PLAYING WITH THE RULES: AN EFFORT TO STRENGTHEN THE *MENS REA* STANDARDS OF FEDERAL CRIMINAL LAWS

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The culpability element of a criminal offense, the *mens rea*, is usually a necessary component of a crime that must be proven beyond a reasonable doubt. The *mens rea* narrows the scope of criminal liability by requiring the prosecution to prove a necessary state of mind in addition to the defendant's connection to the act itself. In classic common law crimes like theft, even those who cause harm are not guilty if they were simply negligent, as the *mens rea* element would not be satisfied. Yet, in our modern regulatory age, the *mens rea* principle is less likely to narrow criminal liability. *Mens rea* standards have eroded over time, making people subject to punishment who would not otherwise be blameworthy in the classic criminal law sense. In this way, the diminished significance of the *mens rea* element is part of the trend to overcriminalize.

This article, focusing on regulatory and white collar crimes, reviews the role of the current *mens rea* standards in the federal trend to overcriminalize. Strengthening the *mens rea* standards so the element properly separates those who merit punishment from those who do not would eliminate one cause of overcriminalization. To that end, this article also analyzes Congress's role in establishing standards of culpability and evaluates certain proposals aimed at strengthening *mens rea* standards in federal criminal law.

Part I briefly reviews the congressional propensity to criminalize conduct. The issue of whether regulatory criminal provisions are justified is not evaluated in this article; indeed, that question is not subject to an easy or ready answer. Congress can, nevertheless, be faulted for its focus on conduct and its lack of attention to *mens rea* terms. Part II reviews the significance of *mens rea* in criminal law doctrine, surveys culpability standards in federal white collar and regulatory offenses, and highlights current problematic *mens rea* issues. That section concludes that in the federal system, the combination of passing more criminal laws and deferential judicial interpretation has, over time, weakened the role of *mens rea* in determining guilt and distinguishing between criminal and noncriminal conduct.

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Correcting this problem is Congress's responsibility.[1] In Part III, this article analyzes a new study on the congressional role in defining crimes—*Without Intent, How Congress Is Eroding the Criminal Intent Requirement in Federal Law*—and assesses its recommendations.[2] The study, which analyzed non-violent federal criminal laws that were proposed in the 2005–06 congressional term, demonstrates Congress's responsibility for the erosion of the *mens rea* standard in non-violent crimes. For example, more than half of the offenses surveyed did not include a *mens rea* element that would prevent unjust punishment.[3]

The authors of *Without Intent* recommend that Congress establish new default rules for federal courts to follow when interpreting a statute's *mens rea* element.[4] This article evaluates three of their recommendations in light of current case law, judicial debates, and academic analysis. After identifying the questions and issues these sources raise, this article concludes that the proposed rules are less helpful than they initially appear. If adopted as written, they are unlikely to be effective in achieving the authors' goals. Indeed, they may undermine those goals, threatening to add more indeterminacy to federal *mens rea* standards. My analysis of the default rules identifies these weaknesses, suggesting how they might be amended for greater effectiveness.

I. OVERCRIMINALIZATION

"Too many crimes, too much punishment."[5]

This descriptive and succinct definition encapsulates the overcriminalization phenomenon, where legislators have made a broad swath of conduct a matter of criminal law and imposed unduly harsh penalties.[6] Eric Luna

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[1] *See* Dixon v. United States, 548 U.S. 1, 12 (2006) (("Federal crimes 'are solely creatures of statute'") (quoting Liparota v. United States, 471 U.S. 419, 424 (1985))); United States v. Hudson, 11 U.S. 32, 34 (1812) (holding that federal courts may not exercise common law criminal jurisdiction).

[2] BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 1-32 (2010) [hereinafter WITHOUT INTENT].

[3] *See id.* at 13 (of 446 offenses, 255 or 57% of them did not include an adequate *mens rea* element).

[4] The report also recommends actions to improve the legislative process. *See id.* at 28-32. Focusing on the *mens rea* issue, my analysis does not evaluate these suggestions.

[5] DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3 (2008).

[6] This article does not directly consider the issue of punishment levels. One might consider that the California prison system is under a federal court order to reduce its prison population until it is able to provide adequate medical care for inmates. *See* Coleman v. Schwarzenegger, U.S. Dist. LEXIS 2711, at *35-36 (N.D. Cal. Jan. 12, 2010) (ordering the reduction of prison populations in California); Adam Liptak, *Justices Hear Arguments on California Prison Crowding*, N.Y. TIMES, Dec. 1, 2010, at A22; Solomon Moore, *Court Panel Orders California to Reduce Prison Population by 55,000 in 3 Years*, N.Y. TIMES, Feb. 10, 2009, at A12. For an overview of American punishment practices, see JAMES Q.

adds a more normative dimension, defining "overcriminalization" as an "abuse of . . . a criminal justice system" that results in unjustified punishment.[7] Strict liability and lowered *mens rea* standards are aspects of overcriminalization under this conception because they increase the risk of unjustified punishment.[8]

The tendency of federal legislators to rely on criminal law to control certain conduct and further social policies is well-documented. John Baker estimates there are over 4,450 federal criminal statutes.[9] Congress has added new crimes[10] and new kinds of crimes to Title 18,[11] the nominal federal criminal code. Congress has also sprinkled crimes, as one sprinkles salt,

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WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 41-64 (2003).

7 Eric Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005) ("Overcriminalization, then, is the abuse of the supreme force of a criminal justice system — the implementation of crimes or imposition of sentences without justification.").

8 More generally, overcriminalization refers to a decades-long trend of increased use of criminal law, and its pernicious effects have long been noted. The first critics, writing at mid-century about federal economic regulations, warned that treating regulatory violations as crimes would, in the long run, engender a disrespect for law and the criminal justice system. *See generally* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963). The research of Tom Tyler and Paul Robinson continues to elaborate on this theme. *See generally* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006); Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707 (2000).

Other scholars make similar, though more specific, points. *See* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 749 (2005) (analyzing common problems of overcriminalization); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329 (2009) (critiquing corporate criminal liability as overcriminalization because guilt is not based on personal responsibility); JOHN S. BAKER, JR., HERITAGE FOUNDATION L. MEMO. NO. 26, REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES (2008) (arguing against the enhanced role of federal authority in the criminal law as an affront to the paramount role of the states in criminal law matters).

9 *See* Baker, *supra* note 8, at 1.

The cause of congressional activism in criminal law has been summed up in one word—politics. *Id.* at 5 (noting the number of new crimes enacted in election years significantly surpassed those in non-election years between 2000 and 2007 (except for one year)); Paul Rosenzweig, *Epilogue, Overcriminalization: An Agenda for Change*, 54 AM. U. L. REV. 809, 810 (2005). As Sara Beale noted, "the epithet 'soft on crime' is the contemporary equivalent of 'soft on Communism.'" Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 29 (1997). It is difficult to discern whether public opinion is formed by law-and-order political candidates or whether they are merely responding to public anxiety.

10 *See*, *e.g.*, 18 U.S.C. § 1348 (Supp. III 2009) (securities fraud); 18 U.S.C. § 1349 (2006) (conspiracy and attempt to commit fraud).

11 *See*, *e.g.*, 18 U.S.C. § 1350(a) (2006) (penalizing failure of corporate officers to certify financial reports).

into many other titles in the federal code.[12] It has divided offenses into prohibition and punishment sections and placed the divisions in different titles,[13] and used a combination of federal civil law, agency regulations, and criminal prohibitions to target certain conduct.[14] Congress also ratified specific executive orders, thereby making violations of them a crime as well.[15] This evidence suggests that Congress enacted many of the criminal statutes with little thought to the efficacy of civil regulatory actions or consideration of the ultimate questions of what conduct merits just deserts or deterrence.[16]

Yet the numbers do not tell the whole story. Whether a criminal provision is necessary is not subject to a universal answer. Is a criminal law necessary? Maybe not, but criminal laws are a useful back-up that give force to civil administrative actions.[17] Is a criminal regulatory law necessarily bad? Not when the danger to the public is so overwhelming that no one would hesitate to treat the prohibited conduct as a crime.[18] And, although a sound argument can be made that criminal laws are most appropriately used as a last resort, private civil enforcement is not invariably good

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[12] *See, e.g.*, 26 U.S.C. § 5861(d) (2006) (whoever violates gun registration requirements in 26 U.S.C. §§ 5801-5872 is subject to up to ten years imprisonment); 26 U.S.C. § 7201 (2006) (tax evasion).

[13] *See*, *e.g.*, 17 U.S.C. § 506 (2006 & Supp. III 2009) (banning willful criminal infringement of a copyright); 18 U.S.C. § 2319 (2006 & Supp. III 2009) (providing terms of punishment).

[14] *See* 15 U.S.C. § 78j (2010) (stating it is unlawful to use or employ a deceptive device in connection with trade of security); 15 U.S.C. § 78ff (2006) (authorizing punishment for willful of violations); 17 C.F.R. § 240.10b-5 (2010) (similar to 15 U.S.C. §§ 78j, 78ff).

[15] *See* United States v. Arch Trading Co., 987 F.2d 1087, 1091-92 (4th Cir. 1993) (holding that violation of an executive order constitutes conspiracy to commit a federal offense, 18 U.S.C. § 371, when Congress has enacted a criminal sanction relating to the order, in this case, 50 U.S.C. § 1705(b)).

[16] *See* H. L. A. HART, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY 8 (1968) (noting general disregard for the question of what conduct should be made criminal in the first place).

[17] Securities fraud is an example of this rationale. Securities fraud laws provide three avenues of enforcement: private civil actions, civil administrative actions by the Securities and Exchange Commission, and criminal enforcement. *See* Geraldine Szott Moohr, *The Balance Among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement*, 46 AM. CRIM. L. REV. 1459, 1474-78 (2009) (explaining that administrative regulatory laws are not a panacea for strengthening compliance); *see also* Raymond W. Mushal, *Up from the Sewers: Perspective on the Evolution of the Federal Environmental Crimes Program*, 4 UTAH L. REV. 1103, 1105 n.8 (2009) (noting administrative remedies do not provide sufficient punishment).

[18] Consider, for example, the company executives who misled doctors and the public for five years, claiming that OxyContin was less prone to abuse than similar drugs. *See* Barry Meier, *Ruling is Upheld Against Executives Tied to OxyContin*, N.Y. TIMES, Dec. 10, 2010, at B2. As this was being drafted, new stories disclosed "barns infested with flies, maggots and scurrying rodents, and overflowing manure pits" on Iowa egg farms. *See* William Neuman, *Egg Farms Violated Safety Rules*, N.Y. TIMES, Aug. 31, 2010, at B1. For a discussion of the moral content of regulatory crimes, see Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 36 EMORY L.J. 1533 (1997).

or an improvement over administrative actions.[19] The answer in each case depends on the circumstances.

Simply stated, criminal enforcement merits more serious consideration than Congress gives. For instance, there is little evidence that Congress analyzes the effect of criminalizing conduct or considers whether civil enforcement would achieve its goal. The numbers also do not speak to the quality of the criminal statutes. Carelessly drafted statutes lead to abuse of the criminal justice system. Criminal laws that are couched in broad, vague language invite the executive branch to argue, *ex post*, that an actor's conduct violated the provision.[20] Prosecutors offer a new interpretation of the statute, effectively asking courts to formulate a new type of crime.[21] Once courts accept the government's position, more conduct becomes criminal.[22] By using broadly-worded statutes with undefined terms, Congress effectively delegates authority to the courts to determine if the conduct at issue is encompassed by the statute. Institutional prerogatives and the balance now established between the judicial and executive branches practically guarantee that this common law method of creating crimes will continue.[23] Although Congress usually has constitutional authority to enact corrective legislation, legislators seem more likely to do so when judicial interpretation has narrowed, rather than broadened, the scope of a criminal law.[24]

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19 *See* David M. Uhlmann, *After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, MICH. L. REV. (forthcoming), *available at* http://ssrn.com/abstact=1740567 (noting that criminal action against British Petroleum is more likely to adequately compensate for harm to the environment and coastal communities).

20 The pressure brought by prosecutors on courts to interpret criminal statutes expansively, effectively to define new crimes, was identified by Chuck Ruff over thirty years ago. *See* Charles F. C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement*, 65 GEO. L.J. 1171 (1977). More recent commentators have brought that insight up to date. *See generally* Gerard E. Lynch, *Our Administrative System of Justice*, 66 FORDHAM L. REV. 2117 (1998); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

21 *See e.g.*, United States v. Siegel, 717 F.2d 9, 24 (2d Cir. 1983) (Winter, J., dissenting) (objecting to majority's creation of a new crime of breaching fiduciary obligations).

22 *See* United States v. O'Hagan, 521 U.S. 642 (1997) (adopting misappropriation theory of insider trading); United States v. Turkette, 452 U.S. 576 (1981) (holding that the enterprise element of the Racketeer Influenced and Corrupt Organizations act is not limited to lawful organizations).

23 *See* Lynch, *supra* note 20; Stuntz, *supra* note 20 (examining the institutional pressures on legislators, courts, and the executive branch that encourage overcriminalization).

24 The mail and wire fraud statutes are well-known examples. Congress passed the honest service amendment following the decision in *McNally* that rejected that theory of liability. *See* 18 U.S.C. § 1346 (2006); McNally v. United States, 483 U.S. 350 (1987). As of the writing of this article, a legislative proposal to correct the Court's recent decision in *Skilling* is already in circulation. *See* S. Res. 3854, 111th Cong. (2d Sess. 2010); Skilling v. United States, 130 S. Ct. 2896 (2010) (limiting honest services fraud to cases involving bribes and kickbacks); Ashley Southall, *Justice Department Seeks a Broader Fraud Law to Cover Self-Dealing*, N.Y. TIMES, Sept. 28, 2010, at B3 (reporting that legislation has been introduced in the Senate).

To recap, these trends—poorly-drafted criminal provisions forcing courts to interpret statutory terms—combine to capture increasingly more conduct. The plethora and confusion of federal criminal laws raise notice issues, and, more pertinently, result in unnecessary punishment if civil sanctions would achieve compliance with laws and regulations. Nonetheless, in addition to criminalizing more conduct, Congress has increased the risk of unnecessary punishment by giving scant attention to the *mens rea* element.

II. THE *MENS REA* ELEMENT IN FEDERAL CRIMINAL LAW

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[25]

As Justice Jackson observed, an actor's state of mind, whether encapsulated in the Latin *mens rea* or the Model Penal Code's concept of culpability, is a necessary element of a crime.[26] The concept of culpable conduct plays a significant role in both retributive and utilitarian criminal theory.[27] Culpable conduct is central to retributive criminal theory, which teaches that only those who choose to impose harm or violate established social norms merit punishment.[28] Establishing *mens rea* beyond a reasonable doubt makes it more likely that only those who made that choice are convicted. The utilitarian theory of punishment is similarly served by a robust *mens rea* requirement.[29] In this case, a strong *mens rea* component promotes just punishment, furthering the goal of deterring others from engaging in similar conduct. Researchers have shown that the example of deserved punishment leads to deterrence, as it encourages respect for law and informal enforcement among peers.[30] Punishing only those who are culpable reinforces the community's respect for the criminal justice system. For both retributive and utilitarian purposes, criminal law casebooks make clear

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25 Morissette v. United States, 342 U.S. 246, 250 (1952) (Jackson, J.).

26 *See id.* at 251 (noting the "human instinct" that requires a mental element and noting a child's familiar exculpatory, "[b]ut I didn't mean to.").

27 *See* Staples v. United States, 511 U.S. 600, 605 (1994); Dennis v. United States, 341 U.S. 494, 500 (1951) ("the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence").

28 *See generally* MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (1997); Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47 (1986).

29 *See generally* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (London, Oxford 1876); Kent Greenawalt, *Punishment*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282 (Joshua Dressler, ed., 2d ed. 2002).

30 *See* Robinson & Darley, *supra* note 8; TYLER, *supra* note 8.

in their first pages that crime is a "compound concept," requiring a mental element in addition to conduct.

The *Morissette* opinion reflects these values, making clear that without culpability, even an "inherently evil" act does not merit punishment.[31] Accordingly, the Court held that the statute at issue, a codification of common law theft, implicitly required proof that the defendant knew that the property he had taken had not been abandoned. Even though the Court interpreted this common law offense to require a *mens rea*, it also recognized a significant change in the criminal law.

By 1952, when *Morissette* was decided, Congress had passed a core of strict liability offenses that were designed to regulate economic activity[32] and protect the public from dangerous products.[33] Justice Jackson distinguished public welfare offenses from common law crimes, describing the new offenses as "a category of another character, with very different antecedents and origins."[34] Noting legislators' tendency to create new duties and strict liability crimes, Justice Jackson conceded such laws were necessary to protect the public from increased dangers that affect public health, safety, and welfare.[35]

Ironically, even while the Court reinforced the requirement of culpability in common law felonies, it endorsed a new category of criminal laws.[36] In certain circumstances, some criminal laws would no longer require an evil-meaning mind connected to an evil-doing hand. Thus, there

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[31] *See Morissette*, 342 U.S. at 251 (citing Blackstone's statement that to constitute any crime there must first be a "vicious will").

[32] *See e.g.*, 15 U.S.C. § 1 (2006) (under the Sherman Act, enacted in 1903, anyone who restrains trade is guilty of a felony); 15 U.S.C. § 2 (2006) (monopolizing, attempting to monopolize, or conspiring to monopolize any part of trade is also a felony under the Sherman Act).

[33] *See e.g.*, Food Drug and Cosmetic Act, 21 U.S.C. §§ 331(a), 333(a) (2006); Harrison Narcotics Tax Act, ch. 1, 38 Stat. 785, 786 (1914); United States v. Dotterweich, 320 U.S 277, 281 (1943) (noting that offense of shipping misbranded drugs did not require knowledge that items were misbranded); United States v. Balint, 258 U.S. 250, 254 (1922) (holding that government must prove only that the defendant knew he was selling drugs).

[34] *See Morissette*, 342 U.S. at 252-60 (discussing at length emerging public welfare offenses and legal commentary about the trend).

[35] *See id.* (noting the "great traffic in velocities, volumes, and varieties, and wide distribution of goods.").

> Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. . . . Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

Id. at 254.

[36] The irony did not go unnoticed. *See* Hart, *supra* note 8, at 431-33, n.70. Hart rebuked the Court in *Morissette* for its "examination and labored distinction of the notorious instances in which Congress and this Court have sanctioned blatant defiance of the principle of moral blameworthiness."

were now two kinds of crimes: those that required culpability and those that did not.

In the years following *Morissette*, Congress expanded economic crimes that achieved social policies and offenses relating to dangerous materials.[37] Congress seemed satisfied to create new kinds of criminal conduct, but continued to rely on *mens rea* terms based on the common law.[38] This trend continues to this day because, unlike Model Penal Code jurisdictions, federal legislators are not constrained by a real criminal code.[39] The United States Code does not define *mens rea* terms or provide interpretive guidelines.[40] Instead, each federal criminal law specifies its own *mens rea* element, making it possible for legislators to select from a wealth of common law terms.[41]

By one count, federal criminal laws use seventy-eight different *mens rea* terms.[42] These terms often have numerous and conflicting meanings. For example, in bribery and obstruction statues, Congress uses the *mens rea* term "corruptly," which has no intrinsic meaning, and then guarantees inde-

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37 *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 282-94 (1993) (presenting the introduction of regulatory and public health crimes in American criminal law).

38 This pattern continues. *See infra* Part III(A) (discussing proposed offenses during 2005—06 term).

39 Criticism of Title 18, an alphabetical compilation of disparate offenses, has been critiqued almost since its was established in 1948. It has been described as chaotic, incomprehensible, and a disgrace. *See* PETER W. LOW & JOSEPH L. HOFFMANN, FEDERAL CRIMINAL LAW 6-7 (1997) (quoting extensively from NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE (1970), that stated, "[w]ithin Title 18 itself, chaos reigns"); Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. CRIM. L. REV. 195, 195 (1997) ("[T]he criminal code title of the United States Code should be completely rewritten."); Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643 (2006); Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225 (1997) ([t]he federal criminal law [is] almost incomprehensible").

40 The Model Penal Code drafters rejected common law *mens rea* terms because they lacked precision and clarity. Instead, they chose only four, and specifically defined each of them. *See* MODEL PENAL CODE § 2.02 (Official Draft & Revised Comments 1985) (listing and defining four culpability standards; purposeful, knowing, reckless, and negligent). More specifically, the drafters sought to "advance the clarity of draftsmanship in the delineation of the definitions of specific crimes, to provide a distinct framework against which those definitions may be tested, and to dispel the obscurity with which the culpability requirement is often treated when . . . [common law terms] have been employed." *See* MODEL PENAL CODE § 2.02 cmt. 1; *see also Morissette*, 342 U.S. at 252 (noting "the variety, disparity and confusion of judicial definitions of "the requisite but elusive mental element").

41 *See* LOW & HOFFMANN, *supra* note 39, at 9 (listing, among others, "willfully," "corruptly," "maliciously," "wantonly," "unlawfully," "fraudulently," "improperly," "neglectfully," and combinations thereof); *see also* Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341 (2001); Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127 (2009).

42 *See* PAUL H. ROBINSON, CRIMINAL LAW § 4.1, at 212 n.17 (1997).

terminacy by failing to define it.[43] Courts must construe the term as best they can, depending on the circumstances of the case and a reading of congressional intent.[44] Understandably, interpretations of identical terms have come to vary significantly.

The plethora of new crimes makes the *mens rea* element even more significant. For one thing, the culpability element in a federal criminal law is often the only term that separates civil liability from criminal liability. Thus, a person who acts willfully in infringing a copyright has committed a crime; otherwise, the conduct is a private civil matter.[45] For another, culpability can be the only distinction between behavior that is not unlawful at all, even in the civil sense.[46] Thus, campaign contributions are legal unless the actor understands that the gift is an exchange for an official act or because of an official act.[47] Recently drafted statutes assign punishment based on the actor's *mens rea*, giving greater significance to the culpability level.[48] Some *mens rea* standards, especially in white collar crimes, have been interpreted to include civil notions of blameworthiness.[49] One study of criminal statutes that contained parallel civil provisions found that criminal courts in many cases accepted low *mens rea* standards that had been defined in civil cases.[50]

Even though criminal law doctrine and the rights of the accused call for certainty, the reality is that federal criminal law uses a wide range of *mens rea* terms that are defined according to circumstance. The following sections highlight some particularly troublesome developments posed by this problem.

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43 *See* 18 U.S.C. § 201(b) (2006) (bribery); 18 U.S.C. § 666 (2006) (federal program bribery); 18 U.S.C. §§ 1503, 1512(b) (2006) (obstruction). *See generally* Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning of "Corruptly" Within the Federal Criminal Law*, 31 J. LEGIS. 129 (2004).

44 The Supreme Court corrected judicial interpretations of "corruptly" as used in two obstruction provisions. *See* Arthur Andersen LLP v. United States, 544 U.S. 696 (2005); United States v. Aguilar, 515 U.S. 593 (1995).

45 *See* 17 U.S.C. § 506(a)(1) (2006) (copyright infringement); 18 U.S.C. § 2319 (2006 & Supp. III 2009) (providing penalties).

46 *See* Wendy Gerwick Couture, *White Collar Crime's Gray Area: The Anomaly of Criminalizing Conduct Not Civilly Actionable*, 75 ALB. L. REV. 1 (2009).

47 *See* 18 U.S.C. § 201 (2006) (bribery); 18 U.S.C. § 1951 (2006) (extortion); Evans v. United States, 504 U.S. 255 (1992) (discussing quid pro quo requirement in bribery).

48 *See e.g.*, Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2006 & Supp. III 2009).

49 *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal?": Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991) (noting tendency of federal courts to turn civil breaches of fiduciary duty into crimes).

50 *See* Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209 (2003) (analyzing the relation between civil and criminal causes of action for the same conduct).

A. *The* Mens Rea *of Mail and Wire Fraud*

Fraud is a traditional common law offense, first recognized as being akin to theft by English courts and Parliament in the eighteenth century.[51] The Supreme Court has recognized these common law antecedents of the federal mail and wire fraud statutes.[52] These statutes, the workhorses of federal prosecutors, prohibit fraud executed through the use of the mail or by wire.[53] Although neither statute specifies a *mens rea* term,[54] the statutes require proof of three types of culpability.

In accordance with *Morissette*, courts first read a knowing *mens rea* element into the element of misrepresenting a material fact. Under this standard, the defendant must know that the false or misleading information he or she conveyed is false.[55] The second *mens rea* element applies to the use of the mail. The mailing, once thought of as the *actus reus* of the offense, now merely requires that the actor foresee some use of the mail by someone.[56] Thus, culpability as to mailing is at best a reckless standard and at worst a tort concept. There is no requirement that the defendant know that a mailing would occur as long as it furthers the scheme to defraud.

Finally, a third *mens rea* requirement must also be satisfied. Mail fraud is an inchoate offense because it prohibits "devising or intending to

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51 *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 8.1(b), 705-06 (2d ed., 1986).

52 *See* McNally v. United States, 483 U.S. 350, 359 (1987) (("the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching'") (citing Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).

53 *See* Mail Fraud Act, 18 U.S.C. §§ 1341, 1343, 1346 (2006 & Supp. III 2009). Sharing common conduct elements of deceit and fraud, the mail and wire fraud statutes are jointly interpreted, and readings of one statute apply to the other. *See* Carpenter v. United States, 484 U.S. 19, 24 (1987). For convenience's sake, mail fraud is used here to refer to both statutes.

54 Courts commonly state that the offenses have two elements: a scheme to defraud and a mailing or wire. Notwithstanding this simplification, every circuit has added elements to that basic structure. According to one treatise, the government must prove that the defendant: (1) engaged in a scheme to defraud; (2) involving a material misstatement or omission; (3) "with the specific intent (or purpose) to defraud;" (4) resulting or would result in "loss of money, property, or honest services;" (5) use of the United States mail, a private courier, or interstate or international wires; (6) in furtherance of the scheme; and (7) the defendant used, or caused the use of such communication. J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME § 4.02[B] (2d ed. 2006).

55 *See* Neder v. United States, 527 U.S. 1, 15-17 (1999).

56 *See* Schmuck v. United States, 489 U.S. 705, 721 (1989); Pereira v. United States, 347 U.S. 1, 8-9 (1954). There are various minor permutations of this standard. *See* Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 230 (1992). It is generally agreed that the mailing element functions to establish federal jurisdiction; the government must show that a foreseeable mailing occurred. *See* Peter J. Henning, *Maybe It Should Just Be Called Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 450-51 (1995); Podgor, *supra*.

devise a scheme or artifice to defraud."[57] The scheme need not come to fruition, and proof of harm is not required for conviction. Thus, the offense is similar to an attempt, and requires a similar level of culpability: knowing conduct (deception) undertaken with the purpose of defrauding or harming the victim.[58] Nevertheless, courts do not always require that the defendant act with intent to harm; instead they conflate the terms "deceive" and "defraud," and require a "specific intent" of knowing deception.[59] The problem with this standard is that the intent to deceive is a general or knowing intent to act, not a specific intent to defraud or harm a victim of deceit.[60]

Disturbingly, the Supreme Court recently appeared to accept this lower, flawed standard. In *Skilling v. United States*,[61] the Court, outlining the requirements of a congressional response to its holding, noted that the government's conception of the *mens rea* was a "specific intent to *deceive.*"[62] Fortunately, the Court's comment is *dictum*, and it is to be hoped that appellate courts will promptly revise this formulation before lower courts begin to apply it. A reformulation is also necessary because the error of conflating an intent to act and a further purpose is not confined to mail and wire fraud. Although the federal code does not include a general attempt provision, many other federal crimes are either inchoate[63] or expressly include attempts.[64]

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57 Mail Fraud Act, 18 U.S.C. §§ 1341, 1343 (Supp. III 2009); Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 3 (1989) (noting that fraud is an inchoate offense so that attempt to commit fraud is a doubly inchoate crime).

58 *See* United States v. Regent Office Supply Co., 421 F.2d 1174, 1180-81 (2d Cir. 1970); *see also* Robbins, *supra* note 57, at 8 n.15 (explaining that specific intent in inchoate offenses is a special mental element above and beyond any other required intent to commit the actus reus and is the intent to effect the consequence that is proscribed by the object crime).

59 *See*, *e.g.*, United States v. Paradies, 98 F.3d 1266, 1285 (11th Cir. 1996) (stating that the government satisfied a specific intent to defraud if it proved an intent to deceive).

60 Interested readers may want to refer to an earlier article in which I discussed this issue. *See* Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1, 20-23 (1998).

61 130 S. Ct. 2896 (2010) (confining honest service fraud under § 1346 to schemes that involve bribes or kickbacks).

62 *Id.* at 2933 n.44 (2010) (citing Brief for the United States at 43-44) (emphasis added). Although the Court raised several questions about the government standard, its comments did not address the issue of specific intent. *Id.* at 2932-33.

63 *See*, *e.g.*, 18 U.S.C. § 1503(a) (2006) (omnibus clause of obstruction); 18 U.S.C. § 371 (2006) (conspiracy).

64 *See*, *e.g.*, Computer Fraud and Abuse Act, 18 U.S.C. § 1030(b) (2006 & Supp. III 2009); 18 U.S.C. § 1348(1)-(2) (Supp. III 2009) (securities fraud provision enacted as part of the Sarbanes-Oxley Act).

B. *Willful Blindness*

Other *mens rea* issues bedevil defendants, courts, and commentators. For instance, federal courts do not use a uniform standard in applying the "willful blindness" rule.[65] The rule comes into play when the crime at issue requires proof of knowledge and there is no direct evidence that the defendant knowingly acted. In this typical circumstance, a willful blindness instruction, more colorfully known as an "ostrich" instruction,[66] allows the jury to find knowledge based on deliberate ignorance of the fact at issue.[67] Jurors may decide that those who buried their head in the sand, like an ostrich, instead of ascertaining incriminating facts acted with knowledge or awareness of those facts.[68] The instruction is designed for cases in which there is evidence that the defendants, knowing or at least strongly suspecting that they are involved in unlawful conduct, take steps to avoid acquiring full knowledge of those dealings.[69] Properly instructed, jurors may not use an objective, reasonable person standard—should have known—but must assess the subjective act of deliberately ignoring what would have become obvious to the defendant.[70] Courts have expressed concern that the instruction may lead jurors to find guilt on the ground that the defendant was subjectively reckless as to whether the fact existed.[71] The lack of uniformity and the shading of knowing conduct into reckless conduct makes willful blindness a poor substitute for a knowing *mens rea*.

C. *The* Mens Rea *of Public Welfare Offenses*

When a statute or regulatory scheme conforms to the parameters of a public welfare offense, strict liability for the conduct is reluctantly accept-

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65 *See* JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 115 n.40 (2d ed. 2003) (providing cases).

66 United States v. Black, 530 F.3d 596, 604 (7th Cir. 2008).

67 The instruction is also called a *Jewell* instruction after the case that articulated the rule that acting with an awareness of a high probability of the existence of the fact at issue is tantamount to knowledge. *See* United States v. Jewell, 532 F.2d 697, 700-01 (9th Cir. 1976) (relying in part on MODEL PENAL CODE § 2.02 (7) (Official Draft & Revised Comments 1985)).

68 *See* United States v. Buckley, 934 F.2d 84, 88-89 (6th Cir. 1991) (failure to investigate when aware of facts which demanded investigation). For a defense of the ostrich, who does not actually hide its head in the sand, see *Black*, 530 F.3d at 604.

69 United States v. Giovannetti, 919 F.2d 1223, 1228 (7th Cir. 1990); *Black*, 530 F.3d at 604, *vacated on other grounds*, 130 S. Ct. 2963 (2010).

70 *See Giovannetti*, 919 F.2d at 1227-28.

71 *See* United States v. Skilling, 554 F.3d 529, 548-49 (5th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2896 (2010) (expressing concern that the instruction will mislead jurors into thinking they can convict on negligence or reckless ignorance, rather than intentional ignorance). The Fifth Circuit held that any error on this score was harmless. *Id.* at 550.

ed.[72] Public welfare offenses eliminate the *mens rea* element in order to protect a public that cannot protect itself by avoiding the danger. In addition to strict liability, public welfare offenses are marked by light penalties that do not include incarceration, low stigma, and the notion that those in highly regulated industries have notice of criminal regulations.[73]

Congress has also passed criminal statutes that resemble public welfare offenses, except with a *mens rea* element such as knowing conduct. Notwithstanding the statutory element, when the offense sounds in public welfare, a court is likely to interpret knowing conduct more broadly, making it easier to find guilt. For instance, in *United States v. International Minerals*,[74] the defendant company argued that it was not aware of the regulation that required it to label the contents being shipped with specific names prescribed by regulations.[75] Categorizing the argument as an ignorance of the law defense, the Supreme Court rejected it and held that defendants must know only that they are shipping dangerous items.[76]

The case is notable not for its rejection of a mistake of law defense, but for its reasoning. The Court based its decision on the justifications for public welfare offenses, danger to the public, and the involvement of a highly regulated business.[77] Courts continue to use the justification that supports strict liability offenses to formulate loose definitions of knowledge.[78] In brief, the justification for strict liability in public welfare offenses has migrated to statutes that include *mens rea* terms.[79]

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72 *See* Green, *supra* note 18, at 1548, n.30 (noting near unanimity of opinion against strict liability offenses); Hart, *supra* note 8, at 423; *see also* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 419-22 (1993) (explaining reasons for strict liability doctrine in public welfare offenses).

73 *See* Staples v. United States, 511 U.S. 600, 616-19 (1994) (considering characteristics of public welfare crimes); Morissette v. United States, 342 U.S. 246, 255 (1952) (defining public welfare offenses).

74 United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971).

75 *See id.* at 560.

76 *See id.* at 564-65.

77 *Id.* at 565 ("But where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.").

78 *See*, *e.g.*, United States v. Weitzenhoff, 35 F.3d 1275, 1279-80 (9th Cir. 1993) (*en banc*).

79 It would be remiss not to note that another development takes the opposite approach, rigorously applying a *mens rea* standard even when one could reasonably argue that the offense is one of strict liability. The Supreme Court has recently interpreted regulatory statutes to allow defenses of ignorance of law and mistake of fact. *See* Staples v. United States, 511 U.S. 600, 622-23 (1994) (interpreting a facially strict liability statute to require a *mens rea* element and holding that ignorance of factual characteristics of the gun negated proof of *mens rea*); *see also* Ratzlaff v. United States, 510 U.S. 135, 136-37 (1994) (holding that a money laundering statute requires the government to prove the defendant acted with knowledge that the conduct was unlawful); Cheek v. United States, 498 U.S. 192, 205 (1991) (creating an ignorance of tax law defense); Liparota v. United States, 471 U.S. 419, 434 (1985) (holding that defendant must know that food stamps were acquired in an unauthorized manner).

D. *Variations on "Willful"*

Many economic regulations become crimes if the prohibited action was willfully committed. In these regulatory schemes, that single word—willfully—is often the only distinction between civil and criminal conduct. Despite this centrality in establishing guilt, it is generally conceded that the term is a "word of many meanings."[80] It can denote reckless, knowing, or purposeful conduct, depending on the context in which the term is used.[81] In the tax context, courts define willfully as "a voluntary, intentional violation of a knowing legal duty," a standard that creates an ignorance of the law defense.[82] However, in a case involving licenses to sell guns, the court interpreted "willful" to require that defendants were merely aware that some aspect of their conduct was unlawful.[83]

The Model Penal Code drafters, unable to escape the powerful draw of the common law term, ultimately provided that a defendant can satisfy willfulness by acting knowingly as to the material elements of the offense.[84] It is worth noting the reaction of Judge Learned Hand, recorded in the commentary to the Code:

> It's a very dreadful word . . . . It's an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, "willful" would lead all the rest in spite of its being at the end of the alphabet.[85]

A common denominator in the cases is concern that innocent individuals who are not blameworthy may become embroiled with the criminal justice system. *See* Dan M. Kahan, *Ignorance of Law is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 128-29 (1997); David J. Luban, *The Publicity of Law and the Regulatory State*, 10 J. POL. PHIL. 296 (2002); Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 940-41 (1999); John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1022 (1999).

80 *See* Spies v. United States, 317 U.S. 492, 497 (1943); United States v. Murdock, 290 U.S. 389, 394-95 (1933) (stating that "willful" in a criminal statute "means an act done with a bad purpose, without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by a careless disregard whether or not one has the right so to act.").

81 *See* United States v. O'Hagan, 139 F.3d 641, 650 (8th Cir. 1998) (upholding a jury verdict of willful conduct based on evidence that the defendant knowingly breached his fiduciary duty); STRADER, *supra* note 54, § 1.06[2].

82 *See Cheek*, 498 U.S. at 205.

83 *See* Bryan v. United States, 524 U.S. 184, 192 (1998) (interpreting "willful" in 18 U.S.C. § 924(a)(1)(D) as an action carried out by the defendant with "knowledge that his conduct was unlawful"). The Court also stated that "the term knowingly does not necessarily have any reference to a culpable state of mind." *Id.*

84 *See* MODEL PENAL CODE § 2.02(7) (Official Draft & Revised Comments 1985).

85 *See id.* § 2.02 n.47.

In civil securities fraud cases,[86] prosecutors can satisfy willfulness by a showing of recklessness, or disregarding the risk that a statement might be false.[87] Most circuits have reportedly adopted the reckless standard in criminal insider trading cases,[88] although there are signs of disagreement. In *United States v. O'Hagan*, the misappropriation insider trading case, the Eighth Circuit on remand stated that jurors may infer willful conduct if the defendant acted with knowledge.[89] That court also interpreted a statement in the Supreme Court's *O'Hagan* opinion as rejecting a negligence or recklessness culpability standard for securities fraud.[90] The Supreme Court has yet to rule on whether a reckless state of mind satisfies the statutory requirement of willfulness.

In summation, the federal white collar laws now capture more conduct because Congress liberally uses criminal law as an enforcement mechanism for traditional offenses, economic regulations, and public welfare crimes. While Congress has been innovative in describing new forms of prohibited conduct, it has relied heavily on *mens rea* terms from the common law. Because the federal criminal code does not define *mens rea* terms, courts provide definitions, which, understandably, vary according to the circumstances of the case and the statutory schemes. The examples of problematic issues discussed in previous paragraphs demonstrate that the *mens rea* element in federal criminal law is often too weak to prevent unjustified punishment.

At this point, one might usefully recall that Congress is ultimately responsible for the content of criminal laws, including the *mens rea* element. The recently reported analysis of criminal proposals during a recent term assesses how Congress met this responsibility.

III. HOW CONGRESS IS ERODING THE FEDERAL CRIMINAL INTENT REQUIREMENT

The study on which the report, *Without Intent*, is based sought to determine whether Congress, in its 2005—06 term, wrote criminal laws that

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86 *See* 15 U.S.C. § 78j(b) (2010) (prohibiting the use of manipulative and deceptive devices); 15 U.S.C. § 78ff(a) (2006) (authorizing punishment for willful violations); 17 CFR § 240.10b-5(2010).

87 *See* United States v. Weiner, 578 F.2d 757, 786 (9th Cir. 1978), *cert. denied*, 439 U.S. 981 (1978); *Solan*, *supra* note 50, at 2238-44 (providing the historical development of insider trading from civil administrative adjudication to criminal treatment).

88 *See* STRADER, *supra* note 54, § 5.04 n.32.

89 *See* United States v. O'Hagan, 139 F.3d 641, 646-47 (8th Cir. 1998) (stating that it is not necessary to prove defendant knew his conduct violated a specific statute). In *O'Hagan*, the Court endorsed a theory of insider trading based on misappropriation of nonpublic information from any source to whom the actor owed a heightened duty. *Id.*

90 *See id.*

included "meaningful" *mens rea* requirements.[91] The study springs from the conviction that criminal law must be firmly grounded in fundamental principles of justice, in accordance with criminal law theory.[92] Two principles that underlie the study are the constitutional mandate that citizens have fair notice of what conduct is criminal and the notion, from criminal theory, that punishment requires culpability.[93]

A. *The Data*

The data presented in the report reveal the extent to which Congress utilizes *mens rea* standards that seem likely to result in the punishment of those who are not culpable in the traditional criminal law sense. In addition, the authors provide specific recommendations that are designed to correct this deficiency in legislation.

1. The Large Number of Proposed Criminal Offenses

Concern over fair notice led the researchers to confine the study of *mens rea* to proposals that involved nonviolent and non-drug offenses.[94] They reasoned that inherently wrongful conduct, especially violent conduct, "forecloses the possibility of punishing individuals who are not truly culpable."[95] But when citizens commit non-violent or regulatory offenses, the assumption that they were aware that their conduct was wrongful, a substitute for statutory notice, cannot be made. Although the choice to confine the study in this way is reasonable, this self-imposed limitation has a drawback. Non-violent and non-drug offenses are more likely to incorporate weaker *mens rea* standards than traditional criminal conduct.[96] Thus it is not necessarily surprising that the *mens rea* elements of the offenses that

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91 WITHOUT INTENT, s*upra* note 2, at 1. "Meaningful" *mens rea* elements are defined as those that ensure that only the culpable are subject to the punishment and that all citizens have fair notice of the prohibitions. *See id.*

92 *See id.* at 3.

93 *Id.* at 3-4. The House has held two hearings on the report and its recommendations. *See Reining in Overcriminalization: Assessing the Problems, Proposing Solutions*, *Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 2 (2010); *Over-Criminalization of Conduct and Over-Federalization of Criminal Law*, *Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 11th Cong. 1 (2009).

94 The study excluded proposed statutes that were related to violent or professional crimes, immigration violations, firearms, pornography, and drug-related offenses. *See* WITHOUT INTENT *supra* note 2, at 33 Methodological App. Some of these crimes, such as immigration violations, are not necessarily violent, but the report does not provide further explanation.

95 *See id.* at 1.

96 *See supra* text accompanying notes 34-35 (discussing public welfare and regulatory offenses).

were analyzed skewed toward the weak side. Notwithstanding this caveat, the data are revealing.

The researchers analyzed 446 non-violent and non-drug criminal law proposals contained in 203 proposed statutes.[97] The large number of criminal proposals, even to the untutored eye, seems disproportionate to the number that a legislative body could responsibly consider. This is borne out by the result; Congress ultimately enacted only thirty-six (8%) of the proposed offenses,[98] an apparently unexceptional ratio.[99] The study also shows that criminal statutes were enacted at a rate that was 45% higher than the rate for all other types of proposed bills.[100]

As the authors point out, the flood of proposals makes "simply unreasonable" any expectation that a substantial proportion could receive adequate legislative oversight and scrutiny.[101] The large number of criminal law proposals also seems to illustrate the proclivity of legislators to rely on criminal laws to enforce a wide range of programs and policies. The data also show that Congress did not fully attend to the *mens rea* element.

2. The Small Number of Offenses with Adequate *Mens Rea* Terms

The study defines a *mens rea* element as "adequate" if it is more likely than not to prevent conviction of a person who did not know the conduct was unlawful or sufficiently wrongful to provide notice of possible exposure to criminal responsibility, and did not intend to violate the law.[102] Of the 446 offenses analyzed, only 191 (43%) included an adequate *mens rea* element.[103] That is, over one-half, 255 (57%), of the proposals provided a *mens rea* element that was inadequate to protect individuals from criminal

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97 The discrepancy between the number of statutes and the number of offenses is explained by the choice to count as separate offenses all sections of a statute that required a *mens rea*. *See* WITHOUT INTENT, s*upra* note 2, at 11. This choice reflects the purpose of the study, an inquiry into *mens rea* standards and to examine the independent protectiveness of the *mens rea* requirement of each offense. *Id.* The authors also counted the offenses as separate when a single statute included more than one course of conduct. *Id.* When the mental state applied to two different actions, the offense was counted twice. *Id.*

98 *See id.* at 13 Chart 3.

99 *See id.* at n.35 (citing Baker's calculation that between 2000 and 2007, Congress enacted an average of 56.5 crimes a year).

100 *See id.* at 13.

101 *See* WITHOUT INTENT, s*upra* note 2, at 2 (noting that the large number of proposals, even of the non-violent and non-drug sort, explains why so many of them were poorly drafted and never received adequate deliberation or oversight).

102 *See id.* at 11.

103 *See id.* at 12 Chart 1.

punishment for unknowing conduct.[104] Of the thirty-six proposals actually enacted, twenty-three (63.8%) lack an adequate *mens rea* requirement.[105]

The authors of the study graded the *mens rea* element of the proposals as either "none" (as in strict liability offenses), "weak," "moderate," or "strong."[106] None and weak *mens rea* elements are inadequate because they are unlikely to provide notice or to justify punishment, so strict liability and offenses using negligence standards received a grade of none;[107] 113 or 25.3% fell into this category.[108]

The next slightly higher grade, weak, includes offenses that use the terms knowingly or intentionally in the introductory text of the offense or in a manner that leaves unclear the terms to which *mens rea* applies;[109] 142 (31.8%) were categorized as weak.[110]

The authors graded offenses with *mens rea* elements that provide adequate protection as either moderate or strong.[111] A grade of moderate was given to offenses that use variations of the term willful in their introductory text;[112] 155 (34.8%) were graded as moderate.[113]

The highest grade that could be given to a *mens rea* element, strong, went to offenses that use some combination of the terms knowingly and willfully, coupled with a specific intent to violate the law or to engage in an inherently wrongful act.[114] Of 446 proposals, only thirty-six (8.1%) received a *mens rea* grade of strong.[115]

In sum, a majority of the proposed offenses and enacted offenses incorporated inadequate *mens rea* elements that were insufficiently robust to prevent punishing non-culpable individuals.

B. *Devising New Rules to Restore* Mens Rea *Standards*

The report recommends the enactment of three laws that are designed to protect individuals who are not blameworthy from criminal liability. The recommendations are directed to both Congress and the courts: Congress is to enact rules that direct the federal courts in interpreting statutes. The rules

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104 *Id.*

105 *See id.* at 13 Chart 3.

106 *Id.* at 35-36.

107 *See* WITHOUT INTENT at 35-36 Methodological App.

108 *See id.* at 12 Chart 1.

109 *See id.* at 35-36 Methodological App.

110 *See id.* at 12 Chart 1.

111 In contrast to the inadequate category, these terms are likely to prevent conviction of a person who acted without intent and knowledge that the conduct was unlawful.

112 *See* WITHOUT INTENT, s*upra* note 2 at 35-36 Methodological App.

113 *See id.* at 12 Chart 1.

114 *See id.* at 35-36 Methodological App.

115 *See id.* at 12 Chart 1.

for the courts, however, are not triggered unless Congress fails to make its intentions clear. Thus, the recommendations constrain both branches by requiring Congress to make its intent clear and requiring judges to follow default rules when Congress does not. When Congress has not given specific direction, then the rules effectively limit the scope of the congressional action by delegating decisions to the judiciary. Whether the default rules will guide judicial interpretation and congressional indifference as envisaged by the authors is another matter.

1. Limit Strict Liability Offenses

The first default rule directs federal courts to read a *mens rea* term into any criminal offense that omits the element.[116] The report affirms that Congress may continue to enact strict liability offenses as long as it makes that purpose clear by express language in the statute. That is, unless Congress has made plain its intention that the statute is one of strict liability, courts are to read a protective, default *mens rea* requirement into the provision.

One benefit of this rule is that it avoids the inadvertent passage of strict liability crimes. In time, the number of strict liability offenses would include only those that Congress specifically marks with that designation. Because people can rely on the statutes, citizens and business firms would have actual notice when conduct is a strict liability offense. This new rule addresses Congress's tendency to enact strict liability crimes; 24% of the 2005—06 proposals analyzed did not include a *mens rea* element.[117]

The proposal goes further than the holding in *Morissette*, which read a *mens rea* element into a statute, but limited that practice to "inherently evil" common law offenses.[118] In contrast, the default rule applies to all federal criminal offenses, including criminal offenses that enforce regulatory laws. The recommendation also goes further than the Model Penal Code, which allows punishment if the actor was reckless.[119] The report rejects the *mens rea* standard of recklessness because it is not sufficiently protective of non-culpable actors.[120]

The authors do not explicitly recommend a specific *mens rea* standard, saying only that the default term should be the "most protective of those

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116 *Id.* at 27. In the 2005—06 congressional term, nine of the thirty-six enacted offenses were strict liability offenses that did not specify a *mens rea* term. *See id.* at 13 Chart 3.

117 *See supra* text accompanying notes 107-108.

118 *See supra* text accompanying notes 25-26, 31-35.

119 *See* MODEL PENAL CODE § 2.02(3) (Official Draft & Revised Comments 1985) (stating that, unless otherwise provided, culpability is established if a person acted recklessly).

120 *See* WITHOUT INTENT, s*upra* note 2, at n.95.

who are not truly blameworthy."[121] That general standard immediately raises two questions: What does it mean? Who should decide?

Given the lexicon of culpability elements, the report suggests that conduct must, at a minimum, be accomplished with a knowing state of mind.[122] However, as noted earlier, that standard includes willful blindness, recklessness, a general intention to act, and knowledge of generalized unlawfulness or dangerousness.[123] The knowing standard may not always be rigorous enough to meet the "most protective" standard.

The second question raised by this default rule is who should decide what *mens rea* term will suffice to meet the standard. The report seems to envisage that Congress will choose the default standard.[124] This is a wise choice in light of the report's goal of restricting delegated authority to enact criminal laws. But if Congress fails to specify the default *mens rea* term, courts will be forced to choose the *mens rea* standard, leading inevitably to inconsistent rulings.[125] If Congress is genuinely concerned about the integrity of the *mens rea* element, it will specifically identify and define what culpability standard is sufficient to protect those not blameworthy for violating a criminal law.

In sum, the recommendation effectively requires that Congress attend to the *mens rea* element in every offense it enacts. When Congress has spoken clearly, the courts have no authority to impose a *mens rea* term; when Congress has not made its intention clear, courts are to use the "most protective" standard. But a gap in the recommendation may undermine the report's goal—unless Congress specifies and defines the default *mens rea* term, the consequence will be more, not less, variance in *mens rea* elements.

2. Apply the Culpability Term to All Elements

Under this suggested rule, federal courts are directed to apply "any introductory or blanket *mens rea* term to each element of the offense."[126] This recommendation is based on the Model Penal Code's explanation of how its

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121 *Id.* The recommendation reads: "[I]t is strongly recommended that any default *mens rea* provision enacted into federal law rely on the *mens rea* terms that are most protective of persons who are not truly blameworthy." *Id.* On this ground, a negligent culpability element would also be insufficiently protective of those whose conduct is not worthy of condemnation.

122 *See id.*

123 *See supra* Part II.

124 *See* WITHOUT INTENT, s*upra* note 2, at n.95.

125 The recommendation seems consistent with the result in *Staples.* The holding that the gun control law was not a public welfare offense and thus merited a *mens rea* element may not have been what Congress intended. *See* Staples v. United States, 511 U.S. 600, 624 (1994) (Stevens, J., dissenting).

126 *See* WITHOUT INTENT, s*upra* note 2, at 27.

provisions should be interpreted.[127] Under the suggested rule, federal courts would require the government to prove that the defendants are culpable for each element of the offense. As with the first default rule, this procedure does not alter Congress's ability to except a law from that interpretive standard, as long as the text of the statute makes Congress's intention clear.[128] This suggestion is aimed at weak *mens rea* elements; 31% of the proposed offenses in the report were graded as weak.[129]

One benefit of this default position is that it simplifies the courts' task by imposing a single standard. It avoids a common problem of statutory interpretation and will, in time, reduce the number of inconsistent decisions. The authors cite *Flores-Figueroa v. United States*,[130] recently decided by the Supreme Court, as an example of correct application of the *mens rea* element and take some encouragement from it.[131] That encouragement, however, may be unwarranted.

In *Flores-Figueroa*, the Court considered the Aggravated Identity Theft statute, which imposes an additional two-year consecutive term of imprisonment for those convicted of certain offenses, including the crime of knowingly using false identity documents.[132] The circuit courts had reached diametrically opposite conclusions on whether the *mens rea* of "knowingly" applied to the means of identification of another person.[133] If it did, the government would be obliged to prove that the defendants knew that the false identity document, which the defendants used to find work, belonged to an actual person.

Relying on statutory construction and rules of grammar,[134] the Court unanimously agreed that "knowingly" applied to the documents as well as to their use. Thus, the government must prove that the defendants knew

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127 *See id.* at n.96; MODEL PENAL CODE § 2.02(4) (Official Draft & Revised Comments 1985) (stating that when an offense does not distinguish among its material elements, the prescribed culpability term "shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.").

128 This deference to legislative prerogatives also appears in the Model Penal Code provision on which the recommendation is based. *See* MODEL PENAL CODE § 2.02(4).

129 *See supra* text accompanying notes 109-110.

130 129 S.Ct. 1886 (2009).

131 *See*, *e.g.*, *id.*; *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 68 (1994) (holding that the government must prove that the defendant knew the victim had not reached the age of majority).

132 *See* 18 U.S.C. §§ 1028A, (c)(4) (2006) (listing provisions relating to fraud and false statements).

133 *Compare* United States v. Montejo, 442 F.3d. 213 (4th Cir. 2006) (holding that the government did not have to prove that the defendant knew that the means of identification actually belonged to another person), *with* United States v. Godin, 534 F.3d 51 (1st Cir. 2008) (holding that the government must establish that defendant knew the means of identification actually belonged to another person).

134 *See Flores-Figueroa*, 129 S.Ct. at 1891 ("In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb is telling the listener how the subject performed the entire action, including the object as set forth in the sentence.").

that the means of identification did, in fact, belong to someone else. The opinion included the statement: "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element."[135] This statement mirrors the rule recommended in *Without Intent.*

Three concurring justices wrote specifically to critique the statement, challenging whether it was the "ordinary practice" of courts to apply the *mens rea* to every element in the offense. Justice Alito argued that while it is fair to begin with such a general presumption, he was wary of an "overly rigid rule" that could impede a court when deciding the issue. In his view, a particular context may rebut that presumption of general application to every element.[136] Justice Scalia, with Justice Thomas joining, noted that while the majority's statement may be descriptively correct, it is not what courts *should* do.[137]

The debate in *Flores-Figueroa* illustrates the contextual aspect of *mens rea* in federal criminal law[138] and the preference for continuing contextual interpretation. The concurring justices' objections also demonstrate that the courts developed the federal *mens rea* jurisprudence from the bottom-up—through applications in many circumstances. Courts may resist directives from another source, especially if the default rule makes it difficult to maintain some order among their prior holdings and precedents.[139]

As a final point, the report suggests that the courts apply the *mens rea* to each element,[140] which would seem to include jurisdictional[141] and threshold circumstances.[142] Yet, the report confusingly cites the Model Pe-

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135 *Id.* at 1890.

136 *See id.* at 1895 (Alito, J., concurring) (citations omitted).

137 *See id.* at 1894 (Scalia, J., concurring) ((expressing concern that a *mens rea* term might be "expanded" to reach an element that the statutory text had limited) (emphasis in original)). Because under the default rule Congress is free to draft a statute that specifically states the *mens rea* is not to apply to every element, Justice Scalia's concern is less pertinent to the recommendation.

138 *See supra*, text accompanying note 42-50 (discussing *mens rea* element in federal criminal law and noting that the same terms carry different implications, depending on the type of law and other circumstances).

139 *See generally* Batey, *supra* note 41 (providing evidence that courts are unwilling to leave the definition of mental requirement to the legislature).

140 *See* WITHOUT INTENT, s*upra* note 2, at 27.

141 Federal criminal laws, especially those enacted before the expansion of the Commerce Clause, often require a crossing of state lines using a channel or instrument of commerce. *See*, *e.g.*, National Stolen Property Act, 18 U.S.C. §§ 2311-2322 (2006). Other statutes rely on specific constitutional provisions or the necessity of managing its affairs. *See e.g.*, Mail Fraud Act, 18 U.S.C. § 1341 (Supp. III 2009) (authorized by the postal and necessary and proper clauses of the Constitution); 18 U.S.C. § 1001 (2006) (false statements).

142 For examples of threshold values, *see* 18 U.S.C. § 666 (2006) (program bribery, threshold values of $5,000 and $10,000); 17 U.S.C. § 506 (2006 & Supp. III 2009) (criminal copyright, threshold value of $1,000 total retail value); Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (amended 2008)

nal Code, which applies the *mens rea* only to material elements.[143] The federal courts have held that *mens rea* does not apply to jurisdictional and other non-material elements in case law.[144] This appears to be a point that can be easily clarified, but it is presently unclear whether the authors intended that Congress or the courts decide the matter. If the matter is delegated to the courts to decide—which the report sought to avoid—the prospect of inconsistent decisions increases. It would be preferable if Congress drafts the default statute to explain to which other elements and circumstances the *mens rea* applys.

C. *Codify the Common Law Rule of Lenity*

The third recommendation of the report is that Congress directs courts to apply the rule of lenity. The rule of lenity is a common law device that is applied to break a deadlock that occurs when a statutory term is ambiguous.[145] In that case, courts are to interpret the statute in favor of the defendant, choosing the less harsh reading.[146] The trigger for exercising lenity is ambiguity, defined as "two rational readings of a criminal statute, one harsher than the other."[147] The harsher reading is chosen only when Congress has spoken in clear and definite language so the statute is not ambiguous.[148] Only when doubt exists about the meaning of a statutory term does the benefit of that doubt go to the defendant.

The rule is based on two rationales: the due process requirement that citizens have notice of banned conduct, and Congress's power to delegate lawmaking authority to the courts.[149] As explained in *United States v. Bass*,

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(various values for sentencing purposes); *see also* United States v. Morris, 928 F.2d 504 (2d Cir. 1991) (abrogated by statute).

143 *See* MODEL PENAL CODE § 2.02(4) (Official Draft & Revised Comments 1985).

144 *See* United States v. Yermian, 468 U.S. 63, 76 (1984) (holding that government need not prove that false statements were made with actual knowledge of federal agency jurisdiction); United States v. Feola, 420 U.S. 671, 695-696 (1975) (holding that proof of defendant's knowledge that victims were federal officers is not required); United States v. Lindemann, 85 F.3d 1232, 1241 (7th Cir. 1996) (knowing or reasonably foreseeable use of interstate wire not required under 18 U.S.C. § 1343 (wire fraud)); United States v. Bryant, 766 F.2d 370, 375 (9th Cir. 1985) (wire fraud).

145 For comprehensive reviews of the lenity doctrine and its connections to overbreadth and vagueness in criminal statutes, see John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241 (2002), and Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57 (1998).

146 *See* United States v. Santos, 553 U.S. 507, 514 (2008) (stating that "[u]nder a long line of our decisions, the tie must go to the defendant.").

147 McNally v. United States, 483 U.S. 350, 359 (1987) (exercising lenity to limit mail and wire fraud to the deprivation of property rights) (citation omitted).

148 *See id.* at 359-60.

149 *See* United States v. Bass, 404 U.S. 336, 347-49 (1971) (stating that the rule of lenity is dictated by "wise principles this Court has long followed") (citation omitted). A concern for the balance in

it is appropriate to require Congress to speak in language that is clear and definite; doing so ensures fair warning in language that will be understood.[150] The Court in *Bass* also stated that the seriousness of criminal sanction dictates that legislatures, and not courts, should define criminal activity.[151] Codifying the rule of lenity thus reflects and furthers the report's goal of providing fair notice by reducing delegation of law-making authority.[152] Whether these benefits come to pass, however, depends on how two issues are resolved.

The first issue is fundamental and concerns whether the rule of lenity should be ignored or applied only in a constrained form.[153] The Model Penal Code contains a version of lenity that markedly constrains the scope of a court's interpretation of a statute.[154] It states that when a statutory text is susceptible of differing constructions, it is to be interpreted in a way that furthers the general purposes of the Code as a whole.[155] In sum, the Model Penal Code recognizes the possibility of unclear and ambiguous statutes, but does not empower courts to examine the text of the statute at issue, its legislative history, or its purpose.[156] However, the Model Penal Code directive is of little use to the federal system because federal criminal offens-

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criminal law between the states and the federal government, also referred to by the Court in *Bass*, is not relevant here. *See id.* at 349-50.

150 *See id.* at 347-48 (stating also that fair warning includes notice of what the law intends to do if a certain line is passed). *See also* Bell v. United States, 349 U.S. 81, 83-84 (1955) (stating that the rule merely indicates that unless Congress makes its meaning clear, any doubt will be resolved in favor of the defendant). The Court in *Bell* also stated that resolving an ambiguity in favor of lenity is "not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct." *Id.*

151 404 U.S. at 348.

152 *See* WITHOUT INTENT, s*upra* note 2, at 28. The report also postulates that a codified rule of lenity would empower lower courts to evaluate statutes, thus serving the rights of defendants at every stage of the criminal process. *See id.*; *see also* Conrad Hester, Note, *Reviving Lenity: Prosecutorial Use of the Rule of Lenity as an Alternative to Limitations on Judicial Use*, 27 REV. LITIG. 513, 529-30, 534-35 (2008).

153 Dan Kahan has suggested that the rule of lenity obscures another well-established rule, that Congress may delegate criminal lawmaking power to the Courts. *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347 (1994); *see also* Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 232 (1997) (describing interpretive guidelines when provisions are ambiguous).

154 *See* MODEL PENAL CODE § 1.02(3) (Official Draft & Revised Comments 1985). *See also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 5.04 (5th ed. 2009) ("The Model Penal Code does not recognize the lenity principle.").

155 MODEL PENAL CODE § 1.02(3). "The drafters deliberately rejected the 'ancient rule that penal law must be strictly construed, . . . because it unduly emphasized only one aspect of the problem,' namely fair notice to potential offenders." Kahan, *supra* note 153, at 384 n.190 (quoting MODEL PENAL CODE § 1.02 cmt. 4).

156 The states seem in some disarray on this point. Some have adopted the Model Penal Code standard; others have eliminated the rule entirely, while others have codified the common law rule. *See* Hester, *supra* note 153, at 524-26 (reviewing state approaches to the rule).

es, especially regulatory and welfare offenses, do not share a uniform general purpose.

The second issue raised by the recommendation concerns the way courts determine that a statute is ambiguous, the necessary trigger for exercising lenity. Traditionally, courts find ambiguity only after first using other interpretive devices to divine Congress's intent in enacting the statute. Thus, a statute is ambiguous only after viewing "every thing [sic] from which aid can be derived,"[157] including "the language and structure, legislative history, and motivating policies of the statute."[158] Justice Souter, writing for the majority in *United States v. R.L.C.*, noted that the Court invoked the rule after "examining nontextual factors that make clear the legislative intent."[159]

Another approach, supported by Justice Scalia, would find ambiguity based solely on the text of the statute.[160] In *United States v. Santos*, the Court debated the meaning of the word "proceeds" in a money laundering statute.[161] Justice Scalia, writing for a plurality, stated that "[f]rom the face of the statute" the term was ambiguous.[162] The rule of lenity was then invoked over the objections of four dissenting justices and the concurrence of Justice Stevens. Relying on a traditional inquiry of all relevant material, Justice Stevens argued that the provision was not ambiguous and the rule of lenity was inapplicable.[163] Significantly, Justice Alito, in dissent, noted that five justices agreed that recourse to legislative purpose is warranted.[164]

Although the issue of recourse to legislative materials seems settled, it may not remain so, as the composition of the Court has changed since *Santos* was decided in 2008. As it stands, the recent application of lenity in the Supreme Court is a contested development whose outcome is far from clear. If the authors of the report hope to encourage courts to use the rule more liberally, they should urge Congress to add specific standards for find-

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157 United States v. Fisher, 6 U.S. 358, 386 (1805).

158 United States v. R.L.C., 503 U.S. 291, 293 (1992) (Scalia, J., concurring) (citation omitted).

159 *Id.* at 306 n.6 (citation omitted).

160 *See id.* at 307-11 (1992) (Scalia, J., concurring); *see also* Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197 (1994).

161 553 U.S. 507 (2008) (invoking lenity to determine that the term "proceeds" in a money laundering statute means profits, not gross receipts).

162 *See id.* at 514 (plurality opinion) (stating that the term "proceeds" could mean either receipts or profits).

163 *See id.* at 524-28 (Stevens, J., concurring) (noting also that ambiguous terms effectively delegate to federal judges the task of filling statutory gaps).

164 *See id.* at 532 n.1 (Alito, J., dissenting). The Court's most recent holding on lenity in a case challenging the Bureau of Prisons' calculation of good time credit is probably not its last. *See* Barber v. Thomas, 130 S. Ct. 2499, 2508-09 (2010) ((stating that "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.") (emphasis added) (citations omitted)).

ing ambiguity. Codifying the rule of lenity as it exists will not prevent variations that undermine the goal of the recommendation.

To summarize the analysis in this section, each of the three recommendations raises issues that could negatively affect the goal of pressuring Congress to take responsibility for *mens rea* elements in criminal laws. Requiring courts to insert a *mens rea* element when Congress is unclear about its intention to enact a strict liability crime leaves significant questions unanswered about the ultimate standard of "most protective" and which body should define the standard. Resistance to the recommendation to apply the *mens rea* term to all elements of an offense arises from both the significance of context in federal *mens rea* precedents and the uncertainty about the term's application to jurisdictional and threshold elements of an offense. Finally, the recommendation to codify the rule of lenity does not include a method for finding the threshold requirement of ambiguity, effectively giving courts the choice to invoke the rule. In essence, each of the three recommendations suffers from the same flaw—pushing decisions on to the courts only institutionalizes the status quo rather than providing direction for changing it.

CONCLUSION

One way to curtail overcriminalization is to allow the *mens rea* element to perform its traditional function of ensuring that only the culpable are subject to punishment. Yet the advent of regulatory and public welfare crimes, use of common law *mens rea* terms, and judicial interpretation of those terms has weakened *mens rea* standards in the federal system. Despite these developments, the words of *Morissette* ring true: a robust *mens rea* element remains a necessary prerequisite to criminal liability and just punishment.

Thanks to the authors and sponsors of *Without Intent*, we now have a better grasp of the extent of congressional responsibility for the weak *mens rea* elements in federal criminal laws. Although the proposed default rules may not lead to stronger *mens rea* standards in their present form, they provide a basis for further consideration and commentary. This article identifies weaknesses in the proposed default rules, a first step in amending them for greater effectiveness.