchase alcohol. Under that assumption, introducing strict liability imposes no additional social costs since the socially desirable level of informational effort is fully effective. Now assume that some minors may present fake licenses in order to purchase an alcoholic beverage. Although strict liability will induce sellers to ask customers for a driver license, it will also subject them to the risk of criminal conviction whenever a customer uses a fake license. By contrast, under a mens rea standard, only sellers who are aware of their customers' age may be convicted. Thus, under mens rea, those who sell alcohol to minors who present fake driver licenses would neither bear risk nor be imprisoned.

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<sup>126</sup> *Id.*

Unfortunately, informational efforts are highly unlikely to be fully effective. One can never eliminate the risk of mistake, or of accidental violations of the law. The socially desirable level of informational effort will very often be only partially effective, leaving some probability of mistake. When informational effort cannot achieve full discovery of all relevant facts one cannot eliminate the social cost of sanctions by increasing the magnitude of sanctions in the hope of achieving full deterrence.<sup>127</sup>

Moreover, as far as risk-bearing is concerned, unlike the risk borne by undeterred actors, the risk borne by actors who exercise the socially optimal level of effort to obtain information is borne by all members of the group targeted by the criminal sanction (or who engage in the regulated activity). One does not know that the information one obtains is inaccurate until the detection of a violation. Sellers who require their customers to present identification cannot know in advance when the customer is presenting fake documents. Consequently, under strict liability, all sales of firearms subject sellers to risk.<sup>128</sup>

## **2. *Chilling Effects***

One of the major costs commonly attributed to strict liability is its chilling effect on behavior.<sup>129</sup> Chilling effects describe the deterrent effect of strict liability on actors' engagement in borderline, and socially desirable, activities. When actors are uncertain about the existence of facts that distinguish the prohibited conduct from a similar lawful

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<sup>127</sup> See Louis Kaplow, *The Optimal Probability and Magnitude of Fines for Acts that Definitely are Undesirable*, 12 INT'L REV. L. & ECON 3 (1992) (pointing to circumstances in which raising sanctions above expected social harm can achieve full deterrence and thus eliminate the social cost of sanctions).

<sup>128</sup> See also Coffee, *supra* note 57, at 219-20 (suggesting that the expansion of strict liability and negligence offenses would make substantial population of the American workforce unable to plan their affairs so as to be free from criminal sanctions). This argument needs to be refined: Sellers will not bear risk for some cases, in which they are certain that they make no mistakes. For example, selling liquor to a friend whom the seller knows to be an adult.

conduct, they might decrease their engagement in the lawful conduct to avoid the risk of criminal liability. Under strict liability for liquor-sale to minors, for example, people might decide to avoid sales to all young-looking customers in order to eliminate the risk of criminal liability, thereby denying some *adults* the opportunity to enjoy an alcoholic beverage. This section challenges the tendency to attribute undesirable chilling effects to strict liability by refining the conditions under which chilling effects are indeed undesirable. It is argued that chilling effects would constitute a net social cost only under either of the following assumptions: the sanction for strict liability is higher than optimal; or the borderline activity is associated with positive externalities. In all other cases, the effect on borderline activities is socially desirable.

When the sanction under strict liability equals social harm,<sup>130</sup> any reduction in borderline activity, even a legitimate one, due to the threat of liability is socially desirable. The logic underlying that conclusion is as follows: Since actors bear the full social cost of their actions, any cautionary steps they take, including adjusting their level of engagement in borderline lawful activities, would be socially optimal. Indeed, the effect of strict liability on level of activity is considered one of its *advantages* over negligence.<sup>131</sup> When sanctions are higher than social harm, however, the decrease in borderline activity is higher than optimal. This overdeterrence effect constitutes a net social cost of strict liability.

Likewise, when actors do not capture the full social benefit of the borderline activity, they will decrease their engagement in that activity even when it is not socially

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<sup>129</sup> See Posner, *supra* note 39 at 1221.

<sup>130</sup> For simplicity, the discussion here abstracts from the social cost of sanctions and the adjustments that need to be made in the magnitude of sanctions when taking them into account.

<sup>131</sup> See SHAVELL, *supra* note 38, at 24.

desirable to do so. Imposing strict liability for selling pornographic books, for example, might induce bookstore owners who wish to avoid criminal liability to discontinue selling a broader range of books than the one prohibited. If the revenue a bookstore owner derives from selling books does not reflect the full social value of this activity, her decision to decrease the range of books she sells would not be socially optimal.<sup>132</sup> Where either of these two conditions does not hold, strict liability generates no undesirable chilling effects.

### **3. Public Sensibilities**

It has been argued that the public resents strict criminal liability.<sup>133</sup> To the extent that strict criminal liability indeed offends public sensibilities,<sup>134</sup> it decreases the welfare of those for whom the fairness of the criminal system is of value.<sup>135</sup> Moreover, a divergence between public views and criminal law can increase the cost of enforcement, and undermines people's willingness to obey the law.<sup>136</sup>

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<sup>132</sup> The divergence is not caused by the adoption of strict liability. Strict liability serves to exacerbate an existing problem.

<sup>133</sup> See, e.g., Paul Robinson and John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 490 (1997) (a strong consensus exists that the degree of an offender's liability should follow the person's level of culpability towards the conduct constituting the offense).

<sup>134</sup> See Nemerson, *supra* note 31, at 1543 (positing that if strict liability crimes were promulgated for offenses in which the vast number of offenders were in fact "at fault", the general correlation between punishment and moral blameworthiness would be retained). Likewise, one might argue that there is a difference between measuring public sensibilities about strict liability in the abstract, or about the punishment of a typical "innocent" offender, and measuring public sensibilities about strict liability for an offender who can easily investigate and become informed.

<sup>135</sup> See, e.g., Dan M. Kahan, *Social Meaning and the Economic Theory of Crime*, 27 J. Legal Stud. 609, 619 (1998) (arguing that social-welfare calculus must take into account public tastes and sensibilities). See also A. Mitchell Polinsky & Steven Shavell, *The Fairness of Sanctions: Some Implications for Optimal Enforcement Policy* (Discussion Paper No. 247, 12/98, John M. Olin Center for Law, Economics and Business, Harvard Law School) (analyzing the effect of public tastes for fairness on the optimal structure of public enforcement).

<sup>136</sup> For a recent argument for the importance of preserving the moral power of criminal law see Paul Robinson and John M. Darley, *supra* note 133 (diluting the moral credibility of criminal law undermines its moral authority, and that would negatively affect individuals' willingness to obey the law in borderline cases).

*B. Negligence*<sup>137</sup>

The extent to which criminal negligence differs from civil negligence is controversial.<sup>138</sup> For simplicity, I assume that criminal negligence is functionally equivalent to civil negligence. That assumption implies that actors who exercise due informational effort are not held liable. Like strict liability, negligence induces actors to exercise the socially optimal level of informational effort.<sup>139</sup> Strict liability and negligence differ on other aspects, which are outlined below.

The informational burden on courts under negligence is higher than the informational burden under strict liability. Under strict liability, all the prosecution has to prove is that the defendant committed the unlawful behavior.<sup>140</sup> Under negligence, the prosecution has to prove that the actual level of effort taken by the defendant was below the socially desirable one. This requires courts to know both the socially desirable level of informational effort, and the actual level of effort exercised by the defendant.

The practical outcome of the informational requirements is requiring courts to estimate the cost of additional informational effort and their expected benefits. For example, in statutory rape cases, courts will have to determine whether relying on a

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<sup>137</sup> The economic differences between strict liability and negligence in torts have been thoroughly discussed in the literature. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 65-6 (1987); Steven Shavell, *Strict Liability versus Negligence* 9 J. LEGAL STUD. 1 (1980). This section freely draws on these discussions.

<sup>138</sup> See, e.g., George P. Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401 (1971). Attempts to distinguish criminal negligence from civil negligence focus on: (1) whether criminal negligence requires higher degree of fault than civil negligence. See e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, *CRIMINAL LAW* 235-7 (2ed., 1986); (2) should criminal negligence rely more heavily on individualized standards. See e.g., H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 152-154 (1968).

<sup>139</sup> See *supra* Part II.C.

young woman's appearance, or asking her for her age, is a socially sufficient informational effort, or whether the defendant should have consulted parents, official documents, and other sources of information. The informational burden increases when the activities are more complex and sophisticated.<sup>141</sup>

Another advantage of strict liability over negligence consists of its regulation of the level of activity.<sup>142</sup> This advantage of strict liability may become significant to the extent that the standard of criminal negligence is individualized to take into account each individual's capacity to obtain information.<sup>143</sup>

The central advantage of negligence over strict liability is its elimination of the social cost of sanctions. When courts are fully informed, actors who exercise the socially desirable level of informational effort but fail to obtain the relevant information are not liable. Hence, actors bear no risk, and the social cost of imprisonment is avoided. The presence of legal error, however, reduces the significance of that advantage. In addition, when the conditions specified in the previous section hold, chilling effects might exist even under negligence.

To summarize, the choice between both standards largely depends on our assumptions about how informed courts are and the cost of informing the courts. When courts are not fully informed, negligence not only dilutes deterrence, but also entails

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<sup>140</sup> Note that criminal strict liability imposes a different informational burden than civil strict liability. Under strict criminal liability, courts need not inquire about the damage to victims but the commission of the acts must be proven beyond a reasonable doubt.

<sup>141</sup> See Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 421 (1993) (juries might be ill-suited to decide what is reasonable in complex high risk activities). In fact, the informational burden under negligence may even be higher than the informational burden under mens rea. Under mens rea, the fact finder has to verify the existence of actual knowledge by the defendant. Under negligence, the fact finder has to reach a normative conclusion regarding the due level of effort and compare it to the actual level. The relative magnitude of the informational burden under each standard, then, cannot be determined a-priori.

<sup>142</sup> See *supra* Part I.B..

costly sanctions. When courts are fully informed, by contrast, negligence would provide actors with optimal incentives to acquire information without the costs associated with mens rea.

One of the doctrinal alternatives to strict liability is offering defendants a non-negligence defense.<sup>144</sup> Under the non-negligence defense, the prosecution has to prove neither mens rea nor negligence. Defendants, however, have the burden of introducing evidence showing they were not negligent.

That doctrinal development, which combines strict liability and negligence, can be interpreted as an attempt to cope with the informational difficulties under negligence. Assuming most defendants are negligent, shifting the burden of proof saves administrative costs.<sup>145</sup> Shifting the burden of proof to defendants makes it more difficult for defendants to successfully argue for non-negligence, thereby reducing the likelihood of a systematic error in favor of defendants. Moreover, the good-faith defense reduces the social cost of sanctions because some non-negligent actors may be acquitted. To emphasize, the good-faith defense reduces, but not eliminates, the informational problem and the social cost of sanctions: negligent defendants may still avoid liability<sup>146</sup> and non-negligent defendants may be convicted.

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<sup>143</sup> See sources cited in note 138, *supra*.

<sup>144</sup> See Levenson, *supra* note 141, at 405 (arguing for the adoption of “good faith defense” in strict liability offenses involving imprisonment). See also *United States v. United States District Court*, 858 F.2d 534 (9th Cir. 1988) (the First Amendment requires a reasonable mistake-of-age defense to a charge of child pornography production); *Regina v. City of Sault Ste. Marie* 85 D.L.R.3d 161 (Canada Sct. 1978) (when an offense does not require full mens rea, it is a good defense for the defendant to prove he was not negligent).

<sup>145</sup> When most defendants are negligent only some of the defendants will find it worthwhile to bear the cost of producing evidence. See also Bruce L. Hay, *Allocating the Burden of Proof*, 22 IND. L. J. 651, 675-7 (1997) (the probability that a party is correct supports a shift in the burden of proof in her favor).

<sup>146</sup> One way to reduce administrative cost and the risk of error is to narrow the scope of the defense. See, e.g., Levenson, *supra* note 141, at 405 (in order not to transform all strict liability trials into dispute over intent, defendants would have to prove *beyond reasonable doubt* that they were not negligent). Another way is to require defendants to prove that the harm would not have been avoided even if they were

*C. Regulation and Rule-Based Negligence*

Another alternative to strict liability is creating new criminal offenses, or non-criminal regulations, which would target actors' effort to obtain information. This strategy would be effective when we can determine ex ante what is the socially desirable level of informational effort. Consider the sale of liquor to minors. Instead of imposing strict liability, one could accompany a mens-rea-based offense with a regulation requiring liquor-stores owners to ask for age-identification documents prior to each sale. Similarly, one could directly regulate efforts to insulate sellers from information, by prohibiting online sales of liquor, for example.<sup>147</sup> This alternative loses its effectiveness when actors can find strategies to comply with the new offense, on the one hand, but still commit the basic offense while being genuinely ignorant. Nonetheless, it seems that many existing offenses and regulations (such as the requirement to ask for identification prior to the sale of liquor) can be interpreted as a tacit attempt to directly regulate offenders' level of effort to gather information.

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to exercise extraordinary care. Even when it is difficult to set the socially desirable level of effort, it might be relatively easy to determine whether an effort is substantially above the desirable level. This method was adopted in the corporate officers' context. *See* *United States v. New England Grocers Supply Co.*, 488 F. Supp. 230 (D. Mass 1980) (defendant has to introduce sufficient quantum of evidence as to her exercise of extraordinary care). Most corporate officers, however, have failed to meet the extraordinary care requirement. *See* *United States v. Starr*, 535 F.2d 512 (9th Cir. 1976); *United States v. Y. Hata & Co.*, 535 F.2d 508 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976).

<sup>147</sup> *See also* Steven Shavell, *Liability for Harm versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984) (discussing ex ante regulation versus ex post liability for harm).

*D. Wilful Ignorance*

The recognition of the perverse informational incentives under mens rea has resulted in another doctrinal development, namely, the adoption of the wilful ignorance doctrine.<sup>148</sup> As a general matter, the doctrine substitutes suspicion for knowledge. Under wilful ignorance, the knowledge requirement can be fulfilled by proof of a mere suspicion about the existence of the requisite circumstances.

Though adopted to deal with attempts not to obtain information,<sup>149</sup> the wilful ignorance doctrine provides only a partial solution to the perverse informational incentives under mens rea. First, the doctrine requires some degree of subjective suspicion, usually awareness of a *high probability* that a circumstance exists.<sup>150</sup> Moreover, most formulations of the doctrine require courts to ascertain that the avoidance of the knowledge was motivated by a desire to avoid the legal consequences of such knowledge.<sup>151</sup> As a result, the wilful ignorance doctrine can be applied only to a limited set of cases, especially those in which all circumstances indicate the criminal nature of the activity, but the defendant still argues he was not aware of a particular

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<sup>148</sup> See Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 199-200 (1990) (tracing the adoption of the doctrine in the U.S. to the need to cope with drug traffickers' tactic of deliberate ignorance to avoid criminal liability).

<sup>149</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, 259 (5<sup>th</sup> ed., 1998) (wilful ignorance imposes duty to investigate when information costs are low).

<sup>150</sup> See *United States v. Jewell*, 532 F.2d 697, 700 (9<sup>th</sup> Cir. 1976) (awareness of a high probability of the existence of a particular fact); *United States v. Valle-Vladez*, 554 F.2d 911,914 (9<sup>th</sup> Cir. 1977) ("deliberate avoidance of knowledge is culpable only when coupled with a subjective awareness of high probability"). See also Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L.R. 953, 982-985 (1998) (criticizing the high probability requirement on fairness grounds).

<sup>151</sup> See, e.g., *United States v. Mapelli*, 971 F.2d 284, 286 (9<sup>th</sup> Cir. 1992) ("A deliberate ignorance instruction ... is appropriate only when the defendant purposely contrives to avoid learning all the facts, as when a drug courier avoids looking in a secret compartment . . . because he knows full well that he is likely to find drugs there."); *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5<sup>th</sup> Cir. 1990) (defendant can be convicted under wilful ignorance only when he "purposely contrives to avoid learning all the facts... because he knows full well that he is likely to find drugs there."); *State v. Haas*, 675 P.2d 673, 680 (Ariz. 1983) (knowledge can be found if the defendant was aware of a high probability of an incriminating fact and "deliberately shut his eyes to avoid learning the truth.").

circumstance.<sup>152</sup> Due to its restrictive definition, wilful ignorance can serve as an effective mechanism to provide actors with incentives to obtain information only under a very limited set of circumstances.<sup>153</sup>

## VI. CONCLUSION

This Paper has provided an explanation for the emergence of strict liability and for its limited domain. I have shown that, when ignorance is sufficiently costly, mens rea would be effective in preventing misconduct. However, when ignorance is costless, mens rea would inevitably fail to prevent offenders from engaging in the prohibited conduct. Strict liability, therefore, is likely to govern offense elements for which the cost of ignorance is relatively low. I have also evaluated the selective endorsement of strict liability in light of the costly ignorance thesis, and demonstrated that the costly ignorance thesis is capable of infusing a much-needed degree of coherence into this notoriously perplexing body of law.

The main goal of this Paper has been descriptive, to explore the dynamics underlying the endurance and limited domain of strict criminal liability. Accordingly, I have neither challenged the normative arguments in favor of mens rea nor advocated a greater reliance on strict criminal liability. Yet, the analysis of this Paper has important policy implications. Once the function served by strict liability is accurately identified,

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<sup>152</sup> See Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1360 (1992) (a case that contains evidence of wilful ignorance will usually also contain circumstantial evidence that a reasonable person would have known.) In *Jewell*, *supra* note 142, for example, the defendant was asked by a stranger to drive his car from Mexico to the U.S. for \$100. Under these unusual circumstances, the jury would most likely conclude that the defendant was at least negligent.

<sup>153</sup> The list of doctrinal alternatives presented in this Part is by no means an exhaustive one. It is plausible that substituting recklessness for knowledge would also induce individuals to obtain information. See Robbins, *supra* note 148, at 233 (arguing that a recklessness standard would reach most defendants who deliberately remain ignorant). See also Michaels, *supra* note 150, at 953 (devising a new level of culpability, “indifference”, to fill an alleged gap between knowledge and recklessness).

### *Costly Ignorance*

academics and policymakers can devise tools that would be less harsh than strict liability to achieve the goal of providing offenders with incentives to acquire information. Part IV has made an initial step in that direction by briefly highlighting several alternative doctrines. One could argue that providing actors with incentives to obtain information is beyond the normative boundaries of criminal law. I neither endorse nor dispute that argument, which depends on one's normative theory about the appropriate boundaries of the criminal category. Nothing about the nature of the effort to acquire information suggests that criminal liability is the sole cure to the ignorance problem. Yet, as long as ignorance is costless, and no legal mechanism provides offenders with incentives to overcome this ignorance, mens rea will inevitably fail as a means of social control.