Fordham Law Review

Volume 91 | Issue 6 Article 8

2023

Criminalizing Threats Against Schools: A Divergence of Mens Rea and Punishment Severity in Recent State Legislation

Max Kaufman
Fordham University School of Law

CRIMINALIZING THREATS AGAINST SCHOOLS: A DIVERGENCE OF MENS REA AND PUNISHMENT SEVERITY IN RECENT STATE LEGISLATION

*Max Kaufman**

School shootings occur on a regular basis in the United States. Fear of the next school shooting leads schools to take any potential threat of violence seriously, but responding to a threat can be extremely disruptive to a school's operations and the community that it serves. In the last five years, nine state legislatures have attempted to deter these threats by specifically criminalizing threats of violence against schools.

Despite the proximity in time in which these states enacted school threat statutes, these laws diverge in two important ways: First, the nine statutes employ several different mens rea requirements. Second, these statutes impose a range of punishments, both in their classification as a felony or a misdemeanor and in the potential terms of imprisonment imposed. These differences mean that conduct may be a felony subject to a lengthy prison sentence in one state but may not even rise to the level of a crime in another state. Yet, the conduct at issue is similar across jurisdictions: most school threat offenders are juvenile students, and many of the threats are made digitally, whether over social media or text message.

This Note argues that the disparity in mens rea requirements and wide range of potential punishments in these recent school threat statutes are problematic. After analyzing and comparing these nine statutes, this Note makes two key recommendations for drafting a model school threat statute for future legislatures: First, a knowledge mens rea requirement sets an adequate threshold to distinguish between innocent and criminal conduct. Second, a misdemeanor offense punishable by up to six months' imprisonment is a sufficiently harsh criminal sanction. As juveniles are unlikely to respond to the deterrent message of these laws, and excessive prison terms have negative effects on juveniles, imposing a longer punishment for school threat offenses is unwarranted.

---

* J.D. Candidate, 2024, Fordham University School of Law; B.A., 2019, University of Pennsylvania. Thank you to Professor Deborah W. Denno for her knowledge and thoughtful guidance throughout this process. I would also like to thank Kielan Barua and the other members of the *Fordham Law Review* for their feedback and careful editing. Finally, thank you to my friends and family—especially my parents, Jeff and Wendy Kaufman—for their constant love and support.

INTRODUCTION

In May 2022, just days after the mass shooting at Robb Elementary School in Uvalde, Texas,[1] Daniel Marquez, a student at Patriot Elementary School in Cape Coral, Florida, texted a friend that he had "scammed" someone out of a large sum of money and included a stock image of guns.[2] Later in the

1. On May 24, 2022, a gunman murdered nineteen fourth graders and two teachers at Robb Elementary School in Uvalde, Texas. *See* Elizabeth Findell & Alicia A. Caldwell, *Texas Report Finds Police Failures in Uvalde School Shooting*, WALL ST. J. (July 18, 2022, 8:27 AM), https://www.wsj.com/articles/texas-report-blasts-police-response-to-uvalde-school-shooting-11658088084 [https://perma.cc/QP43-LB9S].

2. *See* Allie Griffin, *Florida 5th Grader Arrested for Mass Shooting Threat*, N.Y. POST (May 29, 2022, 10:04 PM), https://nypost.com/2022/05/29/florida-5th-grader-arrested-for-mass-shooting-threat/ [https://perma.cc/VJ5X-DMWP]; Selim Algar, *10-Year-Old Florida*

conversation, Marquez told his friend to "get ready for water day," a school-sponsored event.[3] After learning of these messages, law enforcement officers in southwest Florida arrested Marquez for allegedly threatening to commit a school shooting.[4] After questioning him in the Lee County Sheriff's Office, officers handcuffed Marquez, led him out of the station, and placed him in the back of a police cruiser.[5] The images of this "perp walk" make clear why this story became national news: the "pint-sized" defendant was only ten years old.[6]

Fear of the next school shooting permeates the United States.[7] A consequence of this fear is that schools take any alleged threat seriously.[8] However, school threats range in specificity: a student may make only a vague reference to a school event, as in the Marquez case,[9] or they may specifically threaten to carry out a shooting at a particular school on a particular date.[10] Still, the fear of a school shooting is so substantial that administrators are likely to respond to either type of threat[11] in a way that can

---

Kid Daniel Marquez, Who Was Perp-Walked for School Shooting 'Threat,' Pleads Not Guilty, N.Y. POST (July 11, 2022, 7:26 PM), https://nypost.com/2022/07/11/florida-kid-daniel-marquez-who-was-perp-walked-for-shooting-threat-pleads-not-guilty/ [https://perma.cc/UCJ9-UF7M].

3. Algar, *supra* note 2.

4. *See id.* As this Note will discuss, many suspects of school threat investigations are juvenile students. *See infra* notes 77–79. These investigations may require police access to text messages and other electronic records on a student's phone. Though beyond the scope of this Note, searches of a juvenile's phone raise interesting Fourth Amendment questions when balancing a student's privacy interests against public safety interests in preventing future violence against schools. *See, e.g.*, Andrew Mueller, Comment, *Preventing Parkland: A Workable Fourth Amendment Standard for Searching Juveniles' Smartphones Amid School Threats in a Post-Parkland World*, 28 WM. & MARY BILL RTS. J. 1057 (2020).

5. *See* Griffin, *supra* note 2.

6. Algar, *supra* note 2.

7. *See* Nikki Graf, *A Majority of U.S. Teens Fear a Shooting Could Happen at Their School, and Most Parents Share Their Concern*, PEW RSCH. CTR. (Apr. 18, 2018), https://www.pewresearch.org/fact-tank/2018/04/18/a-majority-of-u-s-teens-fear-a-shooting-could-happen-at-their-school-and-most-parents-share-their-concern/ [https://perma.cc/E9TX-H2HP] (reporting that a majority of teens aged thirteen to seventeen were "very or somewhat worried about the possibility of a shooting happening at their school").

8. *See* Cam Smith, *Juvenile Charged With 'Domestic Terrorism' Following Lake Region Union H.S. Threat*, WCAX3 (June 3, 2022, 11:02 AM), https://www.wcax.com/2022/06/03/lake-region-uhs-closed-friday-due-threat/ [https://perma.cc/PUM2-SREH] (stating that a superintendent conveyed that "no matter what the intention is behind a threat," the administration would take it seriously).

9. *See* Algar, *supra* note 2.

10. *See* Dennis Bright, *Juvenile to Face Charges for St. Pauls High School Shooting Threat, Police Say*, WBTW (Oct. 12, 2022, 5:48 PM), https://www.wbtw.com/news/state-regional-news/robeson-county/girl-17-considered-person-of-interest-in-school-shooting-threat-at-st-pauls-high-school/ [https://perma.cc/ZDN6-W89A] (describing a threat that a "shooting would take place in the 9th-grade hall" in a North Carolina high school on a specific day).

11. *See* Julie Bosman, *Anatomy of a School Lockdown: A Threat, Then the Anxious Wait*, N.Y. TIMES (Mar. 2, 2018), https://www.nytimes.com/2018/03/02/us/threat-school-shooting.html [https://perma.cc/Y42N-TCJ6] (noting that "[c]ommunities find themselves navigating a fine, sometimes blurred, line between vigilance and overreaction" in responding to school threats).

be extremely disruptive.[12] In 2015, for example, the Los Angeles Unified School District closed schools while investigating a potential threat against its students.[13] The closure affected over 900 schools and 640,000 students.[14] This type of disruption, along with the fear and anxiety stemming from these threats,[15] has prompted state legislatures to act. As the First Amendment does not extend free speech protections to threats of violence,[16] several states have opted to specifically criminalize threats of violence against schools.[17]

In the last five years, nine states have enacted or revised statutes that criminalize these threats.[18] As most criminal lawmaking authority is vested in the states as opposed to the federal government,[19] criminal law regularly varies across the fifty states.[20] Such a variation exists here, as nine state statutes seek to solve the same problem[21] but differ in two aspects that are fundamental to criminal law. First, these states employ different mens rea requirements.[22] Mens rea requirements focus on the defendant's mental state when committing a prohibited act, reflecting the belief that a person's intentions relate to their moral culpability.[23] As criminal law aims to punish only the "blameworthy" and not the innocent,[24] mens rea distinguishes between criminally culpable and inculpable conduct.[25] The fact that the nine school threat statutes utilize different mens rea elements means that the boundary between criminal and innocent differs based on the state in which the conduct occurred.[26] Second, these states classify the offense as either a

12. *See infra* notes 54–58 and accompanying text.

13. *See* Tamara Audi, Miguel Bustillo & Miriam Jordan, *Los Angeles Officials Defend Decision to Close Schools After Threat*, WALL ST. J. (Dec. 16, 2015, 1:00 AM), https://www.wsj.com/articles/los-angeles-schools-closed-after-threat-1450193499 [https://perma.cc/7MBH-FE3H].

14. *See id.*

15. *See infra* notes 54–58 and accompanying text.

16. Criminalizing threats is constitutionally acceptable because such prohibitions protect individuals from the fear of violence. *See* Virginia v. Black, 538 U.S. 343, 360 (2003).

17. *See infra* Appendix A.

18. These include Arkansas, Florida, Idaho, Michigan, New York, North Carolina, Tennessee, Utah, and Vermont. *See infra* Appendix A.

19. *See* U.S. CONST. amend. X (reserving for the states "powers not delegated to the United States by the Constitution"); United States v. Morrison, 529 U.S. 598, 599 (2000) (rejecting congressional authority to regulate purely local "violent criminal conduct" as an invasion of state police powers).

20. *See, e.g.*, Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 561 (2018) (describing variations in both state constitutional and statutory law in setting standards for pretrial detention decisions in criminal cases); Emily Buss, *Kids Are Not So Different: The Path from Juvenile Exceptionalism to Prison Abolition*, 89 U. CHI. L. REV. 843, 856–58 (2022) (detailing juvenile justice reforms taken on by different jurisdictions, ranging from raising the age of juvenile court jurisdiction to the shuttering of youth prisons altogether).

21. *See infra* Part I.A.

22. *See infra* Part II.

23. *See* Stephen F. Smith, *"Innocence" and the Guilty Mind*, 69 HASTINGS L.J. 1609, 1617 (2018) (noting that the traditional goal of mens rea is "'innocence'-protection," which is meant to prevent the punishment of morally blameless conduct).

24. Morissette v. United States, 342 U.S. 246, 252 (1952); *see also* Andrew Ashworth, *Conceptions of Overcriminalization*, 5 OHIO ST. J. CRIM. L. 407, 411 (2008).

25. *See* Smith, *supra* note 23, at 1617.

26. *See infra* Part II.

felony or misdemeanor and impose a range of potential prison sentences upon conviction.[27] As the potential punishment for a crime weighs on how well a law deters the undesired behavior, the difference in punishment severity may play a role in the effectiveness of these school threat statutes.[28]

In more general terms, mens rea requirements determine who may be convicted[29] of a school threat offense, whereas punishment severity determines how harshly they may be sanctioned, possibly deterring others from committing the same crime.[30] The jurisdictional differences mean that although Daniel Marquez could potentially be convicted under Florida's school threat statute, under which the maximum punishment is a fifteen-year prison sentence,[31] his conduct would likely not be criminal under Utah's corresponding law.[32]

Though both the mens rea requirements and punishment severity differ across school threat statutes, there are two facts that are common across the nine states that have significant implications for these laws. First, many of these threats are communicated electronically, either on social media or over text.[33] Determining an individual's mental state when making an alleged threat on these mediums can be especially difficult.[34] Electronic communications lack tone and context; what a sender views as a joke, the recipient may view as a threat.[35] Second, the vast majority of those individuals making threats against K–12 schools are K–12 students.[36] One

27. *See infra* Part II.

28. *See infra* notes 160–65 and accompanying text.

29. *See Mens Rea*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime.").

30. *See* VALERIE WRIGHT, SENT'G PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VERSUS SEVERITY OF PUNISHMENT 2 (2010), https://webpage.pace.edu/jhumbach/Crim-SentencingProject%20ReportonDeterrence.pdf [https://perma.cc/BK4N-395Q] (stating that part of the logic of harsh sentencing policies is to use the "threat of very severe sentences" to deter some people from committing criminal offenses).

31. *See infra* Part II.C.

32. *See infra* Part II.B.

33. *See* AMY KLINGER & AMANDA KLINGER, EDUCATOR'S SCH. SAFETY NETWORK, VIOLENT THREATS AND INCIDENTS IN SCHOOLS: AN ANALYSIS OF THE 2018–2019 SCHOOL YEAR 6 (2019), https://static1.squarespace.com/static/55674542e4b074aad07152ba/t/5d79760e23c1aa028e158caf/1568241167705/2018-2019+Violence+Threats+and+Incidents+in+Schools+Report+-+The+Educator%27s+School+Safety+Network+-+www.eSchoolSafety.org.pdf [https://perma.cc/JT9Q-AVVT] (finding that social media had accounted for approximately 40 percent of threats against schools between 2016 and 2019); Ken Trump, *Study Finds Rapid Escalation of Violent School Threats*, NAT'L SCH. SAFETY & SEC. SERVS., https://www.schoolsecurity.org/2015/02/study-finds-rapid-escalation-violent-school-threats/ [https://perma.cc/PMJ7-QMMX] (Mar. 2016) (reporting that electronically communicated messages accounted for 37 percent of threats in a national study).

34. *See* Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I U: Considering the Context of Online Threats*, 106 CALIF. L. REV. 1885, 1906–07 (2018) (describing the characteristics of social media as "magnify[ing] the potential for a speaker's innocent words to be misunderstood").

35. *See id.* at 1907 ("[A] cause of misunderstanding [on social media] is the lack of tonal and other nonverbal cues that signal sarcasm, jests, or hyperbole in oral communications.").

36. *See* KLINGER & KLINGER, *supra* note 33, at 6.

study found that students under the age of eighteen made 87 percent of all threats of violence against schools during the 2018–2019 academic year.[37] This fact has important ramifications for both the mens rea analysis and the deterrence value of these laws. Already elusive mens rea elements become even more difficult to grasp when a prosecutor, judge, or jury must determine the intent of an adolescent's digital communication.[38] Additionally, the young age of most potential offenders complicates the deterrence calculus, as research suggests that juveniles do not have the same decision-making capabilities as adults.[39]

To potentially label an adolescent as a convicted felon or misdemeanant is a serious matter[40]: contact with the criminal justice system is often damaging to a youth's life.[41] As juveniles are the population most likely to violate the nine recent school threat statutes, it is important to consider what type of conduct will be punished and whether these statutes will operate as effective deterrents of threats against schools. This Note seeks to answer those questions by analyzing these school threat statutes' various mens rea requirements and potential punishments. Acknowledging that juvenile students make most of the threats against K–12 schools, this Note argues that these statutes should employ—at a minimum—a knowledge mens rea requirement, should classify violations as misdemeanors, and should impose a maximum prison term of six months. This proposed statute would punish only criminally culpable conduct, while also reflecting the limited deterrence value of any law applied to juveniles.

Part I provides background on school threat laws. Part I first discusses the difficulties posed by school threats and then describes the recent enactment of school threat statutes. This overview then addresses the role of mens rea in criminal convictions under these statutes and how these laws aim to deter future threats. Part II further analyzes the nine state school threat laws by categorizing them based on their mens rea requirements and comparing the inconsistencies in punishing similar conduct across the nine states. To remedy the significant jurisdictional disparities found in Part II, Part III proposes a model school threat statute and advocates for a knowledge mens rea element and less severe punishment to better reflect the largely juvenile population that may run afoul of this law.

---

37. *See id.*

38. *See* Lidsky & Norbut, *supra* note 34, at 1922 (discussing the difficulty that adults face in trying to accurately read adolescent communications on social media platforms with which they are unfamiliar).

39. *See, e.g.*, Charles Garabedian, *Juvenile Empiricism: Approaches to Juvenile Sentencing in Light of* Graham *and* Miller, 21 U.C. DAVIS J. JUV. L. & POL'Y 195, 203 (2017) (noting that although the cognitive capacities of teenagers are close to those of adults, "a significant gap in judgment still exists between adolescents and adults").

40. *See* Karl A. Racine & Elizabeth Wilkins, *Toward a Just System for Juveniles*, 22 UDC L. REV. 1, 4 (2019) (stating that although the need to prosecute and detain juveniles may be suitable in some instances, these cases are "relatively rare" compared to the number of cases involving low-level delinquent behavior).

41. *See id.* (recognizing that contacts with the criminal justice system can cause trauma in adolescents).

I. AN OVERVIEW OF SCHOOL THREAT STATUTES

Analyzing the differences in school threat statutes requires understanding how these laws developed and their key concepts. Part I.A discusses the ongoing fear of school shootings and the resulting legislative response in the form of school threat statutes. Part I.B then explains mens rea generally, its application to threats, and the challenges posed in proving the subjective intent of adolescents for threats made online. Finally, Part I.C discusses the deterrent goals of these statutes and the implications of punishing a largely juvenile population.

A. School Shooting Threats: Challenges and Responses

Although school shootings are not a new phenomenon, these incidents have remained prevalent since the 1990s and have increased slightly since 2015.[42] These tragic attacks are seared into the national conscience: Columbine in 1999,[43] Sandy Hook in 2012,[44] Parkland in 2018,[45] and Uvalde in 2022.[46] A school shooting leaves an immeasurable impact on the affected community.[47] And beyond the borders of a Columbine, Newtown, Parkland, or Uvalde, communities across the country wrestle with the fear that they may one day experience such a tragedy, too.[48] In response to this fear, legislatures have advanced various measures to prevent future attacks,

42. *See* Paul M. Reeping, Louis Klarevas, Sonali Rajan, Ali Rowhani-Rahbar, Justin Heinze, April M. Zeoli, Monika K. Goyal, Marc A. Zimmerman & Charles C. Branas, *State Firearm Laws, Gun Ownership, and K–12 School Shootings: Implications for School Safety*, 21 J. SCH. VIOLENCE 132, 133 (2022) (detailing research indicating that, following the Columbine shooting in 1999, "the yearly incidence of school shootings remained relatively constant until a noticeable uptick occurred again beginning in 2015").

43. *See generally Columbine High School Shootings Fast Facts*, CNN (Apr. 1, 2022, 3:13 PM), https://www.cnn.com/2013/09/18/us/columbine-high-school-shootings-fast-facts [https://perma.cc/4Q96-ERBH].

44. *See generally Sandy Hook School Shootings Fast Facts*, CNN (May 26, 2022, 9:25 PM), https://www.cnn.com/2013/06/07/us/connecticut-shootings-fast-facts [https://perma.cc/GW7K-CKPE].

45. *See generally Frozen in Horror: Notes from Inside the Parkland School Massacre Site*, CNN, https://www.cnn.com/2022/08/04/us/parkland-shooting-sentencing-massacre-scene/index.html [https://perma.cc/3UUS-FBF6] (Aug. 5, 2022, 8:19 AM).

46. *See generally What to Know About the School Shooting in Uvalde, Texas*, N.Y. TIMES (Aug. 25, 2022), https://www.nytimes.com/article/uvalde-texas-school-shooting.html [https://perma.cc/EEV9-DVTM].

47. *See, e.g.*, Amy Held, *'We Live With It Every Day': Parkland Community Marks 1 Year Since Massacre*, NPR (Feb. 14, 2019, 12:31 PM), https://www.npr.org/2019/02/14/694688365/we-live-with-it-every-day-parkland-community-marks-one-year-since-massacre [https://perma.cc/T4G4-QEQN] (noting that Marjory Stoneman Douglas High School made grief counselors and therapy dogs available to Parkland students on the one-year anniversary of the mass shooting).

48. *See* Graf, *supra* note 7.

ranging from increased school security training[49] to creating state commissions dedicated to school safety.[50]

Fear of school shootings has also brought forth the additional challenge of responding to threats against schools.[51] Alleged threats are always highly concerning for schools,[52] but perhaps even more so when made in the wake of other actual school shootings.[53] And concern over any purported threat often prompts schools to act swiftly: administrators may dismiss students from school,[54] request a police presence on campus,[55] or even cancel classes altogether.[56] These disruptions impose a substantial burden on the school and surrounding community,[57] and they take an emotional toll on students, teachers, and parents.[58]

---

49. *See, e.g.*, Sophie Nieto-Munoz, *Bills to Protect N.J. Schools from Threats Advance in Assembly*, N.J. MONITOR (June 10, 2022, 6:54 AM), https://newjerseymonitor.com/2022/06/10/bills-to-protect-n-j-schools-from-active-threats-advance-in-assembly/ [https://perma.cc/G4TG-Y5NH] (describing bills drafted by the New Jersey legislature, including one that would increase required training for school security officers).

50. *See, e.g.*, Dave Berman, *Gov. Scott Details Timeline for School District Safety Upgrades After Parkland Shooting*, FLA. TODAY (Mar. 24, 2018, 6:59 PM), https://www.floridatoday.com/story/news/local/2018/03/24/gov-scott-details-timeline-school-district-safety-upgrades-after-parkland-shooting/455475002/ [https://perma.cc/23JY-MEXB] (detailing the responsibility of the Marjory Stoneman Douglas High School Public Safety Commission to evaluate policies for "preventing and responding to school shootings").

51. *See* Jeanine Santucci, *Schools Across US Hit with Dozens of False Shooting, Bomb Threats. Experts Say It's a 'Cruel Hoax*,*'* USA TODAY (Sept. 18, 2022, 6:00 AM), https://www.usatoday.com/story/news/nation/2022/09/18/fake-school-shooting-threats-us-fbi/10400404002/ [https://perma.cc/3D2U-QP4S] (reporting that dozens of schools nationally went on lockdown in response to purported threats).

52. *See* Smith, *supra* note 8 (stating that a superintendent conveyed that "no matter what the intention is behind a threat," the school administration would take it seriously).

53. *See Rash of Michigan School Threats Includes 9-Year-Olds' Alive-or-Dead Lists*, MERCURY NEWS (Dec. 10, 2021), https://www.mercurynews.com/2021/12/09/rash-of-michigan-school-threats-includes-9-year-olds-alive-or-dead-lists/ [https://perma.cc/CEF8-JQTQ] (detailing a wave of violent threats against schools in Michigan in the weeks following a shooting at Oxford High School).

54. *See Lonoke School District Responds to Social Media Threat, Releases Students Early*, FOX16 (Apr. 5, 2019, 7:19 PM), https://www.fox16.com/news/lonoke-school-district-responds-to-social-media-threat-releases-students-early/ [https://perma.cc/8R3G-MPP2].

55. *See* Scott McKane, *Unconfirmed TikTok Threats Force Extra Security at Most Utah Schools Friday*, FOX13 (Dec. 17, 2021, 6:25 PM), https://www.fox13now.com/news/local-news/unconfirmed-tiktok-threats-force-extra-security-at-most-utah-schools-friday [https://perma.cc/R3VM-BQAR].

56. *See Rash of Michigan School Threats Includes 9-Year-Olds' Alive-or-Dead Lists*, *supra* note 53.

57. *See* Bosman, *supra* note 11 (noting that in deciding to take every possible threat seriously, school administrators risk "needless disruption[,] . . . a noisy police response and a crush of worried parents").

58. *See Lunenburg Schools Closed Monday Due to Shooting Threat, Superintendent Says*, NBC12 (Sep. 12, 2022, 2:04 PM), https://www.nbc12.com/2022/09/12/lunenburg-schools-closed-monday-due-shooting-threat-superintendent-says/ [https://perma.cc/5NYH-XLYT] (interviewing one parent who was "sure a lot of parents didn't sleep last night" following a reported school threat and who would not be sending his children to school all week because they were scared).

In response to fears of school shootings[59] and the added burden of dealing with alleged threats, several states have enacted "school threat statutes"[60] that criminalize making threats of violence against schools. In the past five years, nine states have passed such laws.[61] Although these states enacted similar laws with a similar purpose[62] in a short time frame, the text of the statutes varies considerably. Five states prohibit threats of "mass" violence, harm, or shootings.[63] Five states target the use of a firearm or deadly weapon in their laws.[64] Three states prohibit threats to inflict death or serious bodily injury.[65] All but Florida specifically mention schools in the text of their statutes.[66] However, Florida enacted its threat statute in 2018 as part of the Marjory Stoneman Douglas High School Public Safety Act[67] in response to the Parkland school shooting, and the law has regularly been used to charge students for making threats against schools.[68]

More important than these textual variations, these school threat statutes employ several different mens rea requirements[69] and impose a range of

59. One criticism of policy driven by the fear of a school shooting is that the actual probability of an attack is extremely low. *See* David Ropeik, Opinion, *School Shootings Are Extraordinarily Rare. Why Is Fear of Them Driving Policy?*, WASH. POST (Mar. 8, 2018, 3:27 PM), https://www.washingtonpost.com/outlook/school-shootings-are-extraordinarily-rare-why-is-fear-of-them-driving-policy/2018/03/08/f4ead9f2-2247-11e8-94da-ebf9d112159c_story.html [https://perma.cc/FD2S-WWPU] (arguing that the fear of certain risks, such as school shootings, is "irrationally excessive" because the emotional nature of school shootings overshadows the actual chance of such an attack, which is "extraordinarily low").

60. For the purposes of this Note, a "school threat statute" is one that criminalizes communicating a threat of violence against a school or a school-sponsored event, or against students, faculty, or other educational employees. To locate these laws, this author reviewed the criminal codes for all fifty states and the District of Columbia. This survey includes any statute with "threat," "school," and some form of violence in the title of the provision or text of the law. Florida's mass shooting threat law is also included, even though it did not meet these criteria, because of the history of that statute's enactment. *See supra* notes 67–68 and accompanying text.

61. *See infra* Appendix A. Two additional states, Colorado and Virginia, have laws that meet these criteria, enacted in 2001 and 2005, respectively. This Note excludes these laws. The nine statutes analyzed in this Note were all passed in the time since the 2018 Parkland school shooting and aim to combat similar types of threats, namely, threats to commit school shootings that are often made over social media or other digital media. *See infra* Part I.B.2.

62. *See infra* Part I.C.

63. These states are Arkansas, Florida, New York, North Carolina, and Tennessee. *See infra* Appendix A.

64. These states are Florida, Idaho, Michigan, and Utah. *See infra* Appendix A.

65. These states are New York, Utah, and Vermont. *See infra* Appendix A.

66. *See infra* Appendix A.

67. 2018 Fla. Laws 6 (codified as amended at FLA. STAT. § 836.10 (2023)).

68. *See, e.g.*, Algar, *supra* note 2 (describing charges brought against Daniel Marquez under the Florida threat statute for allegedly threatening to carry out a school shooting); Marc Freeman, *He Says His Mass Shooting Threat Was a Joke. His Case May Answer Whether Such Posts Are a Crime.*, S. FLA. SUN-SENTINEL (Feb. 3, 2020, 6:00 AM), https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-ne-mass-shooting-threats-florida-law-appeal-20200203-rixnlwvrcze2pbsqmrq4h7i6ti-story.html [https://perma.cc/88EF-XX8B] (detailing charges brought against David Puy under the Florida threat statute for allegedly threatening to carry out a school shooting).

69. *See infra* Part II.

punishments in both classification and terms of imprisonment imposed.[70] Six states classify these offenses as misdemeanors,[71] and three classify them as felonies.[72] Either classification carries a significant social stigma for the offender.[73] Yet felony convictions have the added effect of depriving individuals of certain rights, including the right to vote.[74] Additionally, maximum terms of imprisonment range from as low as three months[75] to as high as fifteen years.[76]

Despite the differences across these nine laws, they are all likely to capture the same type of offender. A substantial portion of those who threaten K–12 schools, and are thus subject to punishment under these laws, are juvenile students.[77] One survey found that students made 87 percent of all threats of violence against K–12 schools in the United States during the 2018–2019 academic year.[78] In other words, most potential school threat offenders are adolescents under the age of eighteen.[79] The fact that these laws cover mainly juvenile conduct has important implications for analyzing the school threat statutes' mens rea requirements and deterrence value.

B. Juvenile Mens Rea in a Digital Threat Environment

Criminal law seeks to punish the "blameworthy" and not the innocent.[80] It does so, in part, by focusing on an individual's state of mind during the commission of a prohibited act.[81] To distinguish between criminally culpable and inculpable conduct, criminal law uses mens rea elements to

70. *See infra* Part II.

71. These states are Idaho, Michigan, New York, Tennessee, Utah, and Vermont. *See infra* Appendix B.

72. These states are Arkansas, Florida, and North Carolina. *See infra* Appendix B.

73. *See, e.g.*, J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2468–69 (2020) (noting that people with prior criminal convictions "face serious employment barriers" and that "[m]any employers report that they . . . avoid hiring individuals with [criminal] records"); Brian M. Murray, *Retributive Expungement*, 169 U. PA. L. REV. 665, 669, 676 (2021) (stating that "the stigmatizing effect of [a] public criminal record . . . is undeniable," especially when attempting to secure housing or employment).

74. *See* Kendra D. Willis, *Post-Conviction Release and De Facto Double Jeopardy: Making the Case for Felons as a Quasi-Suspect Class Due to the Collateral Consequences of a Felony Conviction*, 16 FLA. AGRIC. & MECH. U. L. REV. 1, 20–22 (2022).

75. *See* N.Y. PENAL LAW § 70.15(2) (McKinney 2023).

76. *See* FLA. STAT. § 775.082(3)(d) (2023).

77. *See* KLINGER & KLINGER, *supra* note 33, at 6.

78. *Id.* This percentage represented a slight increase from 81 percent in the prior school year. *See id.*

79. All available research indicates that most school threat offenders are adolescents. This conclusion is supported anecdotally by the research conducted by this author. Most news media reviewed reported on school threats made by K–12 students. *See infra* Part II.

80. Morissette v. United States, 342 U.S. 246, 252 (1952); *see also* Ashworth, *supra* note 24, at 411 (stating that part of the "core conception of criminal law" is to punish culpable, rather than innocent, behavior).

81. *See Morissette*, 342 U.S. at 251 ("Crime, as a compound concept, generally constitute[s] only from concurrence of an evil-meaning mind with an evil-doing hand . . . .").

define the mental state required to be convicted of a particular crime.[82] Part I.B.1 introduces the concept of mens rea and discusses how common mens rea terms apply in the context of threats. Part I.B.2 then describes two key issues with mens rea analyses in school threat statutes: (1) the adolescence of most perpetrators of school threats and (2) the digital forum through which many school threats are communicated.

1. Mens Rea and Its Application to Threats

To illustrate mens rea generally, consider the defendant in *Morissette v. United States*.[83] While out hunting, Morissette found a pile of scrap metal in a field.[84] Believing the scraps to be abandoned, Morissette took the metal home and resold it.[85] The defendant, it turns out, had taken the metal from a tract of land belonging to the government.[86] The government subsequently charged Morissette with knowingly stealing and converting property of the United States.[87] A jury convicted Morissette despite his insistence that he thought someone had abandoned the scrap metal.[88] On appeal, the U.S. Supreme Court overturned Morissette's conviction.[89] The Court found that the trial court's jury instructions omitted a necessary ingredient for a conviction: criminal intent.[90] To be guilty of the charged crime, Morissette needed to have a particular mental state, that is, know that the property belonged to the government when he took it.[91]

As *Morissette* illustrates, the difference between innocent and criminal conduct often depends on a person's state of mind at the time of the act.[92] The importance of a defendant's mental state reflects a belief in U.S. criminal law that a person's intentions relate to their moral culpability.[93] As a criminal conviction carries a significant degree of social stigma,[94] it follows that only blameworthy conduct should be punished.[95] And because criminal law aims

82. *See Mens Rea*, *supra* note 29 (defining mens rea as "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime").

83. 342 U.S. 246 (1952).

84. *See id.* at 247–48.

85. *See id.*

86. *See id.*

87. *See id.* at 248.

88. *See id.* at 249.

89. *See id.* at 276.

90. *See id.*

91. *See id.*

92. *See id.*

93. *See* Smith, *supra* note 23, at 1617 (noting that the traditional goal of mens rea is "'innocence'-protection," which is meant to prevent the punishment of morally blameless conduct). In the context of *Morissette*, a person who takes property knowing that it belongs to another is said to be more morally blameworthy than one who takes the property believing it abandoned. *See* 342 U.S. at 252.

94. *See* Murray, *supra* note 73, at 669 ("[T]he stigmatizing effect of [a] public criminal record . . . is undeniable . . . .").

95. *See* Ashworth, *supra* note 24, at 409 (arguing that the stigma of a criminal conviction should not be imposed for a very minor transgression).

to punish only the blameworthy and not the innocent, it is necessary to draw boundaries that reflect this principle.[96] Criminal law uses mens rea elements to set that boundary.[97] Mens rea terms take many forms,[98] with terminology ranging from willfulness to malice.[99] A common formulation, put forth by the Model Penal Code (MPC), includes four levels of culpability: purpose, knowledge, recklessness, and negligence.[100] Purpose is the most difficult for the government to prove and is considered to encompass the most morally blameworthy conduct.[101] Negligence, on the other end of the spectrum, is the easiest for the government to prove and is considered the least morally blameworthy.[102] Despite attempts to define these terms in the MPC and in state laws, they are still the subject of substantial confusion.[103] In the context of threats, examples of qualifying conduct under each MPC term can be instructive in understanding their definitions.

Purpose, often synonymous with intent, requires that the offender intended to cause the prohibited result.[104] To satisfy a purpose mens rea element in the context of a threat, an offender must have intended to threaten the recipient with their statements or actions.[105] Purpose is also the most difficult mens rea for the government to prove.[106] Absent a confession from the speaker that they meant their statements to be a threat (which is unlikely),

96. *See supra* note 80 and accompanying text.

97. *See Mens Rea*, *supra* note 29.

98. *See* Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1436 (1968) (listing many mens rea terms common to American law, including "general and specific intent, malice, wilfulness [sic], wantonness, recklessness, scienter, [and] criminal negligence").

99. According to one scholar, there are twelve distinct mens rea terms used by most states and the federal government. *See* Jeremy Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21, 26 (2001).

100. *See* MODEL PENAL CODE § 2.02(2)(a) (AM. L. INST. 2022). Many states also codify their own definitions of mens rea terms, which may or may not align with the definitions set forth in the MPC. *See* Miller, *supra* note 99, at 25 (noting that although many states adopt part of the MPC approach to mens rea, states have also created additional mens rea terms, such as "premeditation").

101. *See* Miller, *supra* note 99, at 30.

102. *See id.* Whether negligence should suffice to establish criminal liability in any context is an ongoing debate among legal scholars. *See, e.g.*, Marcia Baron, *Negligence, Mens Rea, and What We Want the Element of Mens Rea to Provide*, 14 CRIM. L. & PHIL. 69, 69–70 (2020) (stating that although few challenge whether purpose, knowledge, or recklessness are sufficiently culpable mental states, negligence is controversial); Garrath Williams, *Taking Responsibility for Negligence and Non-Negligence*, 14 CRIM. L. & PHIL. 113, 122–23 (2020) (arguing that although skeptics of negligence "tend to frame negligent acts as unwitting omissions . . . negligent conduct is less a matter of omission and more a matter of doing some activity badly").

103. *See* Miller, *supra* note 99, at 24 ("[L]aw professors, born into the genius of the Model Penal Code, have almost religiously taught it, much to the confusion of their students.").

104. *See id.* at 29.

105. *See* MODEL PENAL CODE § 2.02(2)(a)(i) ("A person acts purposely . . . when . . . it is his conscious object to engage in conduct of that nature or to cause such a result.").

106. *See* Miller, *supra* note 99, at 29.

other evidence is necessary to establish an intentional mental state.[107] Often, the specificity of the threat gives a jury the basis for assessing the intent of a defendant.[108]

In *State v. Blanchard*,[109] for example, prosecutors charged the defendant under a Vermont threat statute for statements made to police officers attempting to impound his car.[110] The defendant made multiple threatening comments: "I'm going to defend myself . . . I've got an AR-15 right fucking here. Do we need that?"[111] The court found it reasonable to conclude that the defendant "intended to use the AR-15 that he had nearby."[112] The speaker, the court found, made the statement because he wanted to make clear to the recipient that he would defend himself by use of violence.[113] Thus, the defendant satisfied an intent mens rea element, as he meant to threaten the police officers.[114]

Knowledge requires that the speaker subjectively believe that the prohibited result is extremely likely to occur from his speech and actions.[115] Knowledge, unlike purpose, does not require that the offender desire to threaten the recipient or to make the recipient feel threatened.[116] Instead, knowledge is satisfied when the person communicating the threat is practically certain that the communication will be viewed as a threat.[117] The conduct at issue in *Elonis v. United States*[118] is illustrative of a knowledge mens rea element. There, the defendant made references to killing his wife in Facebook posts.[119] These posts frightened his wife, leading her to seek a restraining order against Elonis.[120] Elonis continued to post similar messages in spite of the fear caused by his previous posts.[121] Even if he was not purposely threatening his wife, one could think that Elonis was "practically certain"[122] that his wife would view these new posts as threats given her

107. *See* Megan R. Murphy, Comment, *Context, Content, Intent: Social Media's Role in True Threat Prosecutions*, 168 U. PA. L. REV. 733, 741 (2020) (explaining that proof of intent often turns on circumstantial evidence rather than any admission from the defendant).

108. *See* Enrique A. Monagas & Carlos E. Monagas, *Prosecuting Threats in the Age of Social Media*, 36 N. ILL. U. L. REV. 57, 69 (2016) (arguing that relative to a specific, targeted threat, a nonspecific threat with no named targets does not indicate any subjective intent to threaten).

109. 256 A.3d 567 (Vt. 2021).

110. *See id.* at 571–72.

111. *Id.* (quoting the defendant).

112. *Id.* at 574.

113. *Id.*

114. *See* MODEL PENAL CODE § 2.02(2)(a)(i) (AM. L. INST. 2022) ("A person acts purposely . . . when . . . it is his conscious object to engage in conduct of that nature or to cause such a result.").

115. *See* Miller, *supra* note 99, at 29.

116. *See id.*

117. *See id.*; MODEL PENAL CODE § 2.02(b)(ii) ("A person acts knowingly . . . when . . . he is aware that it is practically certain that his conduct will cause such a result.").

118. 575 U.S. 723 (2015).

119. *See id.* at 728.

120. *See id.* at 728–29.

121. *See id.* at 729.

122. MODEL PENAL CODE § 2.02(b)(ii).

response to the previous post, and therefore, that he knowingly threatened her.[123]

Recklessness requires that a person be aware of the possibility of the risk that the prohibited result will occur but consciously ignores that risk and acts regardless.[124] Unlike knowledge, recklessness does not require that the speaker be practically certain that the recipient will feel threatened.[125] Instead, recklessness requires only that the speaker understand that there is a substantial risk that their conduct will be viewed as a threat.[126] For example, if one person tweets "I am going to kill you tomorrow at school" and tags their friend in the post, the two friends may have a clear understanding that the tweet is a joke.[127] Yet, a third party may read the tweet and take it as a serious threat.[128] Based on their knowledge that online communications lack tone and that the tweet may be misinterpreted, the tweeter could be criminally reckless, as they ignored a "substantial" and "unjustifiable" risk that someone could feel threatened.[129] Thus, recklessness requires that a speaker was aware that their words could be viewed as threatening and, in spite of that risk, nevertheless transmitted the communication.[130]

Finally, negligence requires that the defendant should have known that the result would occur.[131] Unlike purpose, knowledge, and recklessness, negligence does not depend on the speaker's subjective intent.[132] Instead, negligence is assessed objectively and depends on whether a reasonable person in the offender's position would have known that their conduct created a "substantial and unjustifiable risk" of causing another person to feel threatened.[133] This standard, however, would likely violate the First Amendment if used to criminalize threats.[134]

---

123. *See Elonis*, 575 U.S. at 735 (defining a guilty mind generally as a defendant's "knowledge of 'the facts that make his conduct fit the definition of the offense'" (quoting Staples v. United States, 511 U.S. 600, 608 n.3 (1994))). The *Elonis* Court did not actually determine the mens rea of the defendant nor did it definitively state the mens rea required under the federal threat statute, which omits any mental state element. *See generally* Maria A. Brusco, Note, *Read This Note or Else!: Conviction Under 18 U.S.C. § 875(c) for Recklessly Making a Threat*, 84 FORDHAM L. REV. 2845 (2016).

124. *See* Miller, *supra* note 99, at 31 (stating that recklessness requires an awareness of the "possibility" that the prohibited action will occur, whereas knowledge requires an awareness of the "probability" that the prohibited action will occur).

125. *See id.* at 29.

126. *See* Monagas & Monagas, *supra* note 108, at 76.

127. *Id.*

128. *Id.*

129. *Id.* at 76–77.

130. *See id.*

131. *See* Miller, *supra* note 99, at 29.

132. Subjective mental states, such as purpose, knowledge, and recklessness, require the fact-finder to consider what the defendant was actually thinking when they acted. *See* Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539, 556–57 (2016). Purely objective mental states, such as negligence, depend not on what was actually in the mind of the accused, but rather, on what a like-situated "reasonable" person would have done in the defendant's situation. *See id.*

133. MODEL PENAL CODE § 2.02(2)(d) (AM. L. INST. 2022).

134. The First Amendment allows legislatures to criminalize "true threats" because such prohibitions protect "individuals from the fear of violence and from the disruption" that such

2. School Threats Present Particular Mens Rea Challenges

The boundaries between these mens rea requirements are unclear. Despite the promulgation of statutory definitions, the line between purpose and knowledge is "razor-thin,"[135] and the divide between recklessness and negligence is similarly muddled.[136] Evaluating the various mens rea requirements is even more difficult when applied to school threats for two reasons. First, most threats are made by juveniles,[137] which complicates traditional notions of culpability underlying mens rea analysis.[138] The doctrine of mens rea assumes that an individual can conceptualize their actions in the "context of . . . social norms and expectations."[139] Furthermore, it requires that an actor, even if they do not understand the potential illegality of an act, "understand the harm [the act] may cause and the nature of the act as unacceptable or criminal."[140] Mens rea analysis therefore requires that defendants be "rational, capable of understanding and adapting to social norms, and capable of self-reflection."[141]

The characteristics of juveniles complicate this analysis. Adolescents process information and weigh priorities differently than adults do, especially in perceiving the future consequences of their actions.[142] Juveniles are

---

fear creates, in addition to protecting people "from the possibility that the threatened violence will occur." Virginia v. Black, 538 U.S. 343, 360 (2003) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)). Under the "true threat" doctrine, the Supreme Court has indicated that some subjective intent is necessary to lose First Amendment protections. *See id.* at 359 ("'True Threats' encompass those statements where the speaker means to communicate a *serious expression of an intent* to commit an act of unlawful violence to a particular individual or group of individuals." (emphasis added)). However, some states only require an objective, "reasonable-observer" standard for threats, which seems to contradict the subjective definition of "true threat." *See* Murphy, *supra* note 107, at 744 (arguing that sanctioning defendants under an objective standard, such as negligence, punishes speech that falls within the "heart of the First Amendment's protective sphere"). In the 2023 term, the Supreme Court will hear a case that questions whether any subjective intent is required for the purpose of excluding true threats from First Amendment protection. *See* Brief for the Petitioner at I, Counterman v. Colorado, No. 22-138 (Feb. 22, 2023), 2023 WL 2241858.

135. Transcript of Oral Argument at 43, Elonis v. United States, 575 U.S. 723 (2015) (No. 13-983), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/13-983_hejm.pdf [https://perma.cc/2FS7-GRCV].

136. *See* Christopher Cowley, *Special Issue on Recklessness and Negligence*, 14 CRIM. L. & PHIL 5, 7 (2020) ("The concepts of recklessness and negligence also raise interesting questions about boundaries: where they are, how fuzzy they are, and where they ought to be, and whether this might depend on the context.").

137. *See supra* notes 77–79 and accompanying text.

138. *See* Carroll, *supra* note 132, at 543 (arguing that applying adult mens rea standards to juveniles "undermines the very function of the mental state element").

139. *Id.* at 547.

140. *Id.* at 548 (describing an actor's "ability to grasp the cause-and-effect relationship" as "fundamental" to mens rea theory); *see also* Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 158 (2003) (noting that the law considers an act more blameworthy when the individual weighs their options and makes a conscious decision to engage in criminal conduct).

141. Carroll, *supra* note 132, at 548.

142. *See* Jill M. Ward, *Deterrence's Difficulty Magnified: The Importance of Adolescent Development in Assessing the Deterrence Value of Transferring Juveniles to Adult Court*, 7 U.C. DAVIS J. JUV. L. & POL'Y 253, 271–72 (2003) (stating that even though studies indicate

relatively poor decision-makers,[143] tend to be more impulsive than adults,[144] and tend to be more easily influenced by their peers.[145] In addition to implicating juvenile criminal culpability,[146] these characteristics also present challenges to judges and juries who evaluate a defendant's mental state. Assessing whether a defendant had the requisite mens rea for an offense requires the fact-finder to determine the defendant's mindset at the time of the act.[147] This inquiry means that adult jurors must try to understand an adolescent's thought process, often through circumstantial evidence.[148] Even though adults were once juveniles, they are unlikely to remember how a juvenile thinks.[149] Adults' inability to replicate adolescent thinking increases the likelihood that they will mistakenly interpret evidence of a juvenile's mental state through the lens of their own matured thought processes.[150] Therefore, adolescence poses an additional challenge in assessing mens rea in the enforcement of school threat statutes.

Second, a sizable portion of threats directed at schools are made digitally, including via social media or text message.[151] Convicting someone for a digital threat requires proving their mental state at the time of posting or sending.[152] However, these communications lack context and tone that may indicate a speaker's seriousness or sarcasm.[153] If one person, in a playful tone, tells their friend "don't make me kill you," it is clear that they had no

---

that individuals over the age of fifteen employ similar decision-making processes as adults, "adolescents are still likely to use information and weigh priorities differently from adults").

143. *See id.* at 267; Garabedian, *supra* note 39, at 205.

144. *See* Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65, 99 (1999) (noting that studies generally point to the conclusion that adolescents tend to have less impulse control).

145. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005) (acknowledging that juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure").

146. *See* Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 113 (2009) (stating that adolescents are more impulsive when making choices and are unlikely to fully contemplate the consequences of such choices, and that even when a juvenile has the requisite mental state, mens rea is a "relatively poor proxy for culpability" for juveniles).

147. *See* Carroll, *supra* note 132, at 556–57.

148. Absent a direct confession from a defendant, jurors must use other evidence to discern what that person was thinking when committing the prohibited act. *See* Murphy, *supra* note 107, at 741 (explaining that proof of intent often turns on circumstantial evidence rather than any admission from the defendant).

149. *See* Jenny E. Carroll, *The Problem with Inference and Juvenile Defendants*, 45 FLA. ST. U. L. REV. 1, 31 (2017) ("[I]t is dubious to assume an adult fact finder, merely because he or she was at one point an adolescent, is capable of accurately assessing [a] juvenile's state of mind based on circumstantial evidence.").

150. *See id.*

151. *See* KLINGER & KLINGER, *supra* note 33, at 6; Trump, *supra* note 33.

152. *See* Monagas & Monagas, *supra* note 108, at 69 (noting that the circumstances under which a person issues a threat can shed light on their mental state at that time).

153. *See* Jessica L. Opila, Note, *How* Elonis *Failed to Clarify the Analysis of "True Threats" in Social Media Cases and the Subsequent Need for Congressional Response*, 24 MICH. TELECOMM. & TECH. L. REV. 95, 99 (2017).

intention to threaten the friend.[154] Yet, if that same person posted that message to their Twitter feed, tagging their friend in the tweet, the potential for misunderstanding increases.[155] Without the expressive cues inherent in verbal speech, the friend or another person viewing the tweet may view this as a serious threat.[156] Accordingly, a digital forum is a particularly difficult place to discern intent.[157]

C. Deterring Juvenile Behavior

Not only does the adolescence of the likely offenders pose a challenge in evaluating the mens rea of an individual defendant,[158] but it may also undermine a central goal of these laws: deterring individuals from making threats against schools in the first place.[159]

Deterrence[160] is predicated on the idea that an individual considers the potential "costs" of punishment before committing a crime.[161] The "costs" in this calculation include both the probability of being caught and punished and the severity of the expected punishment.[162] Greater certainty of punishment deters would-be offenders by increasing the perceived risk of apprehension.[163] For example, if there are more police cars on a highway, drivers may slow down to avoid receiving a ticket.[164] Meanwhile, severity of punishment deters would-be offenders when they consider the potential sanctions and conclude that the penalty is too high to risk apprehension.[165]

---

154. Lidsky & Norbut, *supra* note 34, at 1907.

155. *See id.*

156. *See id.*

157. *See* Monagas & Monagas, *supra* note 108, at 69.

158. *See supra* Part I.B.2.

159. *See, e.g.*, Marjorie Cortez, *Real or Hoax Threats Against Schools Could Be Punished as Felonies, Misdemeanors in Utah*, DESERET NEWS (Mar. 6, 2019, 8:10 PM), https://www.deseret.com/2019/3/6/20667630/real-or-hoax-threats-against-schools-could-be-punished-as-felonies-misdemeanors-in-utah [https://perma.cc/YQ4X-JVEJ] (quoting the sponsor of Utah's school threat bill as stating that the law could be "something . . . able to teach kids that [real or fake threats are] serious and put a little bit of teeth behind it"); Melissa Zygowicz, *People Posting Threats Against Schools Face Up to Five Years in Federal Prison*, THV11 (Feb. 13, 2020, 10:44 PM), https://www.thv11.com/article/news/local/people-posting-threats-against-schools-face-up-to-five-years-in-federal-prison/91-1e9af0e3-f4f6-47bd-aedf-24fe4c42ea4e [https://perma.cc/L8QB-BG6B] (quoting a local police officer as saying that the Arkansas statute would be used to "deter people from thinking" that making school threats is "a game").

160. Though scrutinized as a theory of punishment, deterrence remains a prevalent influence on criminal justice policy across the country. *See* Beschle, *supra* note 144, at 78 (noting that in recent decades, general deterrence has likely been the most frequently invoked justification for criminal punishment).

161. Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 205 (2013) ("Deterrence is a theory of choice in which would-be offenders balance the benefits and costs of crime.").

162. *See* Patrick J. Keenan, *The New Deterrence: Crime and Policy in the Age of Globalization*, 91 IOWA L. REV. 505, 519 (2006).

163. *See* WRIGHT, *supra* note 30, at 2.

164. *See id.*

165. *See id.* (stating that part of the logic of harsh sentencing policies is to use the "threat of very severe sentences" to deter some people from committing criminal offenses). Though

School threat statutes attempt to effectuate general deterrence by discouraging others from committing the same offense through public prosecutions.[166]

A deterrence justification for school threat statutes is problematic, as it is predicated on rational adult actors weighing the costs and benefits of their actions.[167] However, juveniles are different from adults, which, like the mens rea analysis, complicates the deterrence calculus.[168] Studies show that juveniles appreciate the risks and rewards of decisions differently than adults do.[169] Young people tend to consider short-term costs and benefits more than long-term consequences.[170] Additionally, adolescents are more impulsive than adults are[171] and tend to be more easily influenced by their peers.[172] Although some of these characteristics stem from a lack of life experience, evidence suggests that the differences between adult and adolescent decision-making are the product of biology,[173] with data suggesting that a juvenile brain "operate[s] differently" than an adult brain.[174]

As traditional deterrence theory is based on the considered choices of a rational adult, the relative decision-making deficiencies of juveniles present a problem.[175] Deterrence assumes a rational actor balancing the costs and benefits of a course of action before deciding whether to act.[176] Adolescents, however, tend to be more impulsive than adults.[177] Impulsivity is inherently at odds with rational calculation.[178] Furthermore, deterrence requires a

---

"costs" include both probability of apprehension and severity of punishment, the former has been found to deter crime more consistently than the latter. *See* Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats Into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865, 865 (2001).

166. *See* Nagin, *supra* note 161, at 200 (defining general deterrence as the "crime prevention effects of the threat of punishment"). Specific deterrence, on the other hand, focuses on the effect that punishment has on whether an individual reoffends in the future. *See id.* Thus, although specific deterrence considers the individual offender exclusively, general deterrence considers the community at large. *See id.*

167. *See* Ward, *supra* note 142, at 254 (arguing that because deterrence theory is based on adult actors, its application to juveniles is "somewhat problematic").

168. *See* Roper v. Simmons, 543 U.S. 551, 571 (2005) ("[T]he same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.").

169. *See* Garabedian, *supra* note 39, at 205.

170. *See* Ward, *supra* note 142, at 274–75.

171. *See* Beschle, *supra* note 144, at 99 (noting that studies generally point to the conclusion that adolescents tend to have less impulse control); Ward, *supra* note 142, at 269 (stating that juveniles' capacity to control their impulses is limited).

172. *See Roper*, 543 U.S. at 569 ("[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.").

173. *See* Garabedian, *supra* note 39, at 205 (describing research that attributes some of the differences between adults and adolescents to "neuropsychological and neurobiological underpinnings").

174. *Id.*

175. *See* Ward, *supra* note 142, at 254.

176. *See id.* at 264.

177. *See* Beschle, *supra* note 144, at 99; Ward, *supra* note 142, at 269.

178. *See Impulse*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/impulse [https://perma.cc/F66T-V98C] (last visited Apr. 3, 2023) (defining impulse as a

person to appreciate certain information, including the chance of being caught and punished for the prohibited action and the potential severity of that punishment.[179] Yet, adolescents seem to process and use this type of information differently than adults do.[180] For example, according to traditional deterrence theory, the "threat" of transfer from juvenile to adult court should factor into a juvenile's decision-making.[181] Adult courts can impose harsher treatment and longer sentences,[182] implicating the severity-of-punishment prong of the deterrence calculus.[183] However, evidence suggests that providing this information to adolescents has only a limited effect on their decision-making.[184] If juveniles are less capable of using information about potential criminal sanctions, then such information has limited practical effect in deterring future criminal conduct.[185]

Beyond the limited deterrence value of severe criminal sanctions, actually applying such penalties on juveniles may have adverse consequences.[186] Interaction with the criminal justice system can change both a juvenile's self-perception and the way in which others perceive them, leading to lower educational achievement and increased delinquency.[187] Excessive terms of incarceration can increase long-term mental and physical health problems.[188] Yet, the most common state time limit on juvenile prison sentences is two years, which is "far longer" than evidence suggests is necessary for young offenders.[189] Further, research indicates that prison sentences exceeding six months do not reduce the likelihood of recidivism in adolescents.[190] Thus,

---

"sudden spontaneous inclination" to "some usually unpremeditated action" or as a "propensity or natural tendency usually other than rational").

179. *See* Keenan, *supra* note 162, at 519.

180. *See* Ward, *supra* note 142, at 272 (stating that even though studies indicate that individuals over the age of fifteen employ similar decision-making processes as adults, "adolescents are still likely to use information and weigh priorities differently from adults").

181. *See id.* at 270.

182. *See id.*

183. *See* WRIGHT, *supra* note 30, at 2.

184. *See* Ward, *supra* note 142, at 270; U.S. DEP'T OF JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION, STUDYING DETERRENCE AMONG HIGH-RISK ADOLESCENTS 12 (2015), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248617.pdf [https://perma.cc/8H2R-5V8N] (concluding that the "deterrent effect of more severe punishments . . . in terms of both institutional placement and longer stays" seems to be limited).

185. *See* Ward, *supra* note 142, at 270.

186. *See* Thalia Gonzalez, *Youth Incarceration, Health, and Length of Stay*, 45 FORDHAM URB. L.J. 45, 80–81 (2017) (arguing that unnecessarily long prison sentences for juveniles place them at a higher risk of reoffending in addition to exacerbating health issues); Wade Askew, Note, *Keeping Promises to Preserve Promise: The Necessity of Committing to a Rehabilitation Model in the Juvenile Justice System*, 20 GEO. J. ON POVERTY L. & POL'Y 373, 385 (2013) (noting that the conditions of correctional facilities, seclusion, staff insensitivity, and exposure to verbal and physical aggression all contribute to traumatizing juvenile offenders).

187. *See* Racine & Wilkins, *supra* note 40, at 4 ("Whatever the mechanism, contact with the juvenile justice system is often highly detrimental to a young person's educational prospects.").

188. *See* Gonzalez, *supra* note 186, at 75.

189. *Id.* at 76.

190. *See id.*

excessive punishments are unlikely to provide a consequential general deterrence benefit to the public[191] and appear to have negative long-term effects on a juvenile offender.[192]

II. DIVERGING SCHOOL THREAT STATUTES AMONG THE STATES

Though nine states have enacted or amended school threat statutes in the last five years, the laws vary in significant ways. These statutes employ several different mens rea requirements, classify the offense as either a felony or misdemeanor, and impose a range of potential prison terms. These inconsistencies mean that similar conduct can lead to a felony conviction and extensive prison sentence in one state, a misdemeanor conviction and short term of imprisonment in another state, and possibly no criminal conviction at all in yet another state.

Part II of this Note categorizes these statutes based on their mens rea requirements and considers the potential for unequal treatment of similar conduct across jurisdictions. Part II.A details state statutes that provide the most protection to defendants by employing an intent mens rea requirement. Part II.B then describes two jurisdictions that utilize a knowledge mens rea standard. Finally, Part II.C analyzes two states that provide the least protection to would-be offenders by utilizing a recklessness mens rea requirement.

A. Intent Mens Rea Jurisdictions

Five states employ an intent or equivalent mens rea requirement in their school threat statutes: Idaho, Michigan, New York, North Carolina, and Utah.

Idaho's statute, revised in 2018, prohibits "willfully threaten[ing] . . . to do violence to any person on school grounds."[193] Michigan's 2019 statute makes it a crime to "intentionally threaten[]" to carry out an act of violence with a dangerous weapon against students or employees on school grounds.[194] Utah's statute, passed in 2020,[195] prohibits threats against a school that involve the use of a weapon to cause bodily injury or death either "with real intent or as an intentional hoax."[196] New York's 2022 school threat statute makes it a crime to "threaten[] to inflict or cause to be inflicted, serious physical injury or death at a school" with "intent to intimidate a group of people or to create public alarm."[197]

---

191. *See supra* notes 179–85 and accompanying text.

192. *See supra* notes 186–89 and accompanying text.

193. IDAHO CODE § 18-3302I(1)(a) (2023) (effective Mar. 23, 2018). Willfulness is defined under Idaho law as the "purpose or willingness to commit" the criminal act. *Id.* § 18-101. As purpose and intent are synonymous, this law can be fairly read as imposing an intent standard. *See supra* note 104 and accompanying text.

194. MICH. COMP. LAWS § 750.235b(1) (2023) (effective Mar. 28, 2019).

195. *See* 2020 Utah Laws 426 (codified as amended at UTAH CODE ANN. § 76-5-107.1 (West 2023)).

196. UTAH CODE ANN. § 76-5-107.1(2)(a) (West 2023).

197. N.Y. PENAL LAW § 240.78(1) (McKinney 2023) (effective June 6, 2022).

North Carolina's 2018 school threat law is unique among these jurisdictions, as it lacks a statutory mental state element, instead making it a crime to "threaten[] to commit an act of mass violence on educational property."[198] Despite North Carolina's failure to include a mens rea term, the state's supreme court has previously implied such an element into another threat statute.[199] Under the standard used by that court to the school threat statute, an offender would have to make an "objectively threatening statement" while "possess[ing] the subjective intent to threaten."[200] So despite the lack of a statutory mens rea element, North Carolina's school threat statute implicitly requires an intentional mental state when making a threat.[201]

Each state employs an intent—or equivalent—mens rea element that is functionally the same, in that the speaker must want to threaten the recipient.[202] Conviction therefore depends on the defendant's subjective desire to threaten, rather than on any awareness of the risks associated with their conduct.[203] New York and Utah also include an additional type of intent in their statutes. Utah prohibits threats made as an "intentional hoax,"[204] whereas New York makes it a crime to threaten a school "with the intent . . . to create public alarm."[205] These prohibitions appear to be aimed at threats made by students who hope that their schools will respond by canceling classes.[206]

An intent or purpose mens rea sets a high threshold for conviction.[207] Prosecutors and juries often rely on the specificity of a threat to find that a

198. N.C. GEN. STAT. § 14-277.6(a) (2022) (effective Dec. 1, 2018).

199. *See* State v. Taylor, 866 S.E.2d 740, 753 (N.C. 2021) (reading a subjective intent requirement into a state statute that prohibited threatening to kill a court officer to avoid infringing on First Amendment speech protections).

200. *See id.*

201. *See id.*

202. Michigan, New York, and Utah all define intent as having the "conscious object" or "objective" to cause a result. MICH. COMP. LAWS § 8.9(10)(b) (2023); PENAL LAW § 15.05(1); UTAH CODE ANN. § 76-2-103(1) (West 2023). Idaho's definition of willfulness requires purpose to commit the prohibited act, which is synonymous with intent. *See supra* note 193 and accompanying text. North Carolina does not have a statutory definition of intent; however, the North Carolina Supreme Court's opinion in *State v. Taylor*, 866 S.E.2d 740 (N.C. 2021), suggests that intent requires the desire to threaten someone. *See supra* notes 200–01 and accompanying text.

203. *See infra* Parts II.B., II.C.

204. UTAH CODE ANN. § 76-5-107.1(2)(a). Utah's inclusion of "intentional hoax[es]" appears to be a response, in part, to the panic schools faced when responding to all threats. *See* Cortez, *supra* note 159 (noting that a school district asked the bill's sponsor to draft the legislation after a bomb threat caused the district to evacuate a school).

205. PENAL LAW § 240.78(1).

206. *See Three Charged in Separate Threats Made to Sampson County Schools*, WRAL NEWS (May 31, 2022, 9:26 PM), https://www.wral.com/three-charged-in-separate-threats-made-to-sampson-county-schools/20308367/ [https://perma.cc/EQG7-SJQ3] (reporting that a twelve- and thirteen-year-old threatened a school because "they simply didn't want to go to school"); McKane, *supra* note 55 (noting that school and law enforcement officials across the nation believed that a viral school shooting threat began as a way to get out of class).

207. *See* Miller, *supra* note 99, at 30.

defendant intended their statements or actions as a threat.[208] In North Carolina, for example, a student stated on social media that a shooting would take place on a specific day at a specific high school in a specific hallway.[209] Although the level of detail there may allow a jury to infer an intent to threaten, it becomes more difficult to satisfy the mens rea needed in Idaho, Michigan, New York, North Carolina, and Utah when threats are more vague and less targeted.[210]

In addition to their high mens rea standards, these states also apply relatively lenient potential punishments.[211] Four out of the five states classify a school threat offense as a misdemeanor.[212] Only North Carolina classifies the offense as a felony.[213] These states also impose relatively short prison sentences.[214] Maximum terms of incarceration include three months in New York,[215] six months in Idaho,[216] one year in Michigan,[217] 364 days in Utah,[218] and thirty-nine months in North Carolina.[219] Thus, not only do their mens rea requirements make it unlikely that these states will criminalize inculpable conduct,[220] but these states are also unlikely to impose harsh penalties for the sake of deterrence.[221]

B. Knowledge Mens Rea Jurisdictions

Two states use a knowledge mens rea requirement: Vermont and Arkansas.

Vermont amended its criminal threatening statute in 2022 to specifically proscribe threats against schools.[222] The law now prohibits knowingly "threaten[ing] another person or a group of particular persons" in a way that leads any person to reasonably believe that death or serious bodily injury will occur at a school.[223] Arkansas's 2019 school threat statute makes it a crime to "knowingly threaten[] to commit an act of mass violence on school

208. *See* Monagas & Monagas, *supra* note 108, at 69 (arguing that relative to a specific, targeted threat, a nonspecific threat with no named targets does not indicate any subjective intent to threaten).

209. *See* Bright, *supra* note 10.

210. The issues with criminalizing less detailed threats are discussed in Part II.C.

211. *See infra* Parts II.B, II.C.

212. *See* IDAHO CODE § 18-113 (2023); MICH. COMP. LAWS § 750.235b(1) (2023); UTAH CODE ANN. § 76-5-107.1(3)(a)(i) (West 2023); N.Y. PENAL LAW § 240.78 (McKinney 2023).

213. *See* N.C. GEN. STAT. § 14-277.6(a) (2022). Still, this is the second least serious felony level in North Carolina. *See id.* § 15A-1340.17 (setting out the sentencing matrix for felony offenses, with only class I felonies receiving lesser prison terms than class H offenses).

214. *See infra* Parts II.B, II.C.

215. *See* PENAL LAW § 70.15(2).

216. *See* IDAHO CODE § 18-113.

217. *See* MICH. COMP. LAWS § 750.235b(1).

218. *See* UTAH CODE ANN. § 76-3-204(1) (West 2023).

219. *See* N.C. GEN. STAT. § 15A-1340.17 (2022).

220. *See infra* Part III.A.1.

221. *See infra* Part III.B.1.

222. *Compare* VT. STAT. ANN. tit. 13, § 1702 (2023) (effective May 3, 2022) (containing a prohibition on threats against schools), *with id.* § 1702 (2016) (amended 2022) (criminalizing threats generally without any reference to schools).

223. *Id.* § 1702(d).

property" or at a school-sponsored event.[224] Under Arkansas law, a person knowingly threatens another when they are "practically certain"[225] that the recipient will feel threatened.

Given that the boundary between purpose and knowledge is "razor-thin,"[226] conduct covered in the intent jurisdictions[227] and conduct covered in the knowledge jurisdictions—Arkansas and Vermont—are likely to overlap.[228] For example, in June 2022, authorities charged a Vermont high school student under the state's school threat statute after they made threatening statements on social media.[229] The individual made "gun threats" on Snapchat, specifically naming three students and other members of the school community.[230] Identifying specific targets indicates that the student intended the message to be a genuine threat, especially if they believed that the targets would receive the message.[231] Such evidence provides support for finding that the student made an intentional threat,[232] and therefore, the student could likely be found guilty in any of the intent jurisdictions.[233] And because intentional conduct includes knowing conduct, the student could likely be found guilty in Vermont and Arkansas, too.[234]

A violation of Vermont's law constitutes a misdemeanor carrying a maximum prison term of two years.[235] The punishment in Arkansas is more severe. Violating Arkansas's law constitutes a class C felony[236] punishable by a minimum of three and a maximum of ten years' imprisonment.[237] Thus, there is divergence between two states seeking to punish similar conduct: a person who "knowingly" threatens a school could be labeled a felon and face ten years in prison in Arkansas,[238] while a person communicating the exact same threat in Vermont could face a misdemeanor charge and two-year prison term at most.[239] Additionally, although the boundary between purpose and knowledge is not always clear,[240] there is conflict between these two states and the intent jurisdictions. The law views knowledge as a less

224. ARK. CODE ANN. § 5-13-302(b)(1) (2023) (effective July 24, 2019).
225. *Id.* § 5-2-202(2)(B). This definition of knowing is practically identical to that used by the MPC. *See* MODEL PENAL CODE § 2.02(2)(b)(ii) (AM. L. INST. 2022).
226. Transcript of Oral Argument, *supra* note 135, at 43.
227. *See supra* Part II.A.
228. *See* Wechsler, *supra* note 98, at 1437 ("The [distinction] between acting purposely and knowingly is very narrow.").
229. *See* Smith, *supra* note 8.
230. *Id.*
231. *See* Monagas & Monagas, *supra* note 108, at 69.
232. *See id.*
233. *See supra* Part II.A.
234. *See* MODEL PENAL CODE § 2.02(5) (AM. L. INST. 2022) ("When acting knowingly suffices to establish an element [of a crime], such element also is established if a person acts purposely.").
235. *See* VT. STAT. ANN. tit. 13, § 1702(d) (2023); *id.* § 1 (defining any offense that imposes a maximum penalty of no more than two years as a misdemeanor).
236. *See* ARK. CODE ANN. § 5-13-302(c) (2023).
237. *See id.* § 5-4-401(a)(4).
238. *See supra* notes 236–37237 and accompanying text.
239. *See* VT. STAT. ANN. tit. 13, § 1702(d); *id.* § 1.
240. *See* Miller, *supra* note 99, at 24.

culpable mental state than purpose or intent.[241] Yet Arkansas punishes less culpable conduct more severely than any state using the more culpable intent mens rea;[242] Vermont punishes less culpable conduct more severely than all the intent jurisdictions save for North Carolina.[243] This jurisdictional conflict is even more stark when considering the recklessness jurisdictions.[244]

C. Recklessness Mens Rea Jurisdictions

Two states utilize a recklessness mens rea: Tennessee and Florida.[245]

Tennessee's 2021 school threat law criminalizes "recklessly . . . threaten[ing] to commit an act of mass violence on school property or at a school-related activity."[246] Under Tennessee law, recklessness requires an offender to be aware of "a substantial and unjustifiable risk" and to "consciously disregard[]" that risk.[247]

In April 2022, Delron Thomas, a Tennessee high school student, sent Snapchats to another student stating that he was "thinking/planning on shooting up the school."[248] The recipient of the messages had also heard the defendant make several comments in person about shooting up the school.[249] Local authorities arrested Thomas and charged him under Tennessee's school threat statute.[250] Specifically targeting his high school in repeated threatening statements provided evidence of an intent to threaten.[251] At the least, the defendant likely satisfied a knowledge mens rea: though he failed to specify when he would carry out his threat,[252] he did send the threat directly to another student over social media and made several similar comments,[253] comparable to the multiple threats made by the defendant in *Elonis*.[254] Therefore, a jury could likely find that Thomas met a knowing mens rea element, in addition to Tennessee's lower recklessness standard.[255]

---

241. *See* Andreas Kuersten & John D. Medaglia, *Neuroscience and the Model Penal Code's Mens Rea Categories*, 71 DUKE L.J. ONLINE 53, 63 (2021) (describing the four MPC terms as "culpability tiers," with purpose "at the top," followed by knowledge, recklessness, and negligence).

242. *See infra* Appendix B.

243. *See infra* Appendix B.

244. *See infra* notes 296–98 and accompanying text.

245. Florida's threat statute omits a statutory mens rea element but functionally uses a recklessness standard. *See infra* notes 259–91 and accompanying text.

246. TENN. CODE ANN. § 39-16-517 (2023) (effective July 1, 2021).

247. *Id.* § 39-11-302(c).

248. Hannah Moore, *Police: Heritage High School Student Threatened 'Mass Violence*,*'* WATE (Apr. 14, 2022, 9:13 AM), https://www.wate.com/news/top-stories/police-heritage-high-student-threatened-mass-violence/ [https://perma.cc/CST7-HYHY].

249. *See id.*

250. *See id.*

251. *See* Monagas & Monagas, *supra* note 108, at 69.

252. *See id.* (giving an example of a nonspecific threat, where the person states "[s]omeday, I am gonna shoot up a school," as providing little evidence of the speaker's specific intent).

253. *See* Moore, *supra* note 248.

254. *See* Elonis v. United States, 575 U.S. 723, 728–29 (2015).

255. *See* MODEL PENAL CODE § 2.02(5) (AM. L. INST. 2022) ("When recklessness suffices to establish an element [of a crime], such element is also established if a person acts purposely or knowingly.").

Although the threat at issue in Thomas's case could probably meet a higher mens rea requirement, cases brought in the other recklessness jurisdiction, Florida, provide a clearer illustration of the additional level of conduct captured under such a standard.[256]

Florida enacted its threat statute in 2018, prohibiting threats to "conduct a mass shooting."[257] Like North Carolina's,[258] Florida's law contains no statutory mens rea element.[259] Despite this omission, Florida courts generally read in a knowledge mental state element, absent express legislative intent to create a strict-liability offense.[260] In *N.D. v. State*,[261] a Florida appellate court read a "guilty knowledge" requirement into the prior version of Florida's threat statute.[262] The court specifically noted that the statute did not "contain any statement making it clear that the legislature intended to dispense with a mens rea requirement."[263] Moreover, given that a strict-liability speech offense would likely violate the First Amendment, some subjective intent should be required.[264]

In *Puy v. State*,[265] however, a Florida appellate court upheld the trial court's denial of a motion to dismiss an indictment against the defendant for making an alleged school shooting threat over Snapchat.[266] The court found that the state made a prima facie showing that the defendant's message "was sufficient to cause reasonable alarm in a reasonable person and thus was a threat."[267] Thus, although *N.D. v. State* suggests that a Florida court would impose a knowledge mens rea standard,[268] the court in *Puy* sidestepped subjective intent completely, relying instead on an objective reasonable

256. *See infra* notes 265–91 and accompanying text.

257. FLA. STAT. § 836.10 (2023). Though the law does not specifically mention schools, the Florida legislature amended the statute to criminalize threats of mass shootings as a part of the Marjory Stoneman Douglas High School Public Safety Act, in response to the Parkland shooting earlier that year. *See* 2018 Fla. Laws 6 (codified as amended at FLA. STAT. § 836.10 (2023)).

258. *See* N.C. GEN. STAT. § 14-277.6(a) (2022).

259. *See* 2018 Fla. Laws 6.

260. *See* State v. Giorgetti, 868 So. 2d 512, 516 (Fla. 2004) ("[W]e will ordinarily presume that the Legislature intends statutes defining a criminal violation to contain a knowledge requirement absent an express indication of a contrary intent."); State v. Carrier, 240 So. 3d 852, 857 (Fla. Dist. Ct. App. 2018) (implying a knowledge element into the Florida forgery statute that omitted any statutory mens rea requirement).

261. 315 So. 3d 102 (Fla. Dist. Ct. App. 2020).

262. *Id.* at 105 (citing State v. Giorgetti, 868 So. 2d 512, 515 (Fla. 2004)).

263. *See id.*

264. *See* Virginia v. Black, 538 U.S. 343, 359 (2003) (exempting from First Amendment protections speech that embodies a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals").

265. 294 So. 3d 930 (Fla. Dist. Ct. App. 2020).

266. *See id.* at 933–34.

267. *Id.* at 934; *see also* State v. Cowart, 301 So. 2d 332, 335 (Fla. Dist. Ct. App. 2020) (affirming the denial of a motion to dismiss an indictment when the "[s]tate made a prima facie showing that the [communication] was a threat because it was 'sufficient to cause alarm in reasonable persons'" (quoting Smith v. State, 532 So. 2d 50, 53 (Fla. Dist. Ct. App. 1988))).

268. *See N.D.*, 315 So. 3d at 105.

person standard.[269] Despite the presumption of a knowledge mental state requirement when the legislature omits a statutory mens rea,[270] the actual mens rea applied to the Florida school threat statute is unclear.

Though Puy's case never proceeded to trial,[271] the facts of *Puy* provide an example of conduct best described as reckless, rather than knowing.[272] While on his way to meet friends for dinner, the nineteen-year-old Puy sent a Snapchat with the caption: "On my way! School shooter."[273] This formed the basis of a prosecution for making a school threat,[274] even though the communication identified no targets and otherwise lacked specificity.[275] Puy denied any intent to make a threat, telling police that he "wasn't thinking."[276] Though proving guilt in any of the intent jurisdictions would be difficult on this evidence alone,[277] the case is much closer if brought in a jurisdiction with a knowledge mens rea.[278] Puy posted the Snapchat on his public feed, which allowed any of his contacts on the app to view the photo.[279] Still, unlike the Thomas case in Tennessee, in which multiple threatening comments likely sufficed to establish a knowing mens rea,[280] the evidence against Puy does not necessarily establish that he was "practically certain" that the Snapchat would be viewed as a threat.[281] Whether Puy could be convicted of knowingly threatening a school in Vermont or Arkansas[282] is uncertain. Instead, Puy's conduct can be more accurately characterized as reckless.[283] One could argue that, as a teenager familiar with social media, Puy knew that his post lacked context and tone, and it therefore created a substantial risk of being misinterpreted as a real threat.[284]

Florida's arrest and prosecution of Daniel Marquez[285] provides further evidence of a recklessness mens rea standard. Marquez texted his friend a stock image of guns and later referenced a school event.[286] Despite the vagueness of this "threat," the local sheriff's office arrested the ten-year-old

269. *Puy*, 294 So. 3d at 934; *see also* Murphy, *supra* note 107, at 744 (arguing that use of an objective standard seems to contradict the subjective standard of a "true threat").

270. *See* State v. Giorgetti, 868 So. 2d 512, 516 (Fla. 2004); State v. Carrier, 240 So. 3d 852, 857 (Fla. Dist. Ct. App. 2018).

271. *See Puy*, 294 So. 3d at 933–34.

272. *See supra* notes 115–23 and accompanying text.

273. Freeman, *supra* note 68.

274. *See id.*

275. *See* Monagas & Monagas, *supra* note 108, at 69.

276. Freeman, *supra* note 68.

277. *See* Monagas & Monagas, *supra* note 108, at 69.

278. *See supra* Part II.B.

279. *See* Puy v. State, 294 So. 3d 930, 931 (Fla. Dist. Ct. App. 2020).

280. *See supra* notes 248–54 and accompanying text.

281. *See* MODEL PENAL CODE § 2.02(b)(ii) (AM L. INST. 2022).

282. *See supra* Part II.B.

283. *See* Monagas & Monagas, *supra* note 108, at 76–77 (arguing that a single, ostensibly sarcastic post stating "I am going to kill you tomorrow at school" would constitute reckless conduct).

284. *See id.*

285. *See* Algar, *supra* note 2.

286. *See id.*

for threatening to commit a school shooting.[287] The lack of specificity in this threat would make it difficult to prove any subjective intent to threaten,[288] but Florida law enforcement still opted to arrest the "pint-sized" defendant.[289] Both the Marquez arrest and the *Puy* case demonstrate a willingness by Florida law enforcement to prosecute when a defendant's conduct falls below the "practical[] certain[ty]" required by a knowledge mens rea.[290] The conduct at issue in each instance could therefore be sufficient for conviction in only one other school threat jurisdiction: Tennessee.[291]

Although Tennessee's and Florida's threat laws both capture reckless conduct, the potential punishments in the two jurisdictions are vastly different. Tennessee classifies a school threat offense as a class A misdemeanor[292] and imposes a maximum prison term of eleven months and twenty-nine days.[293] A violation of Florida's statute is a felony in the second degree[294] and carries a potential maximum prison sentence of fifteen years.[295] Again, as with Arkansas and Vermont,[296] there is divergence among the recklessness jurisdictions. The exact same school threat could lead to drastically different punishments based only on the location of the conduct.[297] Moreover, threats made against a school in Florida can form the basis of a conviction with a lesser showing of subjective intent than in Idaho, Michigan, New York, North Carolina, Utah, and Vermont while imposing harsher sanctions.[298] Given the identical purpose of these statutes and the similar conduct at issue, this conflict is problematic and should be addressed.

III. PROPOSING A MODEL SCHOOL THREAT STATUTE

As detailed in Part II, the required mens rea and potential punishment vary significantly across the nine school threat statutes.[299] Conduct that may be noncriminal in one state may lead to a lengthy prison sentence in another.[300] Yet the fundamentals of school threats are the same across the country. These threats disrupt school operations, stoke fear in communities,[301] and are mostly made by adolescent students.[302] Balancing the legitimate and

287. *See id.*
288. *See* Monagas & Monagas, *supra* note 108, at 69.
289. Algar, *supra* note 2.
290. MODEL PENAL CODE § 2.02(2)(b)(ii) (AM L. INST. 2022).
291. *See* TENN. CODE ANN. § 39-16-517 (2023).
292. *See id.*
293. *See id.* § 40-35-111(e)(1).
294. *See* FLA. STAT. § 836.10 (2023).
295. *See id.* § 775.082(3)(d).
296. *See supra* notes 238–39 and accompanying text.
297. *See supra* notes 292–95 and accompanying text.
298. *See supra* Parts II.A, II.B.
299. *See supra* Part II.
300. *Compare supra* notes 211–19 and accompanying text (describing the range of prison terms for offenses in intent jurisdictions), *with supra* notes 294–95 and accompanying text (detailing the harsher sanctions for violating Florida's statute).
301. *See supra* notes 54–58 and accompanying text.
302. *See supra* notes 77–79 and accompanying text.

important interest in deterring these threats against the immaturity of likely offenders provides a challenge when legislating to solve this issue.

Part III of this Note proposes a model school threat statute that better protects against over-punishing juvenile conduct. Part III.A argues that a knowledge mens rea requirement sets a sufficiently high bar for conviction that is less likely to result in the punishment of unwise, but inculpable, adolescent behavior. Part III.B asserts that classifying the offense as a misdemeanor and imposing a maximum of six months' imprisonment adequately punishes offenders while better reflecting the fundamental issues in deterring juvenile conduct. Finally, Part III.C discusses how the model threat statute would operate once implemented.

A. Setting a Knowledge Mens Rea Requirement

The mens rea requirement operates to distinguish between innocent and criminal conduct.[303] To ensure that only the "blameworthy"[304] are punished under a school threat statute, future statutes should employ a knowledge mens rea element. Part III.A.1 first contends that, given the potential for misinterpreting evidence of intent in ambiguous digital threats, recklessness is not an adequate mens rea threshold. Part III.A.2 then argues that a knowledge mens rea requirement better assures that only those who are truly culpable are subject to a school threat conviction.

1. A Recklessness Standard Is Too Likely to Capture Inculpable Conduct

In the context of school threats, recklessness requires only that a person be aware of a substantial risk that their conduct will be viewed as a threat to harm a school.[305] A recklessness mens rea does not provide an adequate threshold to separate innocent from criminal conduct. Florida's aggressive enforcement of its law[306] supports this position.

In both the Marquez arrest[307] and the *Puy* case,[308] the defendants made largely ambiguous threats. Ten-year-old Marquez texted his friend a stock image of guns and later told his friend to "get ready" for a school-sponsored event.[309] Nineteen-year-old Puy posted a Snapchat, during nonschool hours, with a caption: "On my way! School Shooter."[310] Neither individual named a specific target of their threat.[311] Both Marquez and Puy sent isolated messages, rather than repeated, threatening comments.[312] And neither

303. *See supra* Part I.B.1.
304. *See supra* note 80 and accompanying text.
305. *See* Miller, *supra* note 99, at 29.
306. *See supra* notes 265–91 and accompanying text.
307. *See supra* notes 2–6 and accompanying text.
308. *See supra* notes 271–91 and accompanying text.
309. *See supra* notes 2–3 and accompanying text.
310. *See* Freeman, *supra* note 68.
311. *See supra* notes 229–34 and accompanying text (describing a threat made by a student against a Vermont school in June 2022).
312. *See* Moore, *supra* note 248 (detailing Delron Thomas's repeated threats against a Tennessee high school in April 2022).

defendant made any sort of specified, detailed threat indicating an exact location and time that they would carry out an attack.[313] Both Marquez and Puy denied any intention of making a threat,[314] yet law enforcement arrested them both under the Florida statute.[315]

These cases illustrate two fundamental issues with mens rea analysis in school threat cases. First, both "threats" were conveyed digitally over Snapchat[316] or by text message.[317] The potential for a misunderstanding in a digital environment is significant.[318] These media lack context and tone, which make it difficult for a third party to know whether the speaker was being serious or sarcastic.[319] Second, the potential for a misunderstanding continues to exist at the stage in which a judge or jury must evaluate the mental state of a defendant to determine guilt.[320] The youth of school threat defendants means that adult fact-finders will be attempting to understand an adolescent's thought processes.[321] Adults' inability to think as juveniles do increases the likelihood that they will mistakenly interpret the evidence of an adolescent's mental state through their own matured thought processes.[322]

The potential for misinterpreting evidence of mens rea, especially in cases with ambiguous threats, suggests that a recklessness standard is not sufficient for separating innocent from criminal conduct. Rather, a higher, more culpable mental state is necessary.

2. A Knowledge Standard Provides a Better Dividing Line Between Innocent and Criminal Conduct

Knowledge requires that the person communicating the threat is practically certain that the communication will be viewed as a threat.[323] Although the potential for misunderstanding evidence of intent cannot be taken out of the equation entirely, knowledge is a better mens rea standard because it would decrease the likelihood of prosecutions and convictions for ambiguous threats.

In both the Marquez arrest and the *Puy* case, it would be difficult to prove that either defendant knowingly threatened to commit a school shooting. One could argue that Puy, as a nineteen-year-old, knew from experience with social media that the post could be viewed by others and misinterpreted as a

313. *See* Bright, *supra* note 10 (describing a threat that a "shooting would take place in the 9th-grade hall" in a North Carolina high school on a specific day).

314. *See* Algar, *supra* note 2 (noting that Marquez's father denied any connection between the images of guns and the later message about a school event); Freeman, *supra* note 68 (reporting that Puy told police that he "wasn't thinking").

315. *See supra* Part II.C.

316. *See supra* notes 2–6 and accompanying text.

317. *See supra* notes 271–91 and accompanying text.

318. *See supra* notes 151–57 and accompanying text.

319. *See* Lidsky & Norbut, *supra* note 34, at 1907.

320. *See* Carroll, *supra* note 149, at 31.

321. *See id.*

322. *See id.*

323. *See* Miller, *supra* note 99, at 29.

threat.[324] Yet knowledge requires that a defendant be "practically certain" that the message would be viewed as a threat.[325] A single Snapchat, posted outside of school hours and lacking any specificity, does not seem to rise to such a standard.[326] Additionally, it would be a stretch to argue that ten-year-old Marquez's vague reference to "water day"[327] would suffice to establish a knowledge mens rea.[328] On the other hand, the Thomas case in Tennessee[329] provides an example of clearly knowing conduct. There, the defendant sent a Snapchat directly to another student stating that he was "thinking/planning on shooting up the school."[330] Although Thomas did not specify when he was planning to carry out the threat, he made several additional comments about committing a school shooting.[331]

Even with the inherent difficulties in determining the intent of a juvenile in a digital forum,[332] the circumstances of the Thomas case provide a sufficient basis to find that the defendant made a knowing threat.[333] And when compared to the conduct of Marquez or Puy, Thomas's conduct was more clearly blameworthy. Threats are excluded from the First Amendment's coverage to protect people from the fear of violence.[334] In the context of school threat statutes, legislatures hope to protect schools from the fear and resulting disruption caused by threats of violence, especially threats of school shootings.[335] Thomas's conduct falls squarely within this zone. Repeated messages about committing violence against a school engender legitimate fear requiring a response from the school and law enforcement.[336] Punishing this type of knowing and threatening behavior does not raise concerns that a school threat statute will capture innocent conduct.

In sum, a knowledge mens rea requirement sets a sufficient barrier between innocent and criminal conduct, thus ensuring that a school threat statute punishes only the morally culpable. And as the boundary between a mens rea of intent and knowledge is "razor-thin,"[337] little additional "'innocence'-protection"[338] is achieved by raising the mens rea requirement to intent.

---

324. *See* Monagas & Monagas, *supra* note 108, at 77 (arguing that a speaker's familiarity with lack of tone and context in online communications could support a finding of recklessness).

325. *See supra* notes 115–23 and accompanying text.

326. *See* Monagas & Monagas, *supra* note 108, at 69.

327. Algar, *supra* note 2.

328. See Monagas & Monagas, supra note 108, at 77.

329. *See supra* notes 248–53 and accompanying text.

330. Moore, *supra* note 248.

331. *See id.*

332. *See supra* Part I.B.2.

333. *See* Murphy, *supra* note 107, at 741 (explaining that proof of intent often turns on circumstantial evidence rather than any admission from the defendant).

334. *See* Virginia v. Black, 538 U.S. 343, 360 (2003) (noting that threats fall outside the scope of the First Amendment to protect individuals from the fear of violence).

335. *See supra* Part I.A.

336. *See supra* notes 51–58 and accompanying text.

337. Transcript of Oral Argument, *supra* note 135, at 43.

338. *See* Smith, *supra* note 23, at 1617.

B. Calibrating Punishment to Avoid Excessiveness

Although a knowledge mens rea requirement sets an adequate divide between innocent and guilty conduct, the potential criminal sanctions for a school threat violation should be only as severe as necessary. Part III.B.1 argues that the goals of general deterrence do not justify a harsh punishment, given the youth of most likely offenders. Based on the existing school threat statutes and negative impact of severe sanctions on adolescents, Part III.B.2 recommends classifying the crime as a misdemeanor and setting a maximum prison term of six months.

1. Deterrence Cannot Justify Severe Criminal Sanctions

One of the key goals of school threat statutes is to deter individuals from making such threats.[339] General deterrence is predicated, in part, on the severity of punishment dissuading people from choosing to engage in the undesired conduct.[340] Yet deterrence theory is based on calculated choices made by rational, adult actors.[341] In the context of school threat statutes, however, the data indicates that the individuals most likely to be prosecuted under these laws are far from rational, adult actors.[342] Rather, these laws will probably capture juveniles who, relative to adults, are worse decision-makers and are inherently more impulsive.[343]

Given the decision-making deficiencies of adolescents,[344] the deterrence value of school threat statutes is likely to be limited.[345] Specifically, juveniles are less capable of considering information about potential criminal sanctions.[346] The "message" sent by imposing a criminal punishment is likely to fall on deaf, juvenile ears.[347] A potential ten-year prison sentence in Arkansas[348] is unlikely to be any more effective in deterring future threats than a six-month prison sentence in Idaho.[349] Accordingly, general deterrence cannot justify harsh criminal sanctions for school threat statute defendants. This notion, in conjunction with the negative effects that contacts with the criminal justice system have on juveniles,[350] warrants a more lenient punishment.

339. *See* Cortez, *supra* note 159.
340. *See* WRIGHT, *supra* note 30, at 2.
341. *See* Ward, *supra* note 142, at 254.
342. *See supra* notes 175–85 and accompanying text.
343. *See supra* notes 175–85 and accompanying text.
344. *See supra* Part I.C.
345. *See supra* Part I.C.
346. *See supra* notes 179–85 and accompanying text.
347. *See* Ward, *supra* note 142, at 270 (detailing the limited effect that the "threat" of transferring an adolescent from juvenile court to adult court has on that adolescent's decision-making).
348. *See* ARK. CODE ANN. § 5-4-401(a)(4) (2023).
349. *See* IDAHO CODE § 18-113 (2023); *see also* U.S. DEP'T OF JUST., *supra* note 184, at 12 (concluding that the "deterrent effect of more severe punishments . . . in terms of both institutional placement and longer stays" seems to be limited).
350. *See supra* notes 186–87 and accompanying text.

2. A Misdemeanor Punishable By Up to Six Months in Prison Is Sufficient

Any criminal conviction, whether a felony or a misdemeanor, imposes a significant social stigma on the offender.[351] A felony conviction often carries the additional burden of depriving the offender of certain civil privileges, including the right to vote.[352] In the context of school threat statutes, the juveniles likely to violate these laws are unlikely to hear the deterrence "message" sent by the statutes in the first place.[353] Further, these likely offenders will probably not consider the added severity of a felony versus a misdemeanor offense.[354] If raising the offense from a misdemeanor to a felony does little to deter future offenders, then the heightened stigma of potentially labeling an adolescent as a felon appears to be unwarranted.[355] A misdemeanor offense still represents a significant censure.[356] Moreover, the majority of states with school threat statutes consider a misdemeanor to be an adequate offense level: six of the nine statutes classify the crime as a misdemeanor rather than a felony.[357] As a felony offense would impose a far more burdensome social stigma than a misdemeanor would,[358] without providing even marginal deterrent value,[359] a state legislature that chooses to enact a school threat statute in the future should follow the majority of the existing nine jurisdictions[360] and classify the offense as a misdemeanor.

Any contact with the criminal justice system is likely to have a negative effect on a juvenile.[361] Incarceration has an especially damaging effect on adolescents. A term of imprisonment can traumatize a juvenile;[362] excessive sentences can magnify long-term physical and mental health problems while increasing the risk of criminal recidivism.[363] And again, given the unlikelihood that juveniles will hear the deterrence "message" sent by criminal sanctions for a school threat offense,[364] deterrence cannot justify a substantial term of imprisonment.

---

351. *See* Prescott & Starr, *supra* note 73, at 2469 (describing the difficulties faced by criminal offenders in securing employment); Murray, *supra* note 73, at 669 (stating that "the stigmatizing effect" of a criminal record is especially acute in finding employment and securing housing).

352. *See* Willis, *supra* note 74, at 21 (listing several legal rights revoked as result of a felony conviction, including the right to vote, hold public office, obtain certain occupational licenses, and obtain insurance and pension benefits).

353. *See* Ward, *supra* note 142, at 270.

354. *See id.*; U.S. DEP'T OF JUST., *supra* note 184, at 12.

355. *See* Willis, *supra* note 74, at 20–22; *see also supra* text accompanying note 74.

356. *See supra* note 73 and accompanying text (summarizing the stigmatizing effect of any criminal conviction).

357. *See infra* Appendix B.

358. *See* Willis, *supra* note 74, at 21.

359. See *supra* notes 175–85 and accompanying text.

360. *See infra* Appendix B.

361. *See* Racine & Wilkins, *supra* note 40, at 4 (stating that the damage to a juvenile's self-perception and reputation stemming from contact with the criminal justice system can lead to lower educational achievement and increased delinquency).

362. *See* Askew, *supra* note 186, at 385.

363. *See* Gonzalez, *supra* note 186, at 80–81.

364. *See* Ward, *supra* note 142, at 270.

Although deterrence does not provide a strong justification for a lengthy prison term, and any contact with the criminal justice system is likely to have negative repercussions for a youth, some term of imprisonment may be warranted in particularly serious school threat cases. Credible threats against schools stoke fear,[365] disrupt school operations,[366] and often require a response from law enforcement.[367] States have a legitimate interest in punishing this conduct to protect people from the fear of violence.[368] Setting a maximum term of incarceration for a school threat offense requires balancing the legitimate need to punish serious offenses with the fact that an excessive prison sentence is likely to have negative long-term effects on an adolescent.[369]

The median maximum prison sentence is one year for the nine school threat statutes.[370] Among the six misdemeanor offense states, the median maximum potential term of imprisonment is just under one year.[371] Only the three felony jurisdictions—Arkansas, Florida, and North Carolina—impose sentences exceeding two years,[372] which is already "far longer" than research suggests is necessary for a juvenile offender.[373] Additionally, empirical research indicates that incarceration beyond six months does not reduce recidivism in individual offenders.[374] If a sentence exceeding that time limit is unlikely to benefit the offender, and little-to-no general deterrence value will accrue from a lengthier prison term,[375] then a six-month term should set the upper bound for a school threat offense. This would allow states that enact school threat statutes in the future to punish serious offenses when necessary[376] without imposing excessive sanctions that do not provide any deterrent[377] or rehabilitative value.[378]

C. The Model School Threat Statute

Borrowing language from both the Michigan and North Carolina laws,[379] the proposed model statute set forth in this section draws a sufficiently high

365. *See Lunenburg Schools Closed Monday Due to Shooting Threat, Superintendent Says*, *supra* note 58.
366. *See supra* notes 54–56 and accompanying text.
367. *See* McKane, *supra* note 55.
368. *See supra* notes 51–58 and accompanying text.
369. *See* Gonzalez, *supra* note 186, at 80–81.
370. *See infra* Appendix B.
371. The median maximum term of imprisonment for misdemeanor states would lay between eleven months in Tennessee and 364 days in Utah. *See infra* Appendix B.
372. *See infra* Appendix B.
373. Gonzalez, *supra* note 186, at 76.
374. *See id.* at 75.
375. *See* Ward, *supra* note 142, at 270.
376. *See supra* notes 51–58 and accompanying text.
377. *See* Ward, *supra* note 142, at 270.
378. *See* Gonzalez, *supra* note 186, at 75.
379. *See infra* Appendix A.

boundary between innocent and criminal conduct[380] without imposing an excessive punishment.[381]

> A person who, by means of verbal, digital, or any other communication, knowingly threatens to commit an act of violence against any students or school employees on school grounds or at a school-sponsored event is guilty of a misdemeanor punishable by imprisonment for not more than six months.

This statute would, like the nine statutes surveyed in Part II, capture digital threats made over text message,[382] Snapchat,[383] or other social media. States that use this model would therefore continue to cover much of the relevant threatening conduct.

For ten-year-old Daniel Marquez, the vague reference to a school event[384] would not suffice for him to be convicted under this statute.[385] The "threat" lacked any inkling of specificity necessary for a fact-finder to infer any intent to threaten at all.[386] Thus, Marquez would not be unnecessarily traumatized through contact with the criminal justice system.[387] In the case of the older, nineteen-year-old David Puy, the decision to post a Snapchat was clearly unwise, given the anxiety and fear surrounding school shootings[388] and the caption that went along with it: "On my way! School Shooter."[389] Still, Puy made an unspecific "threat" during nonschool hours.[390] This conduct is not so clearly morally culpable as to warrant criminal punishment.

In utilizing a knowledge mens rea requirement, the model threat statute justifiably excludes the type of conduct at issue with both Marquez and Puy, while still imposing criminal sanctions when necessary. Students who make multiple comments about committing a school shooting[391] or make specific threats to carry out a shooting in a particular school hallway on a particular day[392] could still be punished under this statute.[393] Such threats engender substantial fear in the targeted community and require a response from law enforcement.[394] And unlike the Marquez or Puy "threats," these threats allow fact-finders to reasonably find that each defendant knowingly threatened a school based on the objective evidence.[395]

---

380. *See supra* Part III.A.
381. *See supra* Part III.B.
382. *See* Algar, *supra* note 2.
383. *See* Moore, *supra* note 248.
384. *See* Algar, *supra* note 2.
385. *See supra* Part III.A.2.
386. *See* Monagas & Monagas, *supra* note 108, at 69.
387. *See* Racine & Wilkins, *supra* note 40, at 4.
388. *See* Graf, *supra* note 7 (reporting that a majority of teens aged thirteen to seventeen were "very or somewhat worried about the possibility of a shooting happening at their school").
389. Freeman, *supra* note 68.
390. *See supra* notes 271–91 and accompanying text.
391. Moore, *supra* note 248.
392. *See* Bright, *supra* note 10.
393. *See supra* Part III.A.2.
394. *See supra* notes 51–58 and accompanying text.
395. *See* Monagas & Monagas, *supra* note 108, at 69.

Though schools should and do take any threat seriously,[396] the imposition of criminal sanctions on an adolescent should only occur when absolutely necessary.[397] By punishing only instances of truly "blameworthy"[398] behavior at a knowledge mens rea or higher, the model school threat statute better reflects the specific issues in criminalizing largely juvenile conduct.[399] Further, by limiting the potential penalty to a misdemeanor with a maximum of six months' imprisonment,[400] the model statute avoids the negative consequences of subjecting adolescents to excessive punishment.[401] A clear dividing line between unwise juvenile behavior and criminal conduct ensures that heightened anxiety about school shootings does not result in unjust prosecutions and convictions and prevents states from imposing overly harsh sanctions against adolescents.

CONCLUSION

School shootings unfortunately continue to plague the United States. Fear of the next attack leads schools to take any reported threat seriously, which disrupts normal operations and stokes anxiety in the community. Legislative attempts to criminalize threats against schools are still in their infancy: nine states have adopted school threat statutes in the last five years alone. This spate of legislation has yielded diverging approaches to both the mens rea required for a conviction and the potential punishment for a school threat offense.

As it currently stands, felony-level criminal conduct in one state does not even rise to the level of a crime in another based on their different mens rea requirements. Moreover, lengthy prison sentences cannot be justified in terms of deterrence, as juveniles are unlikely to respond to the deterrence "message" of school threat statutes. Still, some states impose a potential multiyear sentence for offenders. These geographical discrepancies make little sense given the wholly similar conduct at issue.

If more states choose to specifically criminalize school threats, they should draft these laws to reflect the fact that most school threat offenders will be juveniles. To better separate innocent and criminal conduct, state legislatures should employ, at a minimum, a knowledge mens rea requirement. A lower mens rea is far too likely to criminalize inculpable individuals for vague "threats." Additionally, a misdemeanor offense with a maximum prison term of six months avoids the issue of excessive punishment. Taken together, these recommendations achieve a sufficient legislative response to school threats without unjustly imposing severe criminal sanctions on would-be adolescent offenders.

---

396. *See* Smith, *supra* note 8.
397. *See* Racine & Wilkins, *supra* note 40, at 4.
398. *See* Morissette v. United States, 342 U.S. 246, 252 (1952).
399. *See supra* Part I.B.2.
400. *See supra* Part III.B.2.
401. *See* Gonzalez, *supra* note 186, at 80–81.

APPENDIX A: STATUTORY TEXT

State	Threat Statute Text
Arkansas ARK. CODE ANN. § 5-13-302 (2023)	(b) A person commits the offense of threatening to commit an act of mass violence on school property if: (1) The person knowingly threatens to commit an act of mass violence on school property or at a curricular or extracurricular activity sponsored by a school by any means of communication; and (2) Places a person or group of persons in a position to reasonably fear for their safety.
Florida FLA. STAT. § 836.10 (2023)	(2) It is unlawful for any person to send, post, or transmit, or procure the sending, posting, or transmission of, a writing or other record, including an electronic record, in any manner in which it may be viewed by another person, when in such writing or record the person makes a threat to: (a) Kill or to do bodily harm to another person; or (b) Conduct a mass shooting or an act of terrorism.
Idaho IDAHO CODE § 18-3302I (2023)	(1) (a) Any person, including a student, who willfully threatens by word, electronic means or act to use a firearm or other deadly or dangerous weapon to do violence to any person on school grounds or to disrupt the normal operations of an educational institution by making a threat of violence is guilty of a misdemeanor.

State	Threat Statute Text
Michigan MICH. COMP. LAWS § 750.235b (2022)	(1) A person who verbally, through the use of an electronic device or system, or through other means intentionally threatens to use a firearm, explosive, or other dangerous weapon to commit an act of violence against any students or school employees on school grounds or school property if the threat can be reasonably interpreted to be harmful or adverse to human life, or dangerous to human life as that term is defined in section 543b, is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.
New York N.Y. PENAL LAW § 240.78 (McKinney 2023)	1. A person is guilty of making a threat of mass harm when with the intent to intimidate a group of people or to create public alarm, such person threatens to inflict or cause to be inflicted, serious physical injury or death at a school, place of worship, business, government building, or other place of assembly, and thereby causes a reasonable expectation or fear of serious physical injury or death, or causes the evacuation or lockdown of a school, place of worship, business, government building, or other place of assembly.
North Carolina N.C. GEN. STAT. § 14-277.6 (2022)	(a) A person who, by any means of communication to any person or groups of persons, threatens to commit an act of mass violence on educational property or at a curricular or extracurricular activity sponsored by a school is guilty of a Class H felony.
Tennessee TENN. CODE ANN. § 39-16-517 (2023)	(b) A person who recklessly, by any means of communication, threatens to commit an act of mass violence on school property or at a school-related activity commits a Class A misdemeanor.

State	Threat Statute Text
Utah UTAH CODE ANN. § 76-5-107.1 (West 2023)	(2) An actor is guilty of making a threat against a school if the actor threatens in person or via electronic means, either with real intent or as an intentional hoax, to commit any offense involving bodily injury, death, or substantial property damage and the actor: (a) threatens the use of a firearm or weapon or hoax weapon of mass destruction.
Vermont VT. STAT. ANN. tit. 13, § 1702 (2023)	(a) A person shall not by words or conduct knowingly: (1) threaten another person or a group of particular persons; and (2) as a result of the threat, place the other person in reasonable apprehension of death, serious bodily injury, or sexual assault to the other person, a person in the group of particular persons, or any other person. . . . . (d) A person who violates subsection (a) of this section by making a threat that places any person in reasonable apprehension that death, serious bodily injury, or sexual assault will occur at a public or private school; postsecondary education institution; place of worship; polling place during election activities; the Vermont State House; or any federal, State, or municipal building shall be imprisoned not more than two years or fined not more than $2,000.00, or both.

APPENDIX B: THREAT STATUTE OFFENSE MATRIX

State	**Criminal Classification**	**Maximum Punishment**	**Mens Rea Requirement**
Arkansas	Class C Felony	10 years	Knowledge
Florida	Felony in the Second Degree	15 years	Recklessness*
Idaho	Misdemeanor	6 months	Willfulness
Michigan	Misdemeanor	1 year	Intent
New York	Class B Misdemeanor	3 months	Intent
North Carolina	Class H felony	39 months	Intent*
Tennessee	Class A Misdemeanor	11 months	Recklessness
Utah	Class A Misdemeanor	364 days	Intent
Vermont	Misdemeanor	2 years	Knowledge

* This state omits an explicit statutory mens rea term. This is the applicable mens rea term, as per this author's interpretation of the state's case law.