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Mens Rea Reform and its Discontents

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MENS REA REFORM AND ITS DISCONTENTS

BENJAMIN LEVIN*

This Article examines the contentious debates over recent proposals for “mens rea reform.” The substantive criminal law has expanded dramatically, and legislators have criminalized a great deal of conduct that is quite common. Often, new criminal laws do not require that defendants know they are acting unlawfully. Mens rea reform proposals seek to address the problems of overcriminalization and unintentional offending by increasing the burden on prosecutors to prove a defendant’s culpable mental state. These proposals have been a staple of conservative-backed bills on criminal justice reform. Many on the left remain skeptical of mens rea reform and view it as a deregulatory vehicle purely designed to protect defendants accused of financial or environmental crimes. Rather than advocating for or against such proposals, this Article argues that opposition to mens rea reform should trouble scholars and activists who are broadly committed to criminal justice reform. Specifically, I argue that the opposition demonstrates three particular pathologies of the U.S. criminal system and U.S. criminal justice reform: (1) an overreliance on criminal law as a vehicle for addressing social problems; (2) the instinct to equalize or level up—when faced with inequality, many commentators frequently argue that the privileged defendant should be treated as poorly

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as the disadvantaged defendant, rather than using the privileged defendant's treatment as a model; and (3) the temptation for mass incarceration critics to make exceptions and support harsh treatment for particularly unsympathetic defendants. Ultimately, this Article argues that achieving sweeping and transformative criminal justice reform will require overcoming the three pathologies.

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INTRODUCTION

In an era of intense partisan gridlock, criminal justice reform has become a rare area that promises at least some slight space for compromise.¹ Indeed, recent years have seen a number of bipartisan bills

¹ See, e.g., Eric Holder, *Remarks at the National Press Club*, 27 FED. SENT. R. 297, 299 (2015) (“[I]n the preliminary data we’ve seen—and the growing, bipartisan consensus surrounding the work that’s underway—they prove unequivocally that criminal justice reform is an idea whose time has finally come.”); Rachel E. Barkow & Mark Osler, *Designed to Fail: The President’s Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 390 (2017) (describing “a bipartisan call to reform this state of affairs”); Heather Schoenfeld, *A Research Agenda on Reform: Penal Policy and Politics Across the States*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 155, 162 (2016); Alex Altman, *Criminal Justice Reform is Becoming Washington’s Bipartisan Cause*, TIME (Feb. 19, 2015), <http://time.com/3714876/criminal-justice-reform-is-becoming-washingtons-bipartisan-cause> [https://perma.cc/ZV42-99BT]. But see Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 263, 266–67 (2018) (critiquing the “bipartisan consensus”); Douglas A. Berman,

introduced at the national level that, if passed, would take steps towards addressing structural issues in the administration of criminal law.² But compromise has not been without its challenges, and efforts at sweeping reform repeatedly have died on the cutting room floor.³

It is easy to imagine a range of potential sticking points in the effort to forge a bipartisan consensus: the extent to which social and economic programs should be a part of the legislation; how to treat “violent” crime; how much to spend on programs for incarcerated people or people with criminal records; what role questions of racial justice should play; and what prison sentences should be viewed as excessive. But one major obstacle on the road to federal criminal justice reform has been an unexpected one: mens rea reform.⁴ Mens rea—a key component of the substantive criminal law and a staple of the first-year law school curriculum is the requirement that criminal conduct be accompanied by a “bad mind” or guilty mental state.⁵

Mens rea operates as a tricky issue of proof in many cases and when dealing with many statutes. Was a defendant *malicious* or *negligent* when she committed homicide? Did a defendant *know* that she was transporting heroin in her car, or was she merely *reckless*? But, judges, defendants, and

Is It Really True that “Conservatives and Liberals Are Increasingly United” on Criminal Justice Reform?, SENTENCING LAW AND POLICY (Aug. 17, 2012), http://sentencing.typepad.com/sentencing_law_and_policy/2012/08/is-it-really-true-that-conservatives-and-liberals-are-increasingly-united-on-criminal-justice-reform.html [<https://perma.cc/B7C7-G4BB>].

² See, e.g., Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201, 1221 (2017); Honorable Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 AM. CRIM. L. REV. 1, 15 (2015); Jordain Carney, *Senators to Reintroduce Bipartisan Criminal Justice Bill*, THE HILL, Sept. 19, 2017, available at <https://thehill.com/blogs/floor-action/senate/351471-senators-to-reintroduce-bipartisan-criminal-justice-bill> [<https://perma.cc/5CTM-E9HF>]; Lee Rawles, *ABA Urges Senate Action on Bipartisan Sentencing Reform Bill*, A.B.A. J., Jan. 9, 2018, available at http://www.abajournal.com/news/article/aba_urges_action_on_bipartisan_sentencing_reform_bill_before_the_senate [<https://perma.cc/CKU2-WBTA>].

³ See, e.g., C.J. Ciaramella, *The Senate Will Try Again On Sentencing Reform This Year*, REASON (Oct. 4, 2017), <http://reason.com/blog/2017/10/04/the-senate-will-try-again-on-sentencing> [<https://perma.cc/Z5GH-NGFR>]; Carl Hulse, *Why the Senate Couldn't Pass a Crime Bill Both Parties Backed*, N.Y. TIMES, Sept. 16, 2016, at A8.

⁴ See, e.g., Deborah W. Denno, *Concocting Criminal Intent*, 105 GEO. L.J. 323, 378 (2017) (collecting sources); Alexander F. Sarch, *Beyond Willful Ignorance*, 88 U. COLO. L. REV. 97, 100 (2017) (collecting sources); Alex Sarch, *How to Solve the Biggest Issue Holding Up Criminal Justice Reform*, POLITICO (May 16, 2016), <https://www.politico.com/agenda/story/2016/05/criminal-justice-reform-mens-rea-middle-ground-000120> [<https://perma.cc/XR35-DZDH>].

⁵ See generally Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974–75 (1932) (describing the critical role of *mens rea* in criminal law).

prosecutors face particular problems when criminal statutes are silent as to mens rea—i.e., when a statute fails to specify what mental state a defendant possessed.⁶ Does silence mean that the legislature intended to impose strict liability? Or should courts view silence as the result of sloppy drafting and read in some sort of mental state requirement? Reform would alter the existing federal criminal code by imposing a default mental state for all crimes. Congress still could pass strict liability criminal statutes, but those statutes would need to be explicit about the strict liability provisions.

So, why have these reform proposals generated such controversy and taken on such an important role in federal criminal justice reform policy? Certainly, mens rea is an important concept in criminal law,⁷ and, legal scholars have devoted countless pages to examining the proper role of mens rea in assessing culpability and crafting criminal statutes.⁸ But it is not an issue that has cropped up frequently in the growing public conversation about criminal justice reform. Questions about a defendant's mental state appear to have very little to do with concerns about racial disparities, police violence, or structural inequality. As protestors have taken to the streets and as editorial pages have filled with calls for fixing a broken system,

⁶ See, e.g., *Staples v. United States*, 511 U.S. 600, 606 (1994) (outlining rules of construction that courts might adopt when faced with statutory silence as to mens rea); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 600 n. 276 (2001) (describing the importance of specifying a mental state).

⁷ See, e.g., Elizabeth Papp Kamali, *Felonia Felonice Facta: Felony and Intentionality in Medieval England*, 9 CRIM. L. & PHIL. 397, 398–99 (2015); Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741, 741–42 (1993) (“[M]ens rea plainly dominates in the legal determination whether an injurious act will be subject to criminal sanctions”); Sayre, *supra* note 5, at 974 (“No problem of criminal law is of more fundamental importance or has proved more baffling through the centuries than the determination of the precise mental element or mens rea.”); Kenneth W. Simons, *Should the Model Penal Code’s Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 179 (2003) (identifying the clarification of mental state categories as the “MPC’s greatest achievement”).

⁸ See, e.g., Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1106 (1991); Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 646 (1984); Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 22–23 (1994); Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 260–61 (1987); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 349 (1985); Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 685–705 (1983); Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 721 (1930); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 463 (1992).

mens rea reform has hardly been the rallying cry, or even an afterthought.⁹ Yet mens rea reform proposals have taken on outsized significance as the latest stumbling block in the effort to address an unwieldy and seemingly limitless federal criminal system.¹⁰ Among conservatives and libertarians, mens rea reform has become a key component of legislative efforts: the proliferation of laws that criminalize conduct even if defendants are unaware that they are acting unlawfully stands as a powerful illustration of big government and over-regulation run amok.¹¹ For liberals, progressives, and many on the left, however, mens rea reform is not responsive to the real problems with criminal law: Republican proposals would serve deregulatory ends and make it harder to prosecute corporate, financial, or environmental crime, but the proposals would do little to address the plight of the poor people of color who make up a disproportionate part of the carceral population.¹²

This Article examines the debate over proposed mens rea legislation as a means of better understanding the contemporary criminal justice reform movement (or moment) and its limitations. With an eye to the relationship

⁹ See, e.g., MOVEMENT FOR BLACK LIVES, Platform, A Vision for Black Lives, <https://policy.m4bl.org/platform/> [<https://perma.cc/PSM2-K85Y>] (outlining the reforms demanded by the Movement for Black Lives).

¹⁰ See, e.g., Mike Debonis, *The Issue That Could Keep Congress From Passing Criminal Justice Reform*, WASH. POST (Jan. 20, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/01/20/the-issue-that-could-keep-congress-from-passing-criminal-justice-reform/?utm_term=.3592d664b67c [<https://perma.cc/N2QD-J6XE>] (discussing “a narrow but crucial issue that has emerged as the main political obstacle to a criminal justice reform bill: to what degree prosecutors must prove a defendant’s criminal intent in order to win convictions for certain federal crimes”); Paul J. Hofer, *A Change Election*, 29 FED. SENT. R. 69, 71, (2017) (describing *mens rea* reform proposals as “stumbling blocks for reaching bipartisan legislative consensus”).

¹¹ See, e.g., Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 757 (2014); John G. Malcolm, *Criminal Justice Reform at the Crossroads*, 20 TEX. REV. L. & POL. 249, 272 (2016) (“One of the greatest safeguards against overcriminalization—the misuse and overuse of criminal laws and penalties to address societal problems—is ensuring that there is an adequate *mens rea* requirement in criminal laws.”).

¹² See Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 169 (2017) (collecting sources). Contemporary left critiques of mass incarceration and the carceral state certainly vary, but they tend to foreground questions of distributive justice across various axes of power and marginalization. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

between criminal law and broader questions of political economy, I argue that the debate has much to tell us about the limits of criminal justice reform and the continued reliance on criminalization as a means of solving social problems. This Article explores the terms of the debate and reveals the fault lines that lurk below—and threaten to upset—the movement. I argue that the split on mens rea reform is not simply a left or right disagreement about regulated markets and the welfare state; it also reveals disagreements on the political left about the nature of the state and the proper role of criminal law and incarceration in efforts to advance equality and curb the abuses of capital. Where a long line of literature has explained mass incarceration as the exclusive product of tough-on-crime conservatism,¹³ this Article joins a small but growing literature that examines left complicity in—and sometimes support for—the policies that built the carceral state.¹⁴

To be clear at the outset, I am not advocating for or against mens rea reform legislation as a desirable component of a broader package of criminal justice reform policies. Rather, I hope to demonstrate how the debate over mens rea reform—and, particularly, opposition to it from the political left—illustrates deeper pathologies in U.S. criminal policy. Recognizing these pathologies need not compel a specific policy outcome. But it should force reform opponents to recognize the distributional costs of continued reliance on a criminal regulatory model.¹⁵ And, perhaps more importantly, it should force opponents to recognize the place of mens rea

¹³ See generally ALEXANDER, *supra* note 12; MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S, 31–50 (2005); Harry A. Chernoff *et. al.*, *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 527–38 (1996).

¹⁴ See, e.g., LIBBY ADLER, GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM (2018); FORMAN, *supra* note 12; AYA GRUBER, THE FEMINIST WAR ON CRIME (unpublished manuscript) (source on file with author); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA (2014). Cf. Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1127 (2015) (taking “a critical look at the implications of connecting human rights remedies to criminal law”).

¹⁵ Describing the costs of opposing *mens rea* reform does not mean denying that there might be benefits. Indeed, for some of the left critics I discuss, the proper policy determination might rest on such an analysis of *mens rea* reform bills and their consequences. Cf. Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211 (2015) (describing this approach); Prabha Kotiswaran, *Born Unto Brothels - Toward A Legal Ethnography of Sex Work in an Indian Red-Light Area*, 33 LAW & SOC. INQUIRY 579 (2008) (applying a distributional analysis); Jorge L. Esquirol, *Legal Latin Americanism*, 16 YALE HUM. RTS. & DEV. L.J. 145, 161 (2013) (describing distributional analysis as “a popular form of critical analysis by legal progressives in the U.S.”).

reform debates within the broader constellation of criminal policymaking and criminal justice reform. At its core, my claim is that meaningful change in the criminal system will require different groups and interests to move beyond criminalization and incarceration when they confront bad actors or bad conduct. It is easy to talk about reform, reducing sentences, or decriminalization in the abstract. It is much more difficult to embrace a decarceral posture when dealing with specific cases or specific conduct that one views as particularly pernicious.

This Article uses left and center-left opposition to mens rea reform as a way of appreciating the stickiness or intractability of “governing through crime.”¹⁶ To this end, my argument unfolds in four Parts: Part I briefly explains the broader context for mens rea reform proposals. I situate mens rea reform proposals within a discourse on overcriminalization and against the backdrop of strict liability offenses as a growing portion of the criminal code. Next, Part II introduces the statutory framework of mens rea reform, describes the recent legislative proposals, and shows how mens rea reform would work and how it might affect individual case outcomes. Part III tracks the debate over mens rea reform. In this Part, I examine both the sources of progressive opposition as well as core disagreements about the relationship between the carceral state and the regulatory state.

Finally, Part IV steps back to discuss the broader significance of these debates and why opposition to mens rea reform displays the shortcomings of progressive commitments to decarceration and criminal justice reform. In this Part, I identify three core pathologies of U.S. criminal policy and argue that opposition to mens rea reform reflects each of them: (1) a commitment to using criminal law as the default regulatory model; (2) a tendency to level up when faced with inequality (i.e., to punish the powerful defendant more, rather than punishing the powerless defendant less); and (3) the temptation for mass incarceration critics to make exceptions and support harsh treatment for particularly unsympathetic defendants. To be clear, my claim is not that mens rea reform meaningfully addresses deeper structural flaws in the criminal system or that these bipartisan bills are without flaws. Rather, my claim is that the opposition marks a troubling inability to step outside of the criminalization paradigm. I conclude by arguing for a more capacious vision of criminal justice reform that would reject criminalization and incarceration as desirable vehicles for advancing social justice.

¹⁶ See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 17 (2007).

I. THE CONTEXT OF MENS REA REFORM

The academic literature on mens rea reform generally skirts the distributional questions at the heart of conversations about mass incarceration.¹⁷ This literature—unlike much contemporary criminal justice scholarship—frequently avoids issues of social marginalization, race, or structural inequality and instead focuses on questions of moral culpability, “rule of law”, and “neutral” legal principles.¹⁸ A primary goal of this Article is to reframe or reconsider debates about mens rea reform through the broader lens of mass incarceration, considering the distributional consequences of the proposals and their opposition. But, before stepping back to this larger frame, this Part situates mens rea reform in the context of the literatures from which it has grown: (1) the opposition to overcriminalization; and (2) the historical hostility to the use of strict liability in criminal law.

A. OVERCRIMINALIZATION

Everything is a crime, and everyone is a criminal. (Well, almost.) That has become the refrain among a growing chorus of critics who decry the phenomenon of “overcriminalization.”¹⁹ Overcriminalization—the over- or mis-use of criminal law²⁰—was first diagnosed by Sanford Kadish in the 1960s and has remained a topic of scholarly inquiry for the last fifty years.²¹ Initially, the critique generally enjoyed traction on the civil libertarian left, where scholars identified morals legislation as a product of conservatism run amok; over time, though, the critique attracted voices on

¹⁷ See Part III.A., *infra*.

¹⁸ See Part III.A., *infra*.

¹⁹ See generally DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008); HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009); Andrew Ashworth, *Conceptions of Overcriminalization*, 5 OHIO ST. J. CRIM. L. 407 (2008); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005); William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842 (2001); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 909 (1962).

²⁰ While the term is used frequently, its definition remains a point of some contention. See generally Levin, *supra* note 1 (offering alternate definitions).

²¹ See Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 785 (2012) (citing Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 909 (1962)) (“As far as I can tell, Sanford Kadish coined the term “overcriminalization” in a 1962 article in the *Harvard Law Review* . . .”).

the right, which focused on regulatory crimes as illustrations of big government and the regulatory state gone wild.²² In various forms, the overcriminalization critique has achieved substantial purchase not only in the academy but among a range of attorneys and policymakers.²³

The push for mens rea reform has grown out of the literature on overcriminalization—when too much conduct is criminalized, the argument goes, we need to come up with a way of imposing checks on state power.²⁴ When it is so easy to commit a crime unknowingly, something must be amiss. If criminal law is supposed to punish conduct that is morally culpable, isn't it a problem when people are punished when they had no reason to believe they were doing anything wrong?²⁵ In introducing the Mens Rea Reform Act of 2017, Senator Orrin Hatch made the link to overcriminalization explicit:

Rampant and unfair overcriminalization in America calls for criminal justice reform, which starts with default *mens rea* legislation . . . Requiring proof of criminal intent

²² See generally Levin, *supra* note 1. Thanks to David Sklansky for highlighting this shift over time.

²³ See, e.g., *Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. (2013); *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2010); *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2009); NAT'L ASSOC. OF CRIMINAL DEFENSE LAWYERS, *Overcriminalization*, <http://www.nacdl.org/overcrim/> [<http://perma.cc/ZD64-6ZJ4>] (last visited Jul. 6, 2017); THE HERITAGE FOUNDATION, *Overcriminalization*, <http://www.heritage.org/issues/legal/overcriminalization> [<http://perma.cc/2WVG-NLZX>], (last visited June 12, 2018); RIGHT ON CRIME, *Overcriminalization* <http://rightoncrime.com/category/priorityissues/overcriminalization/> (last visited June 12, 2018); TEXAS PUBLIC POLICY FOUNDATION, *Overcriminalization*, <http://old.texaspolicy.com/issues/overcriminalization> [<http://perma.cc/P4DX-PP6C>] (last visited July 6, 2017); *Task Force on Overcriminalization*, ABA, <http://www.americanbar.org/groups/litigation/initiatives/overcriminalization.html> [<http://perma.cc/P5DY-9BWK>] (last visited July 6, 2017).

²⁴ See, e.g., Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 574 (2012) (describing the need for *mens rea* reform as a means of countering overcriminalization and “overzealousness of federal prosecutors”); Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 699 (2017); David Thaw, *Criminalizing Hacking, Not Dating: Reconstructing the CFAA Intent Requirement*, 103 J. CRIM. L. & CRIMINOLOGY 907, 945 (2013); John Villasenor, *Over-Criminalization and Mens Rea Reform: A Primer*, BROOKINGS: FIXGOV BLOG (Dec. 22, 2015), <http://www.brookings.edu/blogs/fixgov/posts/2015/12/22-mens-rea-reform-villasenor> [<http://perma.cc/PM44-9TRE>].

²⁵ See Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109 (“[T]o punish conduct without reference to the actor’s state of mind is both inefficacious and unjust.”).

protects individuals from prison time or other criminal penalties for accidental conduct or for activities they didn't know were wrong. In recent years, Congress and federal agencies have increasingly created crimes with vague or unclear criminal intent requirements or with no criminal intent requirement at all. The Mens Rea Reform Act will help correct that problem²⁶

Drawing on the historical role of mens rea, Stephen Smith similarly has argued that mens rea reform should be a critical component of addressing the scourge of overcriminalization.²⁷ In Smith's account, the absence of express mental state requirements not only erodes necessary gradations of proportionality and moral blame; the silence and lack of clarity also are "troubling because *mens rea* requirements are an essential safeguard against unjust convictions and disproportionate punishment."²⁸

According to this line of critique, an adequate (and explicit) mental state requirement is one of "the greatest safeguards against overcriminalization."²⁹ Or as Representative Bobby Scott put it, "without these protective elements in our criminal laws, honest citizens are at risk of being victimized and criminalized by poorly crafted legislation and overzealous prosecutors."³⁰ The concern here, as in other corners of overcriminalization literature, is that criminal laws are extremely broad and reach a great deal of conduct; without clear terms and without internal checks, too much power is placed in the hands of prosecutors (and, by extension, the state).³¹ In *Without Intent: How Congress Is Eroding the*

²⁶ Press Release, U.S. Senator Orrin Hatch, Senators Hatch, Lee, Cruz, Perdue, and Paul Introduce Bill to Strengthen Criminal Intent Protections (Oct. 2, 2017), <https://www.lee.senate.gov/public/index.cfm/2017/10/senators-hatch-lee-cruz-perdue-and-paul-introduce-bill-to-strength-criminal-intent-protections> [<http://perma.cc/3AUP-TWDE>].

²⁷ See Smith, *supra* note 24, at 568.

²⁸ *Id.*

²⁹ Malcolm, *supra* note 11, at 272.

³⁰ *Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. (2013), at 3.

³¹ See, e.g., Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and A Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 453 (2009) ("We know prosecutors take advantage of overcriminalization."); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 382 (2007) (collecting sources); Alexandra Natapoff, *Misdemeanors*, 85 S. CALIF. L. REV. 1313, 1354 (2012) (describing the "'overcriminalization' framework" as "a diverse body of work that explains how the substantive criminal law has ceded its power over outcomes to police and prosecutorial discretion"); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541, 542 (2005) ("[O]vercriminalization can be a function of both increased legislation and also the application of existing legislation through prosecutorial discretion"); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 679 (2014)

Criminal Intent Requirement in Federal Law, a 2010 report by the National Association of Criminal Defense Lawyers and the Heritage Foundation, mens rea reform is framed as an important antidote to the interwoven problems of overcriminalization and prosecutorial discretion:

Prosecutorial discretion plays an important role in the American criminal justice system But a criminal offense should never be so broad, or its mens rea requirements so lax, that it allows prosecutors to obtain convictions of persons who are not truly blameworthy and who did not have fair notice of possible criminal responsibility.³²

The absence of clear mens rea requirements, therefore, exacerbates the already-troubling dynamics of an expansive criminal code enforced by prosecutors able to leverage their almost-unchecked power and discretion.

In other words, we can understand mens rea reform as a vehicle for reining in criminal law and addressing the problem of overcriminalization.³³ Or, more specifically, mens rea reform might operate as a vehicle for returning criminal law to its proper scope—that is, if we can agree on the proper scope of criminal law. The literature on overcriminalization assumes (either explicitly or implicitly) that there is a proper scope for criminal law and that the legislature has overreached,³⁴ but decades of scholarship and policy debate indicate that not everyone can agree on what conduct criminal law should reach.³⁵ Nevertheless, the case for mens rea

(describing the “vast literature” that “addresses prosecutorial discretion and the related problem of overcriminalization”).

³² BRIAN W. WALSH & TIFFANY M. JOSLYN, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW* 29 (2010).

³³ See, e.g., C. Jarrett Dieterle, *The Lacey Act: A Case Study in the Mechanics of Overcriminalization*, 102 GEO. L.J. 1279, 1305 (2014); RIGHT ON CRIME, *Overcriminalization*, <http://rightoncrime.com/category/priorityissues/overcriminalization/> [<http://perma.cc/3MEZ-55FF>] (last visited June 12, 2018) (identifying “[e]nsur[ing] that an appropriate culpable mental state is included in the elements of all offenses” as a “conservative solution” to overcriminalization); Press Release, U.S. Senator Orrin Hatch, Senators Hatch, Lee, Cruz, Perdue, and Paul Introduce Bill to Strengthen Criminal Intent Protections (Oct. 2, 2017) <https://www.lee.senate.gov/public/index.cfm/2017/10/senators-hatch-lee-cruz-perdue-and-paul-introduce-bill-to-strengthen-criminal-intent-protections> [<http://perma.cc/T5NT-UKGN>] (“Rampant and unfair overcriminalization in America calls for criminal justice reform, which starts with default *mens rea* legislation.”).

³⁴ See, e.g., Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 634 (2005) (“[I]t has become clear that most legislatures no longer use their criminal law codification power to promote broad and useful change, but have become ‘offense factories’ churning out more and more narrow, unnecessary, and often counterproductive new offenses.”).

³⁵ The question of a proper baseline haunts discussions of overcriminalization and criminal policy, generally—without an agreement on the proper scope of criminal law and criminal punishment, critiques of *too much* criminal law tend to assume what they set out to

reform rests at least in part on the belief that a culpable mental state should be a critical component of acceptable or legitimate criminal statutes.

Notably, in this framing, the focus of reformers is on helping defendants who are either innocent or, at least, not morally culpable. The majority of the discourse on overcriminalization implies both that there is a proper scope for criminal law and that there is some class of defendants who is deserving of punishment.³⁶ And, as discussed in Part III, this line of argument might well risk legitimating the treatment of a range of defendants charged with crimes that don't fit into the class of offenses frequently identified with overcriminalization.³⁷

I soon will return to the arguments marshalled in support of mens rea reform. But, before examining the specific proposals in the next Part, it is important to recognize the historical context of mens rea reform. The movement to re-invigorate mental state requirements does not simply draw from the rhetoric of overcriminalization. Indeed, overcriminalization critics identify a range of structural flaws and policy solutions that have little to do with mental states: to some, the problem is the criminalization of "victimless" or "harmless" conduct;³⁸ to others, the problem is the use of criminal law to reinforce morality;³⁹ to others, the problem is the use of criminal law where a civil sanction or regulatory measure might do the

prove and fail to provide a normative framework against which to weigh criminalization efforts. *See, e.g.*, JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 8 (2017) ("Part of the problem is that no one has provided a metric for determining how many people in prison is "too many" . . ."); Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 193–94 (1999) (arguing that an attempt to use the harm principle to restrict the scope of criminal law will fail because of the principle's indeterminacy); Smith, *supra* note 24, at 538 ("It is, of course, difficult to make such claims without a normative baseline—an idea of what constitutes the 'right' number of criminal laws—and such a baseline is elusive at best.").

³⁶ *See generally* Part III, *infra*.

³⁷ This critique might be applied more generally to reform efforts that foreground wrongful convictions and innocent defendants. *See generally* Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587 (2005).

³⁸ *See, e.g.*, MARKUS DIRK DUBBER, *VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS* (2002); Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 34 (1995).

³⁹ *See, e.g.*, Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 749 (2005); Green, *supra* note 39; Kimberly Thomas, *Interpersonal Power in the Criminal System*, 50 AM. CRIM. L. REV. 247, 276 (2013).

trick.⁴⁰ The push for mens rea reform draws from a specific strand of overcriminalization literature that in turn draws from critical literature on the role of strict liability in criminal law.

B. STRICT LIABILITY

Much ink has been spilled on the place of strict liability in criminal law,⁴¹ and rehashing this literature is not necessary to understand the mens rea reform debates, but to appreciate the fights over mens rea reform requires us to recognize that the presence or absence of mental state provisions in criminal statutes has long been a point of contention.

Writing in 1960, two years before Kadish introduced the term “overcriminalization, Richard Wasserstrom observed that “[t]he history of . . . strict liability offenses which are of legislative origin is of quite recent date.”⁴² Despite (or, perhaps, because of) their novelty, Wasserstrom framed strict liability offenses as the subject of widespread scholarly criticism:

The proliferation of so-called “strict liability” offenses in the criminal law has occasioned the vociferous, continued, and almost unanimous criticism of analysts and philosophers of the law. The imposition of severe criminal sanctions in the absence of

⁴⁰ See, e.g., Kip Schlegel, et al., *Are White-Collar Crimes Overcriminalized? Some Evidence on the Use of Criminal Sanctions Against Securities Violators*, 28 W. ST. U. L. REV. 117, 120 (2001) (“[O]vercriminalization represents the imposition of a criminal sanction more frequently than merited given other social control responses that are available . . .”).

⁴¹ See, e.g., R.A. Duff, *Strict Liability, Legal Presumptions, and the Presumption of Innocence*, in APPRAISING STRICT LIABILITY 125 (A.P. Simester, ed., 2005); Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 314 (2003); Gary V. Dubin, *Mens Rea Reconsidered: A Plea for A Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 324 (1966); George P. Fletcher, *The Fall and Rise of Criminal Theory*, 1 BUFF. CRIM. L. REV. 275, 280 (1998) (describing the relationship between theories of strict liability in tort and criminal law); Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1534 (2018); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 402 (1993) (“For years, courts and commentators have struggled with the criminal strict liability doctrine.”); Stephen J. Morse, *The Moral Metaphysics of Causation and Results*, 88 CALIF. L. REV. 879, 879 (2000) (“[V]irtually all criminal law theorists agree that moral fault is at least a necessary condition of blame and punishment . . .”); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 62 (1933); Amy J. Sepinwall, *Faultless Guilt: Toward A Relationship-Based Account of Criminal Liability*, 54 AM. CRIM. L. REV. 521, 522 (2017).

⁴² Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 731 n.1 (1960).

any requisite mental element has been held by many to be incompatible with the basic requirements of our Anglo-American, and, indeed, any civilized jurisprudence.⁴³

In other words, strict liability “is a doctrine that contradicts the most basic principles of modern criminal law.”⁴⁴

Where mens rea requirements reinforce a retributive vision of criminal law (i.e., punishment should match moral culpability), strict liability offenses accord with a range of utilitarian approaches to criminal law.⁴⁵ Over the course of the twentieth century, the rise of strict liability statutes in the United States confounded courts and commentators uncertain of when and how statutory silence was meant to be interpreted.⁴⁶ Some of this uncertainty simply reflected the challenges of statutory interpretation: how should a judge decide what the legislature intended?⁴⁷ But, some of this uncertainty (and some of the hostility from the bench and the academy) appears to find root in a deeper theoretical objection: either a commitment to retributivist principles,⁴⁸ or a deep discomfort with the “regulatory” functions of criminal law.⁴⁹

⁴³ *Id.* at 731 (internal citations omitted).

⁴⁴ Levenson, *supra* note 41, at 402; *see also* Fowler v. Padgett, 7 T.R. 509, 514 (K.B. 1798) (“[I]t is a principle of natural justice, and of our law, that *actus non facit reum nisi mens sit rea*. The intent and the Act must both concur to constitute the crime . . .”).

⁴⁵ *See* Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1075–76 (1997) (“The most vigorous condemnation of strict liability in criminal law comes from retributivists, not from utilitarians. Strict liability appears to be a straightforward case of punishing the blameless, an approach that might have consequential benefits but is unfair on any retrospective theory of just deserts.”).

⁴⁶ *See* Morissette v. United States, 342 U.S. 246, 254, n.14 (1952) (“Consequences of a general abolition of intent as an ingredient of serious crimes have aroused the concern of responsible and disinterested students of penology.”).

⁴⁷ *See, e.g.,* Ratzlaf v. United States, 510 U.S. 135, 153–54 (1994) (Blackmun, J., dissenting); Liparota v. United States, 471 U.S. 419 (1985); Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 293 (2012); John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1026 (1999).

⁴⁸ *See, e.g.,* United States v. Int’l Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) (Stewart, J., dissenting) (“This case stirs large questions—questions that go to the moral foundations of the criminal law. Whether postulated as a problem of ‘*mens rea*,’ of ‘willfulness,’ of ‘criminal responsibility,’ or of ‘*scienter*,’ the infliction of criminal punishment upon the unaware has long troubled the fair administration of justice.”); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 152 (1968) (“The reason why, according to modern ideas, strict liability is odious, and appears as a sacrifice of a valued principle . . . is that those whom we punish should have had, when they acted, the normal capacities . . . for doing what the law requires and abstaining from what it forbids . . .”).

⁴⁹ *See, e.g.,* United States v. U.S. Gypsum Co., 438 U.S. 422, 442–43 (1978); Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL’Y 1065, 1088 (2014) (“The criticism

Confronted with the rising specter of strict liability statutes, the Supreme Court grappled with when and how to read in an implied mens rea requirement.⁵⁰ On March 7, 1922, the Court heard two cases that raised the question of whether statutory silence meant strict liability or implied some mental state requirement: *United States v. Balint*⁵¹ and *United States v. Behrman*.⁵² In *Behrman*, Morris Behrman, a doctor, had been prosecuted for writing an unlawful prescription for an addicted patient in violation of the Narcotic Drug Act of December 17, 1914.⁵³ Behrman sought to take advantage of a statutory exception because of his profession and because he was unaware that the patient suffered from addiction.⁵⁴ In *Balint*, a group of defendants were prosecuted for violating the same Act by selling cocaine and opium derivatives.⁵⁵ Here, the defendants claimed that the indictment was defective because it didn't require proof that they knew they were selling controlled substances.⁵⁶

Both decisions came down on the same day. In *Behrman*, the Court rejected the defendant's arguments and concluded that "[i]f the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent."⁵⁷ *Balint* similarly led to a prosecution-friendly outcome and an expansive reading of the statute.⁵⁸ Here, the Court looked to legislative intent in order to conclude that silence meant strict liability:

Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided. Doubtless considerations as to the opportunity

that strict liability offenses provide inadequate notice of criminal conduct is a particularly cogent one today. Use of the criminal justice system to enforce federal regulatory programs is heavily freighted with problems that do not arise when the only penalties at stake are administrative or civil.").

⁵⁰ See MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 147–53 (2005) (describing the Court's handling of so-called "public welfare" offenses).

⁵¹ 258 U.S. 250 (1922).

⁵² 258 U.S. 280 (1922).

⁵³ *Id.* at 285–87.

⁵⁴ *See id.*

⁵⁵ *See Balint*, 258 U.S. at 251.

⁵⁶ *See id.*

⁵⁷ *Behrman*, 258 U.S. at 288.

⁵⁸ *See Balint*, 258 U.S. at 253–54.

of the seller to find out the fact and the difficulty of proof of knowledge contributed to this conclusion.⁵⁹

In short, the Court read the statute against the backdrop of a set of regulatory concerns, and concluded that strict liability reflected a legislative cost-benefit analysis, an analysis that the Court needn't undertake.

United States v. Dotterweich,⁶⁰ decided just over twenty years later, continued that utilitarian theme and foreshadowed the use of strict liability as a means of reaching corporate executives. Joseph Dotterweich, a pharmaceutical executive, was prosecuted because his company allegedly had shipped mislabeled and adulterated drugs in violation of the Federal Food, Drug, and Cosmetic Act.⁶¹ As in the earlier cases, Dotterweich was convicted under a strict liability standard.⁶² And, as in the earlier cases, the Court declined to read in a mens rea requirement by nodding to legislative intent and the utilitarian calculus of a new generation of regulatory or "public welfare" crimes:

The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.⁶³

Once again, the role of criminal law as a social welfare mechanism overrode traditional concerns with moral culpability.⁶⁴

If *Dotterweich* were the last word on interpreting legislative silence in criminal statutes, the story of mens rea reform might look very different. Advocates might still argue for a default mental state, but the argument would have to be couched in terms of an outright opposition to strict liability; arguments about clarity, confusion, notice, and predictability would hold no water, as it would be pretty clear that statutory silence meant strict liability. But *Morissette v. United States*⁶⁵ complicates the story. Decided in 1952, the case involved a scrap metal dealer, Joseph Edward

⁵⁹ *Id.* at 254.

⁶⁰ 320 U.S. 277 (1943).

⁶¹ *Id.* at 278.

⁶² *See id.*

⁶³ *Id.* at 280–81.

⁶⁴ *See generally* Part IV.A.

⁶⁵ 342 U.S. 246, 263 (1952).

Morissette, who found some used bomb casings on an Air Force bombing range and sold the metal at a junk market.⁶⁶ Morissette was prosecuted under a statute that proscribed “knowingly” converting government property.⁶⁷ Morissette conceded that he had taken the shell casings and done so knowingly, but argued that he didn’t know they were of value to the government and therefore that he didn’t know he was “converting” them.⁶⁸ Unlike the earlier cases, the *Morissette* Court read “knowing” to apply to all the elements of the offense, accepting the defendant’s reading and rejecting the government’s call for strict liability.⁶⁹ In distinguishing this case from its earlier decisions, the Court explained that those cases involved “public welfare offenses” (i.e., newer regulatory crimes defined by a utilitarian focus on Progressive regulation), whereas Morissette’s alleged offense resembled a common law crime (e.g., theft or larceny).⁷⁰ For such common law crimes, the Court reasoned, Congress was legislating against a set of background understandings about mens rea requirements.⁷¹

Even the Court acknowledged the indeterminacy of the distinction it had drawn:

Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static.”⁷² In the decades that followed, courts and commentators have sought guidance to assist in cases where imposing strict liability might feel at odds with intuitions about culpability and justice.⁷³

In *United States v. Bass*, for example, Justice Thurgood Marshall stressed the role of the court in checking the scope of criminal statutes.⁷⁴

⁶⁶ *Id.* at 247–48.

⁶⁷ *See id.* at 248.

⁶⁸ *See id.*

⁶⁹ *Id.* at 272–73.

⁷⁰ *Id.* at 254–56.

⁷¹ *See id.* at 254–56, 261–62.

⁷² *Id.* at 260.

⁷³ *See, e.g.,* *Hughey v. United States*, 495 U.S. 411, 422 (1990) (describing “longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant”); *Rewis v. United States*, 401 U.S. 808, 812 (1971) (“[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”); Aziz Z. Huq & Genevieve Lakier, *The Triumph of Fault in Public Law*, 131 HARV. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940016 [<http://perma.cc/4KBT-K97P>]; John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198 (1985); Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 755 (2002) (proposing “clear statement” rules for criminal statutes).

⁷⁴ *United States v. Bass*, 404 U.S. 336, 347–48 (1971).

“In various ways over the years,” the Court “has stated that when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.”⁷⁵

Justice Marshall’s concerns find purchase in a range of interpretive rules and legal doctrines.⁷⁶ For example, the rule of lenity, a canon of construction, instructs judges to construe ambiguous criminal statutes in favor of defendants.⁷⁷ Similarly, courts have struck down statutes as void for vagueness when the language is so unclear that it fails to provide a defendant with constitutionally adequate notice and invites discriminatory enforcement.⁷⁸ In recent years courts (and, notably, the Supreme Court) have reached for these and other interpretive tools more frequently when faced with prosecutors’ broad readings of statutes or when faced with the at-times-shocking application of expansive criminal prohibitions.⁷⁹

So, we might see mens rea reform as reflecting this skepticism of strict liability and as operating in tandem with judicial hostility to overcriminalization. In the next Part, I describe proposed mens rea reform legislation and explain how it operates against the backdrop of overcriminalization and interpretive framework of strict liability.

⁷⁵ *Id.* (internal quotation omitted).

⁷⁶ *But see generally* Brown, *supra* note 47 (tracking resistance to checks on strict liability).

⁷⁷ *See, e.g.,* Dowling v. United States, 473 U.S. 207, 229 (1985) (“Invoking the ‘time-honored interpretive guideline’ that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity’”); *Bass*, 404 U.S. at 347–48; *Bell v. United States*, 349 U.S. 81, 83 (1955) (“When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.”); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1029 (1989) (“The rule of lenity rests upon the due process value that government should not punish people who have no reasonable notice that their activities are criminally culpable, as well as the separation-of-powers value that prosecutors and courts should be unusually cautious in expanding upon legislative prohibitions where the penalty is severe.”).

⁷⁸ *See, e.g.,* *Johnson v. United States*, 135 S. Ct. 2551, 2566 (2015); *City of Chi. v. Morales*, 527 U.S. 41, 56 (1999); *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”); Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1138 (2016).

⁷⁹ *See, e.g., infra* notes 281–283, and accompanying text; *Yates v. United States*, 135 S. Ct. 1074 (2015); *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Bond v. United States*, 134 S. Ct. 2077 (2014); Carissa Byrne Hessick, *Johnson v. United States and the Future of the Void-for-Vagueness Doctrine*, 10 N.Y.U. J.L. & LIBERTY 152 (2016) (discussing evolutions in the theory and application of vagueness).

II. THE TERMS OF MENS REA REFORM

Understanding the context of mens rea reform and the impetus behind its enthusiastic support requires a reckoning with the place of strict liability in criminal law. But, mens rea reform is not a rejection of criminal strict liability. Indeed, under the terms of proposed legislation, Congress certainly might dispense with any mental state requirement. But, Congress would have to do so explicitly—silence wouldn't be enough. In this Part, I set forth the terms of the recent and pending legislative proposals that have generated controversy. While broader questions about the place of strict liability in criminal law may stand as the backdrop for contemporary policy debates, it is the mens rea reform statutes that have served as the battleground for this latest round of debates about the proper place and scope of criminal liability.

“Mens rea reform” describes a legislative agenda designed to address concerns about overcriminalization and statutes without clear mental state requirements.⁸⁰ Proposed legislation generally includes two components: (1) a default mental state requirement,⁸¹ and (2) a broader requirement that defendants know they are acting unlawfully.⁸² In this Part, I address each component in turn.

A. REINTERPRETING SILENCE

First, proposed legislation typically imposes a default mental state requirement.⁸³ Many statutes are silent as to the mental state required for a given element.⁸⁴ For example, imagine a statute that states: “It is a crime to

⁸⁰ For a helpful discussion of two recent unsuccessful bills and their possible application, see RICHARD M. THOMPSON II, CONGRESSIONAL RESEARCH SERVICE, MENS REA REFORM: A BRIEF OVERVIEW (Apr. 14, 2016).

⁸¹ See, e.g., Mens Rea Reform Act of 2015, S. 2289, 114th Cong. (2015) (“If a state of mind is not specified for an element of the offense, it must be shown that the defendant acted willfully.”); Criminal Code Improvement Act of 2015, H.R. 4002, 114th Cong. (2015) (“A conviction for such federal criminal offense requires proof that a defendant acted knowingly.”).

⁸² See H.R. 4002, *supra* note 81 (“[I]f the offense consists of conduct that a reasonable person in the same or similar circumstances would not know, or would not have reason to believe, was unlawful, the Government must prove that the defendant knew, or had reason to believe, the conduct was unlawful.”).

⁸³ See, e.g., Mens Rea Reform Act of 2017, S. 1902, 115th Cong. (2017); Stopping Over-Criminalization Act of 2015, H.R. 3401, 114th Cong. (2015); H.R. 4002; S. 2289.

⁸⁴ See, e.g., *Staples v. United States*, 511 U.S. 600, 605 (1994) (discussing competing approaches to interpreting silence with respect to mental states); *Morissette v. United States*, 342 U.S. 246, 262 (1952) (same); *State v. Al-Naseer*, 734 N.W.2d 679, 684 (Minn. 2007) (addressing statutory silence in a vehicular homicide case); *Garnett v. State*, 632 A.2d 797, 802 (Md. 1993) (addressing a rape statute without a clear *mens rea* provision); *State v.*

possess a gun capable of holding more than nine bullets.” Further, imagine a Defendant, Dan, who is prosecuted for possessing a gun that, in fact, contained a clip housing fourteen bullets. What must the prosecution prove beyond a reasonable doubt? Certainly, that Dan possessed the gun and that the gun could accommodate a high-capacity clip. But does the prosecution need to show that Dan knew how many bullets his gun could hold? Does the prosecution even need to prove that Dan knew he possessed a gun at all? At common law, it would not be clear.⁸⁵ Because of statutory silence, a trial court would need to determine whether this was a strict liability statute or whether the legislator intended that some mental state requirement be read into the statute.⁸⁶ As should be clear, this is a tricky enterprise that has very real consequences—whether the prosecution must prove knowledge might be the difference between a guilty verdict (or, more likely, plea) and lengthy prison sentence, on the one hand, and an acquittal, on the other.

Mens rea reform legislation would alter this interpretive exercise. For example, the Mens Rea Reform Act of 2017 specifies that “the mere absence of a specified state of mind for an element of a covered offense in the text of the covered offense shall not be construed to mean that Congress affirmatively intended not to require the Government to prove any state of mind with respect to that element.”⁸⁷ Instead of a deep dive into legislative history (or some textualist inquiry),⁸⁸ the court simply would apply a default rule. Most bills would require knowledge, so the court simply would read knowledge into the statute.⁸⁹ Therefore, the prosecution would need to prove that Dan *knowingly* possessed a gun capable of accommodating more than nine bullets. Whether the case went to trial or whether Dan pleaded guilty, then, would rest on the strength of the prosecution’s evidence about Dan’s mental state.

As discussed in Part I, absent a default mens rea requirement, courts grapple with whether, when, and how to read in a mental state requirement. In *Staples v. United States*, a case similar to Dan’s, the Supreme Court was

Audette, 543 A.2d 1315, 1317 (Vt. 1988) (addressing statutory silence). See generally Catherine L. Carpenter, *supra* note 41, at 358 (discussing historical approaches to legislative silence regarding mental state requirements).

⁸⁵ See generally *supra* note 84.

⁸⁶ See *Staples*, 511 U.S. at 605.

⁸⁷ Mens Rea Reform Act of 2017, 115 S. 1902.

⁸⁸ Cf. Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 BUFF. CRIM. L. REV. 399, 437–38 (2000) (explaining approaches to interpreting legislative silence as to *mens rea*).

⁸⁹ See, e.g., S. 2289; H.R. 4002.

asked to interpret Congressional silence in the National Firearms Act.⁹⁰ Under the Act, it was unlawful “for any person to possess a machinegun that [was] not properly registered with the Federal Government.”⁹¹ Harold E. Staples, III had been convicted in Oklahoma of violating the act by failing to federally register his gun.⁹² While the statute was silent as to the mens rea required, Staples argued that the government was required to have proven that he “knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun.”⁹³ A divided Court concluded that Staples was right—the statute included an implied mens rea requirement as to each element of the offense.⁹⁴

In the majority opinion, Justice Clarence Thomas lays out a range of factors or interpretive rules that courts should look to in determining whether a legislature intended to impose strict liability.⁹⁵ Building on the “public welfare” analysis discussed in Part I, the Court concludes that *some* public welfare offenses might impose strict liability, but they generally do so only if they display some of the following factors or characteristics: (1) they are relatively new crimes; (2) they expose defendants to relatively low penalty or stigma; (3) they regulate inherently dangerous activity; (4) they produce diffuse, rather than individualized harm; and (5) they would lead to prosecutions where it was very difficult to prove mens rea.⁹⁶

These considerations appear to speak to the idea that strict liability reflects a sort of tort-like regulatory approach to criminal lawmaking.⁹⁷ But, even so, the Court does not provide clear guidelines going forward.⁹⁸ Indeed, after walking through these considerations, the majority acknowledged the uncertainty of the interpretive exercise: “We emphasize that our holding is a narrow one. As in our prior cases, our reasoning depends upon a commonsense evaluation of the nature of the particular

⁹⁰ *Staples*, 511 U.S. at 602.

⁹¹ *Id.*

⁹² *Id.* at 603–04.

⁹³ *Id.* at 602.

⁹⁴ *Id.*

⁹⁵ *See generally id.*

⁹⁶ *See generally id.*

⁹⁷ Such concerns also might apply to the criminalization of negligent conduct. Michael T. Cahill, *Attempt by Omission*, 94 IOWA L. REV. 1207, 1242 (2009) (“[U]sing criminal law to punish mere negligence . . . runs the risk of blurring the tort-crime distinction and reducing the moral authority of criminal law . . .”).

⁹⁸ *See* Thompson, *supra* note 80, at 1 (“Supplementing the statutory text, the Supreme Court has developed a set of presumptions to apply when a *mens rea* term is omitted. However, the Court has applied these rules in a somewhat ad hoc fashion depending on a variety of factors . . .”).

device or substance Congress has subjected to regulation and the expectations that individuals may legitimately have in dealing with the regulated items.”⁹⁹ In short, the interpretation of legislative silence is an inexact science, leading to the potential for dramatically different outcomes depending on the judge, the strength of the briefing, or the facts.

While understanding mens rea reform proposals requires us to appreciate the debates regarding strict liability, the proposals aren’t (or at least aren’t explicitly) out-and-out rejections of strict liability. Instead, they offer a clear answer to the sorts of interpretive problems in *Dotterweich*, *Morrisette*, *Staples*, and similar cases. The proposed approach is hardly unheard of. Indeed, it mirrors the approach adopted by the Model Penal Code (MPC).¹⁰⁰ In MPC jurisdictions, the default mens rea is “recklessness,” so any statutory silence is interpreted to impose a recklessness requirement.¹⁰¹ This is a lower bar than knowledge, but it still eliminates the possibility of strict liability in cases like Dan’s and ensures some degree of interpretive uniformity and guidance.

According to Stuntz, “[b]y most accounts, the single most important rule in the MPC is the establishment of recklessness—a culpability level that involves subjective fault—as the default mens rea”¹⁰² And, as Kenneth Simons argues, the imposition of a “default mental state is important as a matter of principle. For it expresses the classic liberal idea that moral culpability is, and criminal liability should be, based on a conscious choice to do wrong.”¹⁰³ This approach also would seek to recalibrate the balance between culpability and harm in the federal sentencing scheme. To the extent the rise of strict liability offenses (or, at least, offenses with no specified mens rea) reflect a legislative emphasis on harm over culpability,¹⁰⁴ mens rea reform legislation would elevate culpability in the calculus. Rather than predicating punishment solely on a finding of harmful conduct, a heightened mens rea requirement would re-focus judicial inquiry on an individual defendant’s culpability.

⁹⁹ *Staples*, 511 U.S. at 619.

¹⁰⁰ See MODEL PENAL CODE § 2.03 (1985).

¹⁰¹ *Id.*

¹⁰² Stuntz, *supra* note 6, at 600 n.276. Significantly, though, Stuntz notes that—as of 2001—only half of the states that had adopted the MPC’s “culpability structure” also had adopted a default mental state requirement of recklessness. *Id.*

¹⁰³ Simons, *supra* note 7, at 188.

¹⁰⁴ See Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 48–49 (2010) (“The federal sentencing guideline revolution in the 1980s was perhaps the single most important development signaling the rise of harm and the decline of culpability in penal law.”).

B. OTHERWISE LAWFUL CONDUCT

The second prong of proposed mens rea reform legislation is more unusual and more controversial. This component would require that the prosecution prove that defendants knew that they were breaking the law. Most criminal statutes say nothing about a defendant's mental state as to the *legality* of conduct.¹⁰⁵ Take Dan's gun possession case. Even if the court were to read in a knowledge requirement, there would be no requirement that Dan *knew* that his conduct was unlawful. As long as the prosecution could prove that he knew that he possessed a gun and that he knew that the gun could accommodate more than nine bullets (the material elements of the offense), the prosecution could obtain a guilty verdict. Dan could not raise a successful "mistake of law" defense—that is, his belief that he was behaving lawfully would be irrelevant to any legal inquiry. Therefore, Dan would be guilty even if he had believed reasonably that he was acting lawfully.

Dan's situation mirrors a textbook case of "mistake of law": *People v. Marerro*.¹⁰⁶ In *Marerro*, Julio Marerro, a corrections officer from Connecticut brought his handgun with him on a trip to New York City.¹⁰⁷ Under New York law, it was a criminal offense to carry a handgun without a permit, unless the carrier was a "peace officer," a category defined by statute and interpreted by courts to include police officers and state correctional workers.¹⁰⁸ The problem for Marerro: he worked for a *federal* prison in Connecticut. Marerro was arrested and prosecuted under the statute.¹⁰⁹ He claimed that he had made a good faith mistake—he thought that he was a peace officer, he had read the law, and he even had consulted with friends and coworkers.¹¹⁰ The New York Court of Appeals was unconvinced. Misinterpreting a criminal statute (even if the misinterpretation were reasonable) could not be a defense.¹¹¹

At first blush, there may be nothing troubling about prosecuting Dan or Marerro. They did break the law, after all, and perhaps the societal

¹⁰⁵ See generally Dan M. Kahan, *Ignorance of Law Is an Excuse—but Only for the Virtuous*, 96 MICH. L. REV. 127 (1997) (discussing the general absence of an excuse for unknowingly breaking the law). But see Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 344–45 (1998) (cataloging statutes that courts have interpreted as requiring knowledge of the conduct's illegality).

¹⁰⁶ 507 N.E.2d 1068 (N.Y. 1987).

¹⁰⁷ *Id.* at 1069.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1070.

¹¹¹ See *id.* at 1073.

interest in ensuring compliance with the law (or in serving the substantive ends sought by the specific gun possession statute) outweighs any nagging sense that they are not morally blameworthy.¹¹² Indeed, the axiom that “ignorance of the law excuses no one” speaks to a belief that members of a polity have some obligation to know and obey the laws that govern the community.¹¹³ The “public welfare” reasoning of the *Balint* and *Dotterweich* Courts suggests that the harm to an individual defendant might pale in comparison to the greater social utility of reducing ownership of dangerous weapons.

But, is such an expectation reasonable? There are over four thousand federal criminal laws, and, over the last fifty years, states and localities have criminalized conduct at an alarming rate.¹¹⁴ Put simply, it is hard to believe that anyone—including the people who pass or enforce criminal laws—actually lives up to this theoretical obligation to know the law.¹¹⁵ Given the massive scope of the substantive criminal law, there is good reason to think that someone trying to fulfill this obligation and comply with the law might have trouble doing so.¹¹⁶ And, further, the distributive consequences of such a knowledge gap might be particularly concerning: the wealthy, educated defendant (or the corporate defendant with skilled counsel and/or a compliance department) might be able to stay more apprised of the law than a poor, uneducated defendant.¹¹⁷ Indeed, we might understand the prevalence of strict liability or limited mens rea

¹¹² Cf. Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547, 593 (2015) (critiquing an expansive notice requirement that would allow defendants to raise a defense if they did not know that the *specific* conduct they engaged in was criminal).

¹¹³ See, e.g., Gabriel J. Chin et al., *The Mistake of Law Defense and an Unconstitutional Provision of the Model Penal Code*, 93 N.C. L. REV. 139, 144 (2014); David De Gregorio, *People v. Marrero and Mistake of Law*, 54 BROOK. L. REV. 229, 243 (1988).

¹¹⁴ See, e.g., Villasenor, *supra* note 24.

¹¹⁵ See, e.g., Chin, et al., *supra* note 113, at 145; Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting “Apparent Innocence” in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 5 (1995) (“We live in an era of rapidly expanding criminal liability, in which conduct never before within the reach of the criminal justice system is regulated. Substantive expansions of liability vastly increase the potential for dissonance between law and community expectations.”).

¹¹⁶ See Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 778 (2013).

¹¹⁷ See Levin, *supra* note 1, at 300–01. *But see* John G. Malcolm, *Morally Innocent, Legally Guilty: The Case for Mens Rea Reform*, 18 FEDERALIST SOC’Y REV. 40 (2017) (“While some critics argue that mens rea reform would only benefit wealthy corporations and their executives who flout environmental and other health and safety regulations, the truth is that such corporations and their high-ranking executives are able to hire lawyers to navigate complex regulations and avoid prosecution, while individuals and small businesses lack the time, money, and expertise to avoid accidentally violating obscure rules.”).

requirements in the corporate crime realm as reflecting societal expectations that “responsible corporate agents” should understand the law and be more vigilant than less sophisticated actors.¹¹⁸

It is worth noting one major limitation on this second component of proposed *mens rea* reform legislation: these provisions would require that a defendant knew she was breaking the law in situations when a reasonable person would not expect her conduct to be criminal.¹¹⁹ The Stopping Over-Criminalization Act of 2015, for example, would require that “in the case of an offense, such as a regulatory offense, where a defendant might reasonably be unaware the conduct could be criminally punished, the Government must prove the defendant had reason to know the defendant’s conduct was unlawful.”¹²⁰ So, the prosecution would not need to prove that a defendant knew it was illegal to kidnap a child, but the prosecution probably would have to prove that a defendant knew or should have known it was a criminal offense to camp in a specific corner of a national park.

This limitation might be necessary from an efficiency or common sense standpoint. Additionally, it is consistent with the way that courts already interpret criminal statutes. Courts generally consider the presence or absence of a *mens rea* requirement a significant factor when they are concerned that defendants might be prosecuted for conduct they believed to be lawful.¹²¹ That is, courts often are confronted with constitutional challenges based on a claim that the absence of a mental state requirement has failed to provide notice and has fallen afoul of the constitutional limits on criminal statutes.¹²² In the context of “mistake of fact” cases, courts

¹¹⁸ *United States v. Park*, 421 U.S. 658, 672 (1975) (“The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.”); *see also* Kelman, *supra* note 41, at 605–06.

¹¹⁹ *See* Criminal Code Improvement Act of 2015, H.R. 4002, 114th Congr. (2015) (“[I]f the offense consists of conduct that a reasonable person in the same or similar circumstances would not know, or would not have reason to believe, was unlawful, the Government must prove that the defendant knew, or had reason to believe, the conduct was unlawful.”).

¹²⁰ Stopping Over-Criminalization Act of 2015, 114 H.R. 3401 § 28(b).

¹²¹ *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 234 (2002); *Osborne v. Ohio*, 495 U.S. 103, 115 (1990); *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1286 (9th Cir. 1992), *rev’d*, 513 U.S. 64 (1994); WAYNE R. LAFAYE, *CRIMINAL LAW* 110–11 (5th ed. 2010).

¹²² *See, e.g.*, *Smith v. California*, 361 U.S. 147, 153–55 (1959); *United States v. Posters ‘N’ Things Ltd.*, 969 F.2d 652, 657 (8th Cir. 1992); *State v. Luedtke*, 863 N.W.2d 592, 598 (Wis. 2015); *Burns v. State*, 512 S.W.2d 928, 933 (Ark. 1974); *People v. Finkelstein*, 174 N.E.2d 470, 471 (N.Y. 1961).

generally impose a bar on the defense if a defendant was engaged in otherwise unlawful conduct.¹²³

However, it may not be so easy to distinguish between clearly criminal conduct and surprisingly criminal conduct. Indeed, this distinction and the assumption that it is an easy one to draw represent a core problem with much of the discourse about “overcriminalization” (and, perhaps, criminal justice reform generally).¹²⁴ We might be able to come up with a list of crimes that fall easily into one category or another—crimes that are clearly *malum in se* (i.e., wrong because they are morally blameworthy) and crimes that are clearly *malum prohibitum* (i.e., wrong only because they have been criminalized), but the line is much fuzzier than it initially appears.¹²⁵ Indeed, in a system where crimes are the product of legislative decision-making, not some sort of common law process of criminalization, all crimes are (at least in some sense) *malum prohibitum*.¹²⁶ How a legislature chooses to define murder, rape, or arson is not necessarily an apolitical or natural process.¹²⁷ In many ways, a discussion of this issue falls outside the scope of this Article and is fodder for much more extensive analysis. But I flag it here as a way of noting that, even if one were enthusiastic about the basic premises of mens rea reform, there might be reason to ask whether the proposed legislature lives up to its own claims and its own logic.

More pointedly, this limitation speaks to a distinction in the literature and discourse on overcriminalization between “good” people who are caught up in the web of over-expansive criminal law and “real criminals.” In his statement introducing the Mens Rea Reform Act of 2017, Senator Hatch argued that the bill would “ensure that *honest, hardworking* Americans are not swept up in the criminal justice system for doing things they didn’t know were against the law.”¹²⁸ Read skeptically, it’s not a

¹²³ See, e.g., *People v. Olsen*, 685 P.2d 52, 55 (Cal. 1984) (quoting *People v. Lopez*, 271 Cal. App. 2d 754, 760–61 (1969) (“[A] mistake of fact relating only to the gravity of an offense will not shield a deliberate offender from the full consequences of the wrong actually committed.”); *Garnett v. State*, 632 A.2d 797, 802 (Md. 1993) (“Statutory rape laws are often justified on the ‘lesser legal wrong’ theory or the ‘moral wrong’ theory”); Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler’s Predecessors*, 78 COLUM. L. REV. 1098, 1119 n.167 (1978) (describing the “lesser crime principle”).

¹²⁴ See Levin, *supra* note 1, at 299.

¹²⁵ See Michael L. Rich, *Lessons of Disloyalty in the World of Criminal Informants*, 49 AM. CRIM. L. REV. 1493, 1527 n.234 (2012) (collecting sources).

¹²⁶ See generally Benjamin Levin, *American Gangsters: RICO, Criminal Syndicates, and Conspiracy Law as Market Control*, 48 HARV. C.R.-C.L. L. REV. 105, 154–57 (2013).

¹²⁷ That is, unless we adopt a “natural law” framework, each and every criminal law—from the most venal to the most venial—criminalizes “otherwise innocent conduct.”

¹²⁸ Press Release, Senators Hatch, Lee, Cruz, Perdue, and Paul Introduce Bill to Strengthen Criminal Intent Protections (Oct. 7, 2017), <https://www.lee.senate.gov/public/index.cfm>

stretch to hear the “honest” and “hardworking” as a racialized or class-based dog whistle.¹²⁹ (In his seminal work on overcriminalization, William Stuntz critiqued the expansion of criminal codes that had led to the prohibition of “marginal middle-class misbehavior.”)¹³⁰ Even read more generously, the statement clearly delineates the class of Americans worthy of sympathy (*us*) and the real law-breakers (*them*). The othering of people caught up in the criminal system remains a major problem and impediment to meaningful criminal justice reform.¹³¹ Indeed, in Part IV, I will return to this concept and argue that opposition to *mens rea* reform may actually reflect such an othering.¹³² But the rhetoric of and literature on *mens rea* reform fail to reckon with these distinctions.

III. THE DEBATE OVER *MENS REA* REFORM

What’s so objectionable about *mens rea* reform? As I suggested at the end of the previous Part, there might be some logical flaws in the structure

/2017/10/senators-hatch-lee-cruz-perdue-and-paul-introduce-bill-to-strengthen-criminal-intent-protections [http://perma.cc/VS7S-EPDG] (emphasis added).

¹²⁹ Cf. IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 178–79 (2014) (discussing the way “hard-working Americans” was used rhetorically to describe the white working class in opposition to black “welfare queens”).

¹³⁰ Stuntz, *supra* note 6, at 509. Indeed, such a class-based rhetoric permeates discussion of white-collar crime. In defining the term, sociologist Edwin Sutherland wrote of criminal conduct in the class “composed of respectable or at least respected business and professional men.” Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1, 1 (1940); see also BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 87–88 (2014); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 47 (2003); Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 321–91 (2003) (collecting sources).

¹³¹ See, e.g., FORMAN, *supra* note 12, at 221 (describing the cultural hostility to “violent criminals” as a population distinct from “nonviolent criminals”); Jody Armour, *Nigga Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, 12 OHIO ST. J. CRIM. L. 9, 9–10 (2014) (arguing that legal culture inscribes a racialized dichotomy between “criminals” and the rest of society); Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1522 (2017) (describing the ways in which status courts complicate the traditional “othering effect” of criminal process and punishment); Stephen Herbert, *Policing the Contemporary City: Broken Windows or Shoring up Neo-liberalism?*, 4 THEORETICAL CRIMINOLOGY 445, 458 (2001) (“Broken windows reinforces an ‘othering’ of the criminal population that allows state actors to justify being tough on crime, and that fuels stratospheric rates of incarceration.”); Jocelyn Simonson, *The Place of “the People” in Criminal Procedure* 119 COLUM. L. REV. 249, 270–71 (examining the ways in which constitutional criminal procedure treats criminal defendants as effectively banished from the polity).

¹³² See Part IV.C., *infra*.

of the proposals. Yet that, in and of itself, hardly seems fatal.¹³³ It is not as though Congress generally passes only legislation that represents the paragon of logical and intellectual consistency. Rather, *mens rea* reform has faced two primary objections: (1) it is not responsive to the real problems that plague the criminal system; and (2) it is designed to protect the wrong people.¹³⁴ These two objections are closely related, but in this Part, I address them separately for the sake of clarity.¹³⁵ While some on the left have supported *mens rea* reform,¹³⁶ the objections outlined in this Part have generally been voiced exclusively by left or progressive politicians and activists.

¹³³ Perhaps a stronger version of this argument is that the *mens rea* reform provisions would be difficult to apply or fail to specify just how the criminal code should be modified. See, e.g., Editorial, *Don't Change the Legal Rule on Intent*, N.Y. TIMES, Dec. 5, 2015, at SR8 (“This confusing standard would create endless litigation as the government and defendants argued over how, exactly, to meet it in each new case.”). That said, if the argument is simply that it’s hard to imagine how a prosecutor could prove recklessness, knowledge, or intent, then it’s not clear how much such an argument would differ from a general claim that mental state requirements are too exacting or are imprecise. From “beyond a reasonable doubt” to the painstaking mental state definitions laid out in the MPC, criminal law leaves a great deal of interpretive wiggle room to lawyers, judges, and juries. Maybe the corporate context makes this interpretive exercise even more difficult. But the argument about “confusing standards” appears out of touch with a legal system that relies heavily on similarly confusing and indeterminate definitions, standards, and requirements.

¹³⁴ See Levin, *supra* note 1, at 301–02.

¹³⁵ There certainly are other objections to *mens rea* reform. Indeed, many Republicans and critics on the right generally oppose efforts at criminal justice reform or shrinking the size of the criminal system. But, in this Article, I do not address those critiques. Of course, people who think that the system is functioning properly or is too lenient will not be enthusiastic about or supportive of proposals designed to shrink the system. But my concern here is with scholars, activists, and politicians who have expressed concern about mass incarceration or who have cloaked themselves in reformist language. From a reformist perspective, opponents also might worry about *mens rea* reform functioning as a “Trojan Horse” for conservatives and libertarians seeking to dismantle the welfare state. See Takei, *supra* note 12, at 169. This critique is closely related to the concern about *mens rea* reform reaching the wrong defendants, but it might also speak to a broader political concern about the legitimation of otherwise objectionable political positions or the de-radicalization of reformist goals or values. Cf. MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 258–82 (2014) (critiquing the role of a small-government right in criminal policy reform). Alternatively, left reformists might worry that by embracing a conservative reform designed to reach white-collar crime, they might play into a false narrative that “criminal justice reform had been achieved,” thus stymying future reforms. See generally Levin, *supra* note 1.

¹³⁶ See Barkow & Osler, *supra* note 1, at 422 (“Notably, the *mens rea* reform provision had its own bipartisan support in the House, and most criminal law scholars and professional bar associations have lamented for years that strict liability laws have no place in the criminal sphere.”).

A. SOLVING THE WRONG PROBLEMS?

The first critique of mens rea reform is that it simply misses the point. Understanding this critique (and evaluating its worth) requires us to appreciate and agree on what the *point* is.¹³⁷ That is, what's wrong with the current state of affairs in U.S. criminal law? There are many answers to that question—perhaps it is the astronomical prison population; perhaps it is the length of sentences; perhaps it is the dramatic racial and socioeconomic disparities at each stage in the criminal process; perhaps it is the sheer number of criminal laws; perhaps it is the violence and militarization increasingly associated with policing; or, perhaps it is the economic costs of operating the carceral state. This list represents only a sample of issues that a reformist agenda might address. And, as I have argued elsewhere, figuring out what problems we are concerned with is essential to a meaningful discussion about criminal justice reform.¹³⁸ But, even without drilling down to first principles, it should be easy to see that mens rea reform probably is not directly responsive to many of those concerns.

Worries about notice, respect for “rule of law,” and the criminalization of apparently innocent conduct may be compelling, but mens rea reform does not speak clearly to questions of distributive and racial justice. Nor does it have much to say about prison populations or the social marginalization experienced by people caught up in the criminal system. In short, mens rea reform does not speak the language of mass incarceration.¹³⁹ And, while there might be a range of reasons that mens rea reform is normatively desirable or why it is a policy that should be supported, it is hard to view it as the sort of significant step that many reformers seek.

In this respect, we might view mens rea reform as an outgrowth of a more formalist approach to criminal law and criminal justice.¹⁴⁰ Where

¹³⁷ This is similar to my point in Part I that truly understanding and solving the problem of “overcriminalization” would require a baseline agreement or understanding of what would constitute an appropriate amount of criminalization. See *supra* notes 35–40, and accompanying text.

¹³⁸ See generally Levin, *supra* note 1.

¹³⁹ Cf. David Garland, *Introduction: The Meaning of Mass Imprisonment*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1, 5–6 (David Garland ed., 2001) (defining “mass imprisonment” in terms of racialized social control); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1446 (2012) (same).

¹⁴⁰ In drawing this link, I hardly mean to suggest that criminal law scholarship rooted in moral philosophy doesn't have a role to play in discussions of criminal policy or in discussions of structural reform. Rather, I mean to suggest that the sorts of structural, social,

much contemporary criminal law scholarship and policy discourse take on the language of sociology or criminology in examining the place of the criminal system in society,¹⁴¹ mens rea debates (at least at first blush) appear to remain rooted in the realm of moral philosophy or formal legal analysis. Preoccupied with moral wrong and the theoretical justifications for criminal liability, such an approach often has little to say about the consequences of punishment, the nature of incarceration, or the forms of enforcement or social control that criminal law might trigger.¹⁴² Questions of morality and formal legal reasoning certainly might be important or might have a critical role to play in scholarly discourse or in determinations of institutional design. But they appear far removed from the sorts of realist questions that define our contemporary moment in criminal law and policy debates or the sorts of projects associated with new brands of “criminal justice thinking.”¹⁴³

Similarly, mens rea reform proponents tend to draw from a problematic tendency of the anti-overcriminalization movement: a fixation on absurd statutes and absurd applications of criminal law. It is common in

or cultural considerations that define more institutionally focused criminal law scholarship are not always foregrounded in morally inflected traditional criminal law scholarship.

¹⁴¹ See, e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017) (using social theory to critique policing practices and the policing reform movement); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014) (providing an empirically grounded theoretical account of criminal courts as engines of social control); Benjamin Levin, *Rethinking the Boundaries of “Criminal Justice”*, 15 OHIO ST. J. CRIM. L. 619 (2018) (describing the sociological turn in criminal law scholarship); Mariana Valverde, *“Miserology”: A New Look at the History of Criminology*, in THE NEW CRIMINAL JUSTICE THINKING (Sharon Dolovich & Alexandra Natapoff, eds. 2017) (framing criminal law scholarship within a history of criminological thinking and within an intellectual project focusing on lived experience).

¹⁴² See, e.g., Michael T. Cahill, *Criminal Law’s “Mediating Rules”: Balancing, Harmonization, or Accident?*, 93 VA. L. REV. IN BRIEF 199, 199 (2007) (critiquing the “tendency of theoretical work in criminal law . . . to focus on . . . questions about the proper justification, scope, and amount of punishment in the abstract, while giving significantly less consideration to the various institutional and procedural aspects of any concrete system of imposing such punishment”); Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law’s Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 786 (2005) (“Conventional accounts of the criminal justice system tend to obscure its social control agenda behind the idea that its origins and functions lie with the prevention and punishment of crime or even the humanitarian reform of offenders. Such purported bases of criminal justice, which are ideologized *ad nauseam* in ‘justification theories,’ are not always inaccurate characterizations of what the system actually does and how it arose.”).

¹⁴³ See generally THE NEW CRIMINAL JUSTICE THINKING (Sharon Dolovich & Alexandra Natapoff, eds. 2017) (collecting work on the theories and institutions that drive the contemporary criminal system).

the academic and advocacy literature on overcriminalization for critics to focus on what they take to be the outrageous application of criminal law—the criminal prohibition on the unauthorized use of “Woodsy Owl”; the prosecution of a defendant for mispackaging lobsters, etc.¹⁴⁴ From a rhetorical standpoint, these examples provide a compelling illustration of the staggering breadth of the criminal code. And, for proponents of mens rea reform, they also show how dangerous strict liability can be: if no one would expect conduct to be criminalized, or if that conduct is done frequently, then a strict liability standard seems as though it allows for a huge amount of unknowingly criminal conduct. (Such a result would, in turn, invite selective enforcement or erode respect for the legal system.)

But, even among staunch critics of mass incarceration and proponents of mens rea reform, no one claims that these absurd cases reflect the majority of criminal prosecutions or that federal prisons are full of defendants who unknowingly purchased a high-flow toilet or sold mislabeled cheese. That is, these critiques might be compelling, but they tell us little about the mine run of criminal cases and fail to account for mass incarceration.

We live in a society defined by widespread criminalization,¹⁴⁵ an epidemic of racialized police violence,¹⁴⁶ and an astronomical population of people caged or under state correctional supervision.¹⁴⁷ Assuming that’s a fair characterization of the state of criminal law and policy, it is easy to see why critics might view discussions of mens rea reform as missing the point. Against that backdrop of staggering state violence, discussions about the

¹⁴⁴ See, e.g., Malcolm, *supra* note 11, at 279–80 (cataloging examples of overcriminalization, including statutes that criminalize: “install[ing] a toilet that uses too much water per flush,” “misus[ing] the slogan ‘Give a Hoot, Don’t Pollute,’” “sell[ing] malt liquor labeled ‘prewar strength’”); Mila Sohoni, *The Idea of “Too Much Law”*, 80 *FORDHAM L. REV.* 1585, 1606 n.118 (2012); *Panel: Criminal Law at the Federal Level*, 18 *TEX. REV. L. & POL.* 97, 108 (2013) (discussing *United States v. McNabb*, 331 F.3d 1228, 1247 (11th Cir. 2003), *as amended* (May 29, 2003), a case involving the transportation and packaging of lobsters); A Crime a Day (@CrimeADay), TWITTER, <https://twitter.com/CrimeADay> [<http://perma.cc/VS7S-EPDG>] (listing bizarre and outlandish applications of federal criminal law).

¹⁴⁵ See, e.g., Eisha Jain, *Capitalizing on Criminal Justice*, 67 *DUKE L.J.* 1381, 1389 (2018).

¹⁴⁶ See, e.g., PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017); Bell, *supra* note 141; Alice Ristroph, *The Constitution of Police Violence*, 64 *UCLA L. REV.* 1182 (2017).

¹⁴⁷ See, e.g., Sara Mayeux, *The Idea of “The Criminal Justice System”*, 45 *AM. J. CRIM. L.* 55, 60 (2018); Allegra M. McLeod, *Confronting the Carceral State*, 104 *GEO. L.J.* 1405, 1406 (2016).

“rule of law” and the proper way of assessing moral blame might become yet another debate about how many angels can dance on the head of a pin.

As between the two critiques, I find this one (i.e., that mens rea reform is not responsive to the major problems with the criminal system) to be the most compelling.¹⁴⁸ But it is not entirely clear why this critique would indicate that mens rea reform is a policy to be opposed, rather than a proposal that should be only one small piece of a larger, more ambitious reform agenda.¹⁴⁹ If the broader criminal justice reform project is one of shifting away from a criminal model of social control or of addressing social problems, then any reduction in criminal law or criminalization would appear to be a step in the right direction.¹⁵⁰

While not expressed by reform opponents, there are two reasons why mis-directed reform (i.e., reform that doesn't get to the core issues) might be a problem: (1) legitimation; and (2) preemption. First, by purporting to fix the criminal system with a minor, perhaps misdirected legislative intervention mens rea might legitimate the criminal system and its outcomes.¹⁵¹ That is, the message from such “reform” might be that as long as defendants possess the appropriate mental state, whatever happens to them is justified and legitimate. As a result, mens rea reform might lead to a mistaken belief that we should be less worried about prison conditions, collateral consequences, coercive plea bargains, violent law enforcement,

¹⁴⁸ I have articulated a version of this argument elsewhere. See Levin, *supra* note 1, at 300–01.

¹⁴⁹ To the extent that mens rea reform were being offered in lieu of other reforms, or if critics believed that it might be used to prevent future, sweeping reform, that would be a different story. See note 135, *supra*. It is worth noting that one critique from the left has been that mens rea reform has been used opportunistically to hijack discussions on criminal justice reform. See, e.g., Editorial, *Holding Sentencing Reform Hostage*, N.Y. TIMES (Feb. 6, 2016), <https://www.nytimes.com/2016/02/07/opinion/sunday/holding-sentencing-reform-hostage.html> [<http://perma.cc/4VA4-WTC5>].

¹⁵⁰ As discussed, *infra*, it may be that some reformers have a different vision of criminal justice reform, one rooted less in decarceration or decriminalization, and more in shifting the distribution or distributive commitments of the criminal system.

¹⁵¹ On this concept of legitimation, see, e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* (1997); SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971); Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 127 (Ben Brewster trans., 1971; Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2189 (2013); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 429–32 (1995).

and a host of other structural defects.¹⁵² This is a fair and important critique. But it is worth noting that it actually isn't a part of the rhetoric being used by mens rea reform opponents. Instead, the language they've used explicitly embraces punitive or carceral solutions and the legitimacy of those options.¹⁵³ Second, a narrow or incremental reform might preempt or preclude more sweeping change. To know how realistic or compelling such a concern is, we would need to know how much political will for criminal justice reform (particularly on the right) might be affected by the passage of a mens rea reform statute.¹⁵⁴ But, it is worth noting that this concern of preemption or preclusion could be applied (perhaps fairly) to almost any incremental reform project: the saying goes that "the perfect is the enemy of the good," but the good also may well be the enemy of the perfect.

B. SAVING THE WRONG DEFENDANTS?

The second critique shares some similarities with the first critique—namely the view that mens rea reform represents a misdirection of reformist energy that does not speak to the problems faced by the poor, people of color, and other marginalized groups that suffer as a result of mass incarceration.¹⁵⁵ Unlike the first critique, though, this one does make clear

¹⁵² See, e.g., FORMAN, *supra* note 12, at 230 (arguing that embracing reforms focused only on non-violent crime could mean that "criminal justice reform's first step—relief for nonviolent drug offenders—could easily become its last" because this approach "effectively mark[s] this larger group of violent offenders as permanently out-of-bounds"); PFAFF, *supra* note 35, at 31 ("[T]he rhetoric and tactics used to push through reforms for lower-level offenses often explicitly involve imposing even harsher punishments on those convicted of violent crimes.").

¹⁵³ See notes 154–167, *infra*, and accompanying text.

¹⁵⁴ Legitimation arguments also rest on some range of assumptions about the social and political significance of a given reform, decision, or legal action. See generally Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379 (1983) (critiquing legitimation critiques).

¹⁵⁵ The moral culpability analysis of *mens rea* reform proponents looks very different from a range of relatively common claims about the potentially diminished moral culpability of less privileged defendants. See, e.g., *United States v. Alexander*, 471 F.2d 923, 961 (D.C. Cir. 1972) (Bazelon, C.J., dissenting); RICHARD L. LIPPKE, *RETHINKING IMPRISONMENT* 101–02 (2007); Richard Delgado, *Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. J. 9 (1985). That said, *mens rea* reform proposals have attracted support from public defenders who argue that these bills might help poor defendants of color. See, e.g., Press Release, Senators Hatch, Lee, Cruz, Perdue, and Paul Introduce Bill to Strengthen Criminal Intent Protections (Oct. 2, 2017), <https://www.lee.senate.gov/public/index.cfm/2017/10/senators-hatch-lee-cruz-perdue-and-paul-introduce-bill-to-strengthen-criminal-intent-protections> [http://perma.cc/VLU5-38WU] (statement of David Patton, Executive Director and Attorney-in-Chief, Federal Defenders of New York, Inc.) ("As Federal Defenders, we are acutely aware of the need for mens rea reform. Over 80 percent of people charged with

why mens rea reform should be opposed: mens rea reform is a political project that has nothing to do with mass incarceration and everything to do with deregulation. Democrats have taken to the floor of Congress not to oppose the reforms as too minor or as misdirected, but because they view the proposals as a means of undercutting existing regulatory frameworks.¹⁵⁶ According to opponents of mens rea reform, the proposals would make it even more difficult for prosecutors to go after financial crime, environmental crime, and other sorts of regulatory violations.¹⁵⁷

Massachusetts Senator Elizabeth Warren, a leader of the progressive wing of the Democratic Party and a staunch supporter of increasing corporate regulation to address income inequality, has been one of the most vocal opponents of mens rea reform. Senator Warren has criticized such proposals that would “make it much harder for the government to prosecute hundreds of corporate crimes—everything from wire fraud to mislabeling prescription drugs.”¹⁵⁸ In 2016, her office prepared a report, *Rigged Justice: 2016 How Weak Enforcement Lets Corporate Offenders Off Easy*, that criticized the mens rea reform movement and cataloged twenty-five cases in which corporate defendants were not held accountable for their misconduct.¹⁵⁹ The report decried “prosecutorial timidity” and stressed that the failure to prosecute corporate crimes vigorously was corrosive to democracy and exacerbated economic inequality.¹⁶⁰ Similarly, it repeatedly made reference to a two-tiered justice system that allowed for prosecution

federal crimes are too poor to afford a lawyer, and nearly 80 percent of people charged with federal crimes are Black, Hispanic, or Native American. These are our clients, and too many of them are subject to laws that are neither fair nor consistent with traditional principles of criminal liability. This bill would help to remedy some of those failings.”)

¹⁵⁶ See Matt Ford, *Could a Controversial Bill Sink Criminal-Justice Reform in Congress?*, THE ATLANTIC (Oct. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/10/will-congress-reform-criminal-intent/544014/> [<http://perma.cc/HU6M-4HRH>].

¹⁵⁷ See Takei, *supra* note 12, at 169 (“[S]ome have accused conservatives of using criminal justice reform as a ‘Trojan Horse’ to advance corporate interests and weaken environmental regulations.”).

¹⁵⁸ *Id.* Indeed, a major component of Senator Warren’s support for stronger regulations of the financial sector often has been stronger enforcement of criminal law. See Bridget Bowman, *Elizabeth Warren Releases Report Showing How Corporate Criminals Get Off Easy*, ROLL CALL (Jan. 29, 2016), <http://www.rollcall.com/news/home/warren-releases-rigged-justice-report> [<http://perma.cc/3YHE-9M63>].

¹⁵⁹ RIGGED JUSTICE: 2016 HOW WEAK ENFORCEMENT LETS CORPORATE OFFENDERS OFF EASY (2016), https://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf [<http://perma.cc/G6NL-FBB6>] [*hereinafter* Rigged Justice].

¹⁶⁰ See generally *id.*

of less-affluent defendants, but largely shielded the wealthy from accountability.¹⁶¹

Senator Warren is far from alone in raising these critiques. Illinois Senator Dick Durbin claimed that proposed mens rea reform legislation “should be called the White Collar Criminal Immunity Act.”¹⁶² In a petition drafted by Occupy the SEC (an offshoot of Occupy Wall Street, consisting of former financial industry workers),¹⁶³ the Criminal Code Improvement Act of 2015 is referred to as “A ‘Get Out of Jail Free’ Card for white collar criminals.”¹⁶⁴ The petition urges legislators to reject the bill because it would “make it even more difficult for prosecutors to punish white collar crime,”¹⁶⁵ further empowering the architects of the 2008 financial crisis:

Federal prosecutors already face grave difficulty proving “intent” for corporate misdeeds because culpable criminal conduct is often hidden deep within the corporate veil, underneath layers of management, boards and bureaucracy. The Great Recession of 2008 is a telling example of federal prosecutors’ inability to punish corporate wrongdoing. Malfeasance on Wall Street produced a financial crisis that extinguished nearly 40% of family wealth from 2007 to 2010, pushing the household net worth back to 1992 levels. Despite these appalling statistics, not even ONE executive at a major Wall Street bank was criminally charged for playing a role in the 2008 global financial collapse. Everyday Americans were forced to pay the price for rampant speculation, mismanagement and fraud on Wall Street.¹⁶⁶

In his much-heralded *Harvard Law Review* article, *The President’s Role in Advancing Criminal Justice Reform*, then-President Obama emphasized the problematic nature of mens rea reform proposals that could “undermine public safety and harm progressive goals.”¹⁶⁷

In this account, there are *real criminals* that the system is designed to reach and on whom prosecutors should be focused. Those criminals are the wielders of capital and corporate executives. And, without the tools of broadly written strict liability statutes the state will be powerless to curb capital’s excesses. Criminalization and zealous prosecution might “excite[]

¹⁶¹ See generally *id.*

¹⁶² Ford, *supra* note 156.

¹⁶³ See Simon Johnson, *An Occupy Wall Street Offshoot Has Its Day*, N.Y. TIMES (Jan. 16, 2014), https://economix.blogs.nytimes.com/2014/01/16/occupy-the-s-e-c-has-its-day/?_p hp=true&_type=blogs&_r=0 [<http://perma.cc/DT5C-6SEH>].

¹⁶⁴ PETITION, *JOIN OCCUPY THE SEC IN URGING THE CONGRESS TO OPPOSE H.R.A 4002*, <https://www.petition2congress.com/ctas/join-occupy-sec-in-urging-congress-to-oppose-hr4002-criminal-code> [<http://perma.cc/8RJ5-38MR>].

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 829 n.89 (2017).

public solidarity,”¹⁶⁸ playing up the dynamic of the 1% (here, criminals) against the 99% (“law-abiding” victims). Such an account certainly is oversimplified, but it reflects the ways in which populist criminal justice policies and populist economic rhetoric might find common ground in critiques of corporate criminality.¹⁶⁹

Indeed, as Mark Kelman noted over three decades ago, strict liability crimes are generally designed to target defendants who “control the means of production,” and the “defense of strict liability crimes is likewise grounded in a political agenda—in an attempt to ‘get’ harm-causing managers.”¹⁷⁰ Viewed through this frame, “attack[s] on strict liability [operate] as a simple class-biased, result-oriented defense of corporate managers, those persons most likely to ‘unintentionally’ harm others through routine business operations.”¹⁷¹ Liability rules in criminal law—as in tort law—are not neutral. They distribute harm, cost, pain, and punishment.¹⁷² So, mens rea reform opponents from the (broadly conceived) political left appear to base their objections on a claim that the strict liability rules distribute better and that a move away from strict liability would simply represent a further upward redistribution of capital.¹⁷³ Assuming there is some proper place for criminal law and criminal punishment, wealthy, privileged, or powerful defendants who harm the less powerful are deserving targets of prosecution and punishment.¹⁷⁴

Looking at much of the right-leaning literature on overcriminalization and criminal justice reform, it is hard not to see a deregulatory agenda at work. The laws commonly identified as representing criminal law’s excesses often are those relating to administrative agencies or extending the

¹⁶⁸ WHITMAN, *supra* note 130, at 45.

¹⁶⁹ For an account of the fraught relationship between populism and criminal policymaking, see generally LISA L. MILLER, *THE MYTH OF MOB RULE: VIOLENT CRIME & DEMOCRATIC POLITICS* (2016).

¹⁷⁰ Kelman, *supra* note 41, at 610.

¹⁷¹ *Id.* Cf. John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/crime Distinction in American Law*, 71 B.U. L. REV. 193, 195–96 (1991) (examining the utilitarian justifications for imposing punishment on corporate agents who may have acted in good faith).

¹⁷² See Gruber, *supra* note 104, at 5 (“[C]riminal rules often distribute punishment to defendants in order to secure a good such as compensation, satisfaction, or ‘closure’ for victims.”).

¹⁷³ See *id.* at 59.

¹⁷⁴ Cf. SAMUEL W. BUELL, *CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA’S CORPORATE AGE* 223 (2016) (“When we talk about the fair, right, or proportionate sentence for a business crime, we’re often talking about equality”).

reach of environmental or financial protections.¹⁷⁵ Critiques of criminal law from the right often focus on the ways in which criminalization and prosecution hampers efficient market functioning.¹⁷⁶ For example, in his testimony before the Congressional Over-Criminalization Task Force, former U.S. Attorney and Bush-era Attorney General George Terwilliger, III framed the problem of overcriminalization and the need for mens rea reform against the backdrop of a flawed post-New Deal legal order.¹⁷⁷ According to Terwilliger, the government impinges on:

[T]he freedom of each individual to retain the fruits of his or her labor and decide how, when, and for what to use those funds. Instead, we have a system of taxation that takes more and more from a few to distribute to many . . . The Federal leviathan even reaches into our daily life so far as to dictate to us when we awake in the morning, what kind of light bulbs may illuminate our bathroom, and how much water can flow through our showerhead . . .

Over-criminalization is part of this larger picture. Thus, efforts by Congress to get its arms around these issues, such as through this Task Force, are a most significant step forward . . . I believe the fundamental takeaway is this: We have lost sight of the proper use of Federal criminal law as a carefully applied tool to protect the means and instrumentalities of commerce, a goal in harmony with the principles of federalism and the Framers' intent.¹⁷⁸

In other words, mens rea reform might operate as a prong of a larger project to scale back progressive regulations and re-orient government with a mission to protect capital at all costs.

Therefore, Democrats, progressives, and other left-leaning critics of mens rea reform are right to be skeptical of the motives behind right-wing criminal justice reform efforts.¹⁷⁹ But should skepticism equate to opposing

¹⁷⁵ See Malcolm, *supra* note 11, at 279–81.

¹⁷⁶ See, e.g., Marc A. Levin, *At the State Level, So-Called Crimes Are Here, There, Everywhere*, 28 CRIM. JUST. 4, 5 (2013) (“Excessive criminalization not only leads to injustice and unfairness, it also deters and even reduces productive activity. The Sarbanes-Oxley legislation and the labyrinth of rules it has spawned impose criminal penalties for accounting errors, and has saddled US businesses with an estimated \$100 million in compliance and opportunity costs.”); George F. Will, *Eric Garner, Criminalized to Death*, WASH. POST (Dec. 10, 2014), available at https://www.washingtonpost.com/opinions/george-will-eric-garner-criminalized-to-death/2014/12/10/9ac70090-7fd4-11e4-9f38-95a187e4c1f7_story.html?noredirect=on&utm_term=.5dda9e44b0bf [<https://perma.cc/UGD9-U362>].

¹⁷⁷ *Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. 8 (2013).

¹⁷⁸ *Id.*

¹⁷⁹ Whether Democrats are right about the actual distributive consequences of mens rea reform remains an empirical question—we do not know how many more defendants would

policies supported by the right? Part IV addresses this question by examining the problematic reasons for and potential social costs of a left rejection of mens rea reform.

IV. THE LESSONS OF MENS REA REFORM

Ultimately, we might take many lessons from the debates about *mens rea* reform. Perhaps this legislative debate indicates the limitations of the so-called bipartisan consensus on criminal justice reform. Perhaps the debates are best understood as demonstrating the difficulties of devising a one-size-fits-all approach to fixing the federal criminal code. Or, perhaps the debates indicate the challenge of imagining reforms in the abstract, rather than tying them to individual, controversial cases. But, in this Part, I argue that there is a more troubling dynamic at play here.

Rather than an individual, idiosyncratic or *sui generis* policy debate, the disagreement about mens rea reform illustrates deeper flaws in the politics, discourse, and study of criminal law.¹⁸⁰ In this Part, I trace three pathologies embodied in the opposition to mens rea reform: (1) the reliance on criminal law as a regulatory tool to solve otherwise intractable or knotty social problems; (2) the temptation to “level up” when faced with inequality (i.e., to punish the powerful party more, rather than to punish the powerless party less); and (3) the impulse to exceptionalize certain areas of the criminal system as immune to structural critique or as less deserving of the skepticism that otherwise pervades much left scholarship and political discourse.

A. REGULATING THROUGH CRIME

First, the opposition to *mens rea* reform reflects the continued reliance on criminal law as the regulatory tool of choice. I don’t mean to suggest that Senator Warren and other progressives are wrong that Republican support for *mens rea* reform stems from a deregulatory impulse. I think

be able to raise a successful defense in a world with heightened mental state requirements, nor do we know the demographic breakdown of defendants who would benefit from such legislation.

¹⁸⁰ Cf. MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 238 (2006) (“[W]e should not assume that ‘reform’ means progressive movement toward some social, economic, or political outcome that is widely recognized as necessary and desirable . . . In the case of penal policy, many so-called reforms of the past resulted in a further consolidation of carceral power and the legitimization of continued abuses.”).

they are absolutely right.¹⁸¹ And, that impulse certainly is worrying and might well speak to broader reasons to be skeptical about the aims and potential of bipartisan criminal justice reform.¹⁸² But why should support for regulating corporate actors be synonymous with support for expansive criminal liability? Why should federal prosecutors be the state actors tasked with curbing the abuses of capital? And, why should advocates who generally worry about sweeping criminal laws support similar laws that target their political enemies?

As I have argued elsewhere, progressive reliance on criminalization may reflect a story of interest group convergence:¹⁸³ activists and politicians on the left support some form of regulation and want to see the state address a given social problem. Activists, politicians, and scholars on the right are skeptical, if not outright hostile, to regulatory projects that they perceive as reflecting a “big government” approach to governance. But, there has long been a carve-out in the right’s stated “de-regulatory” commitments: criminalization. Despite the neoliberal hostility to government, criminal law is different.¹⁸⁴ Bernard Harcourt describes this phenomenon as “neoliberal penalty.”¹⁸⁵ According to Harcourt, since the early 1970s, the deregulatory impulse in the economic realm has traveled hand-in-hand with a punitive impulse in the sphere of criminal justice.¹⁸⁶ By the logic of “neoliberal penalty,” the state must be good at something—i.e., it must have some way of justifying its existence in the face of a broader preference for shrinking government and regulatory apparatuses. After the neoliberal turn, that “something” is punishment.¹⁸⁷

¹⁸¹ It is worth noting that *mens rea* reform might not even be necessary to serve deregulatory ends. Indeed, scholars have observed that courts already tend to read heightened *mens rea* requirements into otherwise-silent white-collar crime statutes. See, e.g., Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 262–63 (2007) (“[I]n the context of federal regulatory or white-collar crime prosecutions, federal courts have a clear pattern of interpreting hundreds of criminal statutes to contain strict mens rea requirements.”).

¹⁸² See generally GOTTSCHALK, *supra* note 135, at 258–82 (offering a skeptical take on conservative criminal justice reform).

¹⁸³ See Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2221–22 (2016).

¹⁸⁴ See BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 40–44 (2011). (“Neoliberal penalty facilitates passing new criminal statutes and wielding the penal sanction more liberally because that is where government is necessary, that is where the state can legitimately act, that is the proper and competent sphere of politics.”).

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

So, in periods of political gridlock, where it might be unthinkable for activists on the left to obtain Republican support for expanding the regulatory state or the social safety net, all chances for action are not lost. The left and right converge on a mutually agreeable solution to social problems: criminalization.¹⁸⁸ This is a dynamic that has played out in many contexts—from gun control, to gender violence and subordination, to the War on Drugs.¹⁸⁹ Despite the equality or justice orientation of these interventions, scholars have shown that the poor, people of color, sexual minorities, and other marginalized populations have borne the brunt of criminal punishment and police intervention.¹⁹⁰ And, as Derrick Bell has shown, moments of “interest convergence” often may advance the interests of more powerful actors, rather than the weak, the powerless, or the marginalized.¹⁹¹

In the context of gun control, for example, some of the harshest sentencing schemes and least forgiving possession laws received bipartisan support (even attracting support from the National Rifle Association).¹⁹² James Forman, Jr. has recounted how, in Washington DC, black activists on the left ultimately acquiesced to a range of tough-on-crime policies to address gun violence.¹⁹³ Similarly, Project Exile, a 1990s program in

¹⁸⁸ See Levin, *supra* note 183, at 2192.

¹⁸⁹ See, e.g., FORMAN, *supra* note 12, at 12–13; see generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 340 (2006); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 70 (2006).

¹⁹⁰ See, e.g., FORMAN, *supra* note 12; Crenshaw, *supra* note 139; Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 317 (2007); Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1365–66 (2018):

A poignant example is domestic violence reform, where feminists’ interest in fair treatment of female victims converged with prosecutors’ interest in punishing batterers, resulting in punitive policies that actually devalued and materially harmed women. Lawmakers’ and other state actors’ receptivity to disparity claims vary by their interests, and the criminal arena is one in which punitive interests are ascendant.

Id.

¹⁹¹ See Derrick A. Bell, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 165–79 (2004).

¹⁹² See, e.g., FORMAN, *supra* note 12, at 47–78 (describing the politics of gun control among black community activists in Washington D.C.); Levin, *Guns and Drugs*, *supra* note 183 (describing statutes and policies that received bipartisan support).

¹⁹³ See FORMAN, *supra* note 12, at 47–78.

Richmond Virginia that funneled gun offenders into federal court where they would be subjected to lengthy mandatory minimum sentences, was so popular on both sides of the aisle that Democrats and Republicans fought to take credit for it in the lead up to the 1996 presidential election.¹⁹⁴ And, as scholars have shown, Project Exile and similar provisions have been used disproportionately against defendants of color.¹⁹⁵ That is, in an effort to help predominantly low-income communities of color, a turn to criminal law simply reinscribed the racial hierarchies of mass incarceration. Certainly, it's fair to ask whether activists on the left would have preferred heavy civil regulations on gun sellers and manufacturers to this harsh criminal alternative. But what we saw instead was a bipartisan embrace of carceral politics.

Similar dynamics have played out in other contexts where criminal law has become the operative vehicle for addressing structural inequality. As Jeannie Suk Gersen, Aya Gruber, Janet Halley, and others have shown, the move by feminist activists and scholars to embrace harsh punitive responses to gender violence has exacerbated troubling distributional inequities.¹⁹⁶ Rather than empowering women victimized by gendered subordination, many of these policies (mandatory no-drop policies, preferences for pretrial detention, etc.) have empowered prosecutors and further contributed to the hyper-policing and hyper-incarceration of poor people of color and defendants from marginalized communities.¹⁹⁷ Indeed,

¹⁹⁴ See Levin, *Guns and Drugs*, *supra* note 183, at 2207–09; David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1447–48 (2011).

¹⁹⁵ See, e.g., Gardner, *supra* note 190, at 317 (“According to statistics presented in the Eastern District of Michigan, almost ninety percent of those prosecuted under Project Safe Neighborhoods are African American . . . And under Project Exile in Richmond, Virginia, the defendant and prosecution stipulated in an Eastern District case that ‘as many as 90 percent of the defendants prosecuted under Project Exile are African American.’” (footnotes omitted)); Levin, *Guns and Drugs*, *supra* note 183, at 2193–98; Sonja B. Starr & M. Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 30 (2013).

¹⁹⁶ See, e.g., JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2008); JEANNIE SUK, *AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY* (2009); Aya Gruber, *Neofeminism*, 50 HOUS. L. REV. 1325 (2013); Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J.L. & GENDER 53, 55 (2017); Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 602 (2011).

¹⁹⁷ See, e.g., Crenshaw, *supra* note 139; Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 8 (2006) (“And perhaps unsurprisingly, this phenomenon is thoroughly class-contingent because it largely affects poor urban minorities and immigrants.”); Tara Urs, *Coercive Feminism*, 46 COLUM. HUM. RTS. L. REV. 85, 86 (2014); Claire Houston, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory*

faced with the troubling dynamics of police- and prosecutor-driven responses to gender violence, a wave of left activists has pushed for non-criminal alternatives as a model for protecting victims of intimate partner violence and for responding to various forms of subordination.¹⁹⁸

These are only two examples, but the dynamic recurs elsewhere. Sometimes, activists on the left may support criminal solutions vociferously.¹⁹⁹ Other times, criminal law might be a desired adjunct to other social policies.²⁰⁰ But, whatever the dynamic, progressives, Democrats, and other voices on the (broadly conceived) left continue to rely on criminal law as a vehicle to advance their ends.

This dynamic should trouble critics of mass incarceration and supporters of left or redistributionist policies. To the extent that the criminal system is so structurally flawed, why should we trust it to serve left/progressive ends?²⁰¹ Across lines of gender, race, class, and sexuality, this critique has been voiced powerfully.²⁰² Without resetting the power dynamics and structures that define the criminal system, how can we trust

Criminal Intervention in Domestic Violence Cases, 21 MICH. J. GENDER & L. 217, 270 (2014).

¹⁹⁸ See, e.g., *The Critical Resistance INCITE! Statement on Gender Violence and the Prison Industrial Complex*, in ABOLITION NOW!: TEN YEARS OF STRATEGY AND STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX 15 (The CR10 Publications Collective, eds. 2008); Donna K. Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1046 (2000); Goodmark, *supra* note 196, at 58; Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 38 (2011); *Survived and Punished: End the Criminalization of Survivors of Domestic and Sexual Violence*, SURVIVED & PUNISHED, <http://www.survivedandpunished.org> [<http://perma.cc/VEB4-25EF>].

¹⁹⁹ See generally Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581 (2009) (tracking feminist support for stronger criminal regulation of sexual assault).

²⁰⁰ See FORMAN, *supra* note 12, at 12–13 (arguing that black activists in the late 1960s supported some harsh criminal policies, but did so alongside calls for state intervention in other areas—an imagined “Marshall Plan for the cities”); Elizabeth Hinton, Julilly Kohler-Hausmann, & Vesla M. Weaver, Opinion, *Did Blacks Really Endorse the 1994 Crime Bill?*, N.Y. TIMES, Apr. 13, 2016, at A25 (“Policy makers pointed to black support for greater punishment and surveillance, without recognizing accompanying demands to redirect power and economic resources to low-income minority communities.”).

²⁰¹ See Ely Aharonson, “Pro-Minority” Criminalization and the Transformation of Visions of Citizenship in Contemporary Liberal Democracies: A Critique, 13 NEW CRIM. L. REV. 286, 287 (2010).

²⁰² See, e.g., Aziza Ahmed, *When Men Are Harmed: Feminism, Queer Theory, and Torture at Abu Ghraib*, 11 UCLA J. ISLAMIC & NEAR E. L. 1, 5 (2012); Gruber, *supra* note 199 (arguing that “criminal law historically enforced and entrenched racial, gender, and socio-economic hierarchies”); Suk, *supra* note 189, at 70.

the institutions of criminal law to right deeper social wrongs?²⁰³ If we find critiques of the carceral state and mass incarceration as a means of controlling marginalized populations compelling, how does it make sense to grow those institutions and task them with serving the interests of the same populations that they repeatedly harm? Given the current distributive realities of criminal law and its enforcement, why should we assume that *mens rea* reform would only benefit rich, white defendants (or, conversely, that a strict liability regime would not harm marginalized defendants)?²⁰⁴ Even if we were convinced that strict liability serves to redistribute liability in an unjust society,²⁰⁵ we must recognize that the actors enforcing criminal law are the same police, prosecutors, and judges who preside over the deeply unequal and unjust institutions of mass incarceration.

All of which is to ask, why should criminal law be the operative vehicle through which to achieve left redistributionist ends?²⁰⁶ This is and was the core insight of the overcriminalization literature, long before it became the province of the libertarian right—just because there is a problem in need of fixing, it doesn't mean that the fix should come in the form of another criminal statute or another prosecution.²⁰⁷ Maybe if society could resituate political and social power such that prosecutors and lawmakers represented the wishes of marginalized populations, then such

²⁰³ Cf. Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75, 97-103 (1991) (describing “the reproduction, within a doctrinal solution to a problem, of the policy conflict the solution was supposed to settle”).

²⁰⁴ See *supra* note 179.

²⁰⁵ See *supra* notes 170–173, and accompanying text.

²⁰⁶ There may be some degree of “American exceptionalism” in the way criminal law has been used to address the perceived criminality of capital. In his comparative analysis of criminal policies in Europe and the United States, James Whitman emphasizes different approaches to white-collar crime on both sides of the Atlantic. See WHITMAN, *supra* note 130, at 80–82. While corporate crime became a source of concern in France and Germany in the 1970s and 1980s, the reaction there never became as harsh or punitive as in the States. *Id.* at 81. “Uncomfortable with the idea of inflicting ordinary criminal punishments,” Whitman explains, “the French system . . . developed a whole class of special mild punishments . . . called ‘criminal administrative sanctions’ . . .” *Id.*

²⁰⁷ See, e.g., Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L. Q. 17, 33 (1968–69):

The plain sense that the criminal law is a highly specialized tool of social control, useful for certain purposes but not for others; that when improperly used it is capable of producing more evil than good; that the decision to criminalize any particular behavior must follow only after an assessment and balancing of gains and losses—this obvious injunction of rationality has been noted widely for over 250 years.

Id.

concerns would be less well-founded.²⁰⁸ But that would require a massive reorganization of political power and a massive readjustment of institutional incentives. In the meantime, it's worth asking why or how criminal law might be the right answer.

Perhaps, simply, the answer is that criminal law is the most (or only) feasible regulatory option. Thinking back to the gun control example, if scholars and activists view a range of problems as pressing and don't see any other regulatory apparatus as feasible, criminal law might be the way to address the issue. In her work on corporate crime, Miriam Baer offers an account of this turn to punishment over non- (or less-explicitly) punitive regulatory options.²⁰⁹ Baer suggests not only that there is a baseline political economy story, but also that punishment enjoys significant psychological and rhetorical advantages over "regulation": punishment is easier for the public to understand than regulation; punishment offers flexibility to state actors because it is hard to determine how much punishment is sufficient; and punishment is "public" in ways that regulation, which appears more similar to "private" causes of action, is not.²¹⁰

Notably, though, the criminal turn that Baer describes in the context of corporate regulation strongly resembles a phenomenon largely not associated with white-collar crime: "governing through crime."²¹¹ The theory, articulated by Jonathon Simon, rests on a similar, but more radical, insight than the one that drives overcriminalization research: when faced with a problem, the state identifies a threat or crisis, and then reacts by criminalizing conduct or resorting to state violence.²¹² As Simon puts it, "When we govern through crime, we make crime and the forms of knowledge historically associated with it—criminal law, popular crime narrative, and criminology—available outside their limited original subject domains as powerful tools with which to interpret and frame all forms of social action as a problem for governance."²¹³ Viewed through this frame,

²⁰⁸ See R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 197 (2001) ("We should, of course, do what we can to work towards a restructuring of society that would transform it into a genuine, inclusive liberal community . . . But such restructuring takes time—decades, if not lifetimes."). *But see* Bernard Harcourt, *Matrioshka Dolls*, in TRACEY L. MEARES & DAN KAHAN, URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 87 (1999) (arguing that political power imbalances complicate framings of marginalized populations).

²⁰⁹ See generally Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577 (2012).

²¹⁰ See *id.* at 581.

²¹¹ See generally SIMON, *supra* note 16.

²¹² See *id.* at 17.

²¹³ *Id.*

it's easy to see mens rea reform opponents' rhetoric as rooted in the language of fear-of-crime that, in turn, justifies the harshest of remedies: capitalism (or "Wall Street") is out of control and must be reined in to solve the crisis in U.S. inequality.

Whatever the explanation for the punitive turn, in the mens rea reform context, there should be at least three concerns. First and foremost, the fact that there's a problem needn't justify any solution. Indeed, that line of thinking (i.e., social problems require solutions, whatever the cost) has helped drive mass incarceration and has thrown fuel on the fire of tough-on-crime politics. For "doing something" in response to a problem to mean resorting to criminal law, scholars and activists should consider the costs of that turn.²¹⁴ Scholars of the criminal system have shown repeatedly how such costs have been disregarded, leading to our current, bloated carceral state. Just because the politics of mens rea reform look different than the politics of three-strikes laws, the War on Drugs, or other often-conservative-backed endeavors, this turn to criminal law should not be exempt from a similar critical eye.

Second, it's not at all clear that criminal law is a necessary or desirable way to address corporate malfeasance or bad conduct by affluent defendants. In our contemporary criminal system, incarceration is treated as the default model for or means of punishment—i.e., if defendants do something bad, society's response is generally to cage them (or, in some cases to impose another form of state control with the threat of incarceration lurking in the background).²¹⁵ Therefore, it's reasonable to conclude that the implicit position of many mens rea reform opponents is that individuals who commit white-collar crime (or other crimes currently targeted by reform legislation) belong in prison. Indeed, Senator Warren's report, *Rigged Justice: 2016 How Weak Enforcement Lets Corporate Offenders Off Easy*, explicitly invokes incarceration—and the failure to incarcerate—as the stakes of mens rea reform debates.²¹⁶ The cover page of the report, which addresses and critiques mens rea reform proposals, shows

²¹⁴ Cf. Miriam Baer, *Sorting Out White Collar Crime*, 127 TEX. L. REV. (forthcoming 2019) (describing many criminal statutes passed during the spike in criminalization as "represent[ing] 'cheap' political reactions to singular events or scandals of the day").

²¹⁵ See, e.g., Mark A.R. Kleiman, *Substituting Effective Community Supervision for Incarceration*, 99 MINN. L. REV. 1621, 1621 (2015) ("The default punishment in the current American system is incarceration."); *Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1869 (1998) ("[I]ncarceration is now the default and bedrock of the American criminal justice system.")

²¹⁶ RIGGED JUSTICE, *supra* note 159.

the open door to a jail or prison cell.²¹⁷ The implication is not that white-collar defendants are failing to pay fines or restitution; it is that they have escaped from the cages where they belong.²¹⁸

In a moment where incarceration as a model is subject to heavy criticism, it's fair to ask why we should be sanguine about embracing this narrative of *mens rea* reform as keeping bad actors out of prison.²¹⁹ I will hold off on addressing this question at length until Section C, but it is worth asking here why *prison* and not some other response.²²⁰ That is, if we imagined a different criminal model whereby restitution or some other non-carceral punishment were the norm, the conversation might be different. (Indeed, one possible way to exceptionalize white-collar crime from other corners of the criminal system is the probability of meaningful non-carceral penalties.)²²¹ That said, Senator Warren and others on the left clearly embrace the language of incarceration when objecting to *mens rea* reform efforts.

So, that leaves us with the question of “why prison”? If we turn to the commonly accepted purposes of punishment (rehabilitation, incapacitation, deterrence, and retribution)²²² the answer isn't obvious.²²³ From a rehabilitationist standpoint, U.S. prisons are an abject failure—considering the well-documented instances of abuse in prison and the vast web of collateral consequences that await the formerly incarcerated, it has become extremely difficult to justify a sentence in terms of rehabilitation.²²⁴ From

²¹⁷ See *id.* at 1.

²¹⁸ Prosecutors might pursue other ends rather than incarceration of corporate executives (or even restitution or fines). See Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 855 (2007).

²¹⁹ And, incarceration isn't even that common in many types of high-profile white-collar prosecutions. See GARRETT, *supra* note 130, at 13–14.

²²⁰ Cf. *id.* at 137–40 (discussing the role of civil suits in compensating victims of corporate crime).

²²¹ See Patricia M. Jones, *Sentencing*, 24 AM. CRIM. L. REV. 879, 900 (1987) (“Fines are the traditionally favored mode of white-collar deterrence”).

²²² See, e.g., *United States v. Beasley*, 12 F.3d 280, 283 (1st Cir. 1993) (identifying “the basic purposes of punishment”); Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 6 (2006) (“Generally when people discuss the ‘purposes’ of punishment, they refer to normative rationales such as retribution or crime prevention through deterrence, incapacitation, rehabilitation, and moral education.”).

²²³ For a more thorough analysis in the broader context of corporate crime, see SAMUEL W. BUELL, *CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE* 213–23 (2016).

²²⁴ See, e.g., Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1327 (2017) (“The rehabilitative ideal was, rightly or wrongly, seen as a failed endeavor . . .”); James Gilligan, Opinion, *Punishment Fails. Rehabilitation Works*, N.Y. TIMES (Dec. 19, 2012),

an incapacitationist perspective, the issue is whether a defendant must be incarcerated in order to protect the public from future wrong-doing. Therefore, the question becomes whether people or corporate actors that violate strict liability statutes are a danger to the public such that they must be incarcerated to prevent future harm.²²⁵ It is worth noting that incapacitation is frequently recognized as a driving force in the growth of mass incarceration,²²⁶ and relying on actuarial predictions of future wrongdoing not only implicates a range of cultural biases (across axes of race, gender, class, etc.),²²⁷ it also invites a default to incarceration when other responses might be sufficient.²²⁸

Deterrence can be seen as providing one of the best justifications for incarcerating white-collar defendants and/or defendants who fall afoul of

<https://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/punishment-fails-rehabilitation-works> [<http://perma.cc/92ZB-6HEW>].

²²⁵ Cf. DARIO MELOSSI & MASSIMO PAVARINI, *THE PRISON AND THE FACTORY* (40th Anniversary Edition) 261 (“The prison, and the penal system in general, can be useful in governing and reducing crime only if enabled to select and neutralize those whom the social system cannot include or feels unable to include.”).

²²⁶ See, e.g., Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *CRIMINOLOGY* 449, 449 (1992); Sharon Dolovich, *Confronting the Costs of Incarceration: Foreword: Incarceration American-Style*, 3 *HARV. L. & POL’Y REV.* 237, 252–54 (2009); Mona Lynch, *Waste Managers? The New Penology, Crime Fighting, and Parole Agent Identity*, 32 *LAW & SOC’Y REV.* 839, 839 (1998) (“[O]ver the past few decades, a systems analysis approach to danger management has come to dominate criminal justice administration, and they suggest that the penal enterprise may well be evolving into a ‘waste management’ system rather than a normalizing or rehabilitative one.”).

²²⁷ See, e.g., BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2006); Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 *EMORY L.J.* 59, 62–63 (2017) (“Critics oppose risk-based sentencing as a matter of fairness. They contend that, because risk tools rely on factors like gender or proxies for race, using the tools at sentencing is impermissible as a matter of constitutionality or bad policy.”); Sandra G. Mayson, *Dangerous Defendants*, 127 *YALE L.J.* 490, 495–96 (2018) (“[T]he turn to actuarial risk assessment has engendered both excitement and apprehension, but criticism has centered on its potential to exacerbate race and class inequalities”); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 *STAN. L. REV.* 803, 817 (2014).

²²⁸ Cf. GEORG RUSCHE & OTTO KIRCHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* 207 (1939, 1967)

The futility of severe punishment and cruel treatment may be proven a thousand times, but so long as society is unable to solve its social problems, repression, the easy way out, will always be accepted. It provides the illusion of security by covering the symptoms of social disease with a system of legal and moral value judgments.

Id.

strict liability statutes.²²⁹ Indeed, Senator Warren identifies “deter[ring] future criminal activity” as one of the primary reasons to enforce corporate criminal laws.²³⁰ But, the empirical evidence on the efficacy of incarceration’s deterrent effect is questionable.²³¹ And, it’s not clear why prison (as opposed to non-carceral responses, such as large fines or restorative-justice-inflected remedies) would provide a greater deterrent effect.²³² That leaves us with retribution. And maybe that’s the best

²²⁹ See, e.g., Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295, 1314 (2008) (“[I]f any group is likely to be deterred by increased criminal sanctions, it is the white collar criminals who perpetrate fraud.”); Jones, *supra* note 221 at 899 (“Because the white-collar criminal poses little threat to public safety, and rehabilitation is arguably a secondary sentencing purpose, punishment and deterrence form the primary bases for the white-collar sentence.”) (footnotes omitted); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1224 (1985) (“Because criminal sanctions are so costly, they have to be set at levels that do not deter everyone, but it does not follow that a person who is not deterred is not a wrongdoer. He is just someone for whom criminal activity is utility maximizing. As for strict liability, it will deter, by inducing a change in activity level.”); Daniel Richman, *Federal White Collar Sentencing in the United States: A Work in Progress*, 76 LAW & CONTEMP. PROBS. 53, 65 (2013) (focusing on the role of deterrence in white-collar enforcement).

²³⁰ RIGGED JUSTICE, *supra* note 159, at 1. In full, the report states that: “Strong enforcement of corporate criminal laws serves similar goals: to deter future criminal activity by making would-be lawbreakers think twice before breaking the law and, *sometimes*, by helping victims recover from their injuries.” *Id.* (emphasis added). Interestingly, deterrence is framed as the primary objective and restitution appears to be little more than a possible side effect. This characterization of the social function of corporate criminal law raises important questions about how radical, transformative, or redistributionist white-collar prosecutions can be. If the reason to prosecute corporate actors (and, importantly, to hold them strictly liable) is as a means of redistributing wealth or spreading loss, then it would seem that restitution would be the desired outcome of most prosecutions. If, instead, prosecutions are designed to achieve deterrence via prison time, then this redistributionist goal appears much less clear. (Or, at least, much less clearly advanced.) Certainly, holding a corporate defendant strictly liable might discipline capital and, by extension, curb the sorts of excesses or exploitative practices that drive inequality. But, absent restitution or something resembling restorative justice, a prosecution under a strict liability framework appears to empower the state and prosecutors more than the victims.

²³¹ See, e.g., Peter J. Henning, *Is Deterrence Relevant in Sentencing White-Collar Criminals?*, 61 WAYNE L. REV. 27, 48 (2015) (arguing that white-collar defendants appear to be relatively immune from the deterrent effect of criminal punishment); Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. ILL. U. L.J. 485, 493 (1999) (“There is lukewarm support for the position that criminal penalties effectively deter corporate crime.”).

²³² Another way of thinking about this deterrence-based argument is through the lens of expressivism or public education. That is, perhaps the purpose of the prosecution is not simply to deter corporate actors from behaving badly, but is also to send a message about social values. See, e.g., ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 102 (W.D. Halls trans., 2014) (1893); MICHEL FOUCAULT, *DISCIPLINE & PUNISH* 138 (Alan Sheridan trans., Vintage Books 2d ed. 1995). Whether the idea is that no one is above the law or that

justification for defaulting to prison. The defendants whom Senator Warren and other reform opponents identify have done harm: financial, environmental, or otherwise. But, doesn't our current moment of mass incarceration show us the costs of responding to wrongs in this way? That is, if retribution is compelling here, it is compelling for the same reason that tough-on-crime politicians and activists have been able to amp up punishments and grow the criminal code for the last half century.

Third and finally, opponents of mens rea reform should have to reckon with the reality of a legal framework in which Congress drafts sloppy laws and then defers—with courts' blessings—to the power and judgment of prosecutors.²³³ There's a temptation to frame mens rea reform debates as arguments between criminal prosecution for corporate defendants on the one hand and no prosecution on the other. Or, more pointedly, there's a tendency to frame the debates as between a world of strict liability for corporate crime on the one hand, and a world without strict liability on the other. To be clear, even if those are the aspirations of mens rea reform proponents, no proposed legislation goes anywhere near that far. The argument is simply whether Congress should have to specify when it wants a statute to impose strict liability. Rather than criminalization versus decriminalization, the question actually comes down to how criminalization occurs.²³⁴ That is, even if opponents were to conclude that the benefits of

industry should be unable to harm individuals and communities with impunity, this expressivist or Durkheimian account would suggest that the prosecution sends a message. Other legal liability—whether through tort or a civil regulatory action—might do some work, but it wouldn't bear the same social significance and wouldn't mark the conduct as truly unacceptable. If that's the argument animating opposition to *mens rea* reform—and Senator Warren's rhetoric suggests as much—then there are assumptions worth unpacking. Most importantly, if this account is about legitimacy and public values, then should it matter what punishment looks like? If criminal law and prosecutors are supposed to serve as the moral compass for society, shouldn't it matter that many commentators view the criminal system as deeply immoral? See, e.g., Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016) (arguing that the injustice of the contemporary system is not an aberration but a sign of the system's core function in preserving racial hierarchy); Abbe Smith, *Can You Be A Good Person and A Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 396 (2001) ("My answer to the question, 'Can You Be a Good Person and a Good Prosecutor?', is now probably evident. But, let me say it plainly and then attempt to address some of the objections to my position. My answer is both harsh and tempered: I hope so, but I think not.").

²³³ See Stuntz, *supra* note 6, at 528 ("Legislators gain when they write criminal statutes in ways that benefit prosecutors. Prosecutors gain from statutes that enable them more easily to induce guilty pleas.").

²³⁴ In this respect, some of the bigger questions about the social desirability or utility of using criminal law to regulate corporate actors fall outside of the space of this Article. Those are major questions that have generated a rich scholarly discourse. See, e.g., Baer, *supra* note 209; Darryl K. Brown, *Criminal Law's Unfortunate Triumph over Administrative Law*, 7

criminalization outweighed the costs, that needn't compel a conclusion that *any* criminal law would be justified.

Given the well-trod critiques of the criminal law and of prosecutorial discretion,²³⁵ why should Senator Warren and other pro-criminalization progressives willingly endorse and protect a particularly problematic criminalization framework? Yes, passing *mens rea* reform might mean forcing a new set of legislative fights over what conduct to criminalize, effectively immunizing bad actors in the interim. But, refusing to go through that process and instead accepting a status quo in which judges and prosecutors must work together to smooth over gaps in the law should be concerning to anyone who values defendants' rights or who worries generally about the expansive nature of criminal laws.

B. LEVELLING UP

Not only does the critique of *mens rea* reform demonstrate the intractability of regulating through crime, it also reflects a troubling impulse to “level up” or “equalize up.”²³⁶ That is, when faced with the specter of inequality (wealthy corporate defendants receiving more protections than poor defendants), opponents of *mens rea* reform have made the move to level up punishment and prosecution.²³⁷

The tendency to “level up” has haunted the literature and activism of inequality in the criminal law.²³⁸ Most critics of the criminal system have come to decry its fundamental inequality and excessive punitiveness.²³⁹

J.L. ECON. & POL'Y 657 (2011); Coffee, *supra* note 171. That said, it is worth recognizing that the failure to bring a successful prosecution needn't vitiate other regulatory options. See generally Baer, *supra* note 209 (discussing these tradeoffs).

²³⁵ See, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1044 (2006); Paul Butler, *Starr Is to Clinton As Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705, 705 (1999); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 17 (1998).

²³⁶ Cf. Gruber, *supra* note 190, at 1364–83 (describing and critiquing the “level up” approach).

²³⁷ Cf. JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* (2017) (linking the rise of income inequality in the United States to federal prosecutors' failure to aggressively enforce criminal laws).

²³⁸ See Gruber, *supra* note 190, at 1364–83.

²³⁹ See, e.g., Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 160 (2013); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1333 (2006) (“Criminal law scholars often acknowledge that our criminal justice system is riddled with inequality”); David A. Sklansky, *Cocaine, Race,*

According to Senator Warren, there are two justice systems—one reserved for the rich, powerful defendant.²⁴⁰ Relatedly, Sasha Natapoff suggests that the criminal legal system operates as a sort of pyramid—at the top (where affluent defendants reside), due process and “rule of law” are meaningful institutions; at the bottom (where poor defendants are processed via a system of mass misdemeanors and social control), procedural protections are largely absent or meaningless.²⁴¹ Michelle Alexander argues that the criminal law has come to resemble mass incarceration as a means of excising black people from social and political life,²⁴² and a range of sociologists, criminologists, and legal scholars has tracked the ways in which policing and punishment systematically disadvantage people of color and other socially marginalized groups.²⁴³ Assuming the accuracy of this critique, what is the appropriate policy response?

Bryan Stevenson, the founder of the Equal Justice Initiative, famously tells the story of the strangest motion that he ever filed. Representing a black, fourteen-year-old boy faced with a life sentence in Alabama, Stevenson filed a “Motion to Treat My 14 Year-Old Client As a 75 year Old, White, Privileged Corporate Executive.”²⁴⁴ Needless to say, Stevenson lost on the motion. But the argument speaks to a deep, dark, and increasingly accepted reality of the U.S. legal system: inequality runs rampant. Despite lofty declarations of equal rights, equal opportunity, and equal access to justice, “equality” remains illusory. Across every conceivable axis of power, distributions of resources, influence, voice, and opportunity remain tremendously skewed.²⁴⁵ Recognizing inequality,

and Equal Protection, 47 STAN. L. REV. 1283, 1316 (1995); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1997 (2008).

²⁴⁰ See Bowman, *supra* note 158.

²⁴¹ See Alexandra Natapoff, *The Penal Pyramid*, in THE NEW CRIMINAL JUSTICE THINKING 33 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

²⁴² See generally ALEXANDER, *supra* note 12.

²⁴³ See, e.g., DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007) (examining the role of race and criminal records in enforcing the terms of social exclusion from the labor market); WACQUANT, *supra* note 12; WESTERN, *supra* note 12; Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

²⁴⁴ Bryan Stevenson, *We Need To Talk About an Injustice*, TED TALK (Mar. 2012), https://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice [<http://perma.cc/68YL-9ARN>].

²⁴⁵ See, e.g., THOMAS PIKETTY, CAPITAL IN THE TWENTY FIRST CENTURY (Arthur Goldhammer trans., Belknap Press of Harvard Univ. Press 2014) (tracing the rise of income inequality).

though, need not compel a specific policy response.²⁴⁶ Instead, the question remains how do we react when faced with the harsh reality of inequality? Should the judge have “leveled down” when it came time to punish and treated Stevenson’s fourteen-year-old client like the rich white man? Or, should the legal system “level up” and treat rich white men more like poor black children, exposing them to the ugly realities of the carceral state?

If the problem is *substantive* (i.e., the way poor people, people of color, and other marginalized populations are treated in the criminal system), then the solution seems as though it might be to treat the poor defendant of color like the rich white defendant. If the problem is simply the formal *inequality* itself rather than something substantive (i.e., the treatment of disadvantaged or socially marginalized defendants), the problem could be solved by equalizing in either direction.²⁴⁷ Treating the rich white defendant like the poor black defendant would solve the problem just as effectively as treating the poor black defendant like the rich white defendant.

As Aya Gruber puts it:

In recent years, as evidence has amassed of the inherently racially biased nature of criminal punishment, even the most liberal lawmakers have found themselves in a state of perpetual cognitive dissonance [T]hey recognize that criminal prosecution and punishment is about far more than individual culpability—it is about power, race, socioeconomic status, and other inequalities. At the same time . . . they struggle with how or whether this structural objection should affect the prosecution and punishment of guilty individual offenders, particularly violent criminals and rapists.²⁴⁸

In other words, “[t]o the extent that the American penal state is constitutively racist, formal equality efforts to treat minority victims fairly by leveling up punishment can end up undermining larger substantive racial equality in society.”²⁴⁹

²⁴⁶ See, e.g., Gruber, *supra* note 190, at 1364–83 (tracking different possible responses); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988) (embracing a harsher or more punitive response to inequality).

²⁴⁷ See, e.g., Gruber, *supra* note 190, at 1363–66 (“To some, eliminating whatever individual disparity they encounter through whatever means is an end in itself—and the end of the story.”); Levin, *supra* note 1 (using the example of enforcing drug laws more harshly against white defendants as a “levelling up” solution to racial inequality in the War on Drugs).

²⁴⁸ Gruber, *supra* note 190, at 1364 (citing James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012)).

²⁴⁹ *Id.* at 1366.

Applying this logic, the instinct to level or equalize up is a dangerous one—rather than addressing substantive issues or working towards a system in which *all* are treated well, it legitimates the exact same abuses that are so objectionable when leveled against the marginalized defendant. This approach superficially fixes the problem of inequality, but it does nothing to address the substantive and structural evils faced by the disadvantaged defendant.²⁵⁰ If these are fundamental structural problems with prison, police, prosecutorial discretion, or even with the deeper social, political, or economic forces that undergird the criminal law, it's not clear how exposing more people to injustice is the best response.²⁵¹

²⁵⁰ See Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 776 (2016) (“This realization has led many to call for less process for police. This Article has argued that the far more desirable conclusion is to give more process to the rest of us. Anyone serious about criminal justice reform needs to consider how prosecutors treat police suspects. The process they give their law enforcement partners has much to tell us about how to create a better system for everyone.”).

²⁵¹ One prevalent response to this call for “levelling down” sounds in the language of identification and empathy. According to this line of reasoning, more people—particularly powerful or privileged people—should be forced to experience the criminal system. That is, such an argument goes, one problem with our current system is that many people have no exposure with criminal law or law enforcement; these people—often more affluent white voters—are unable to identify with individuals and communities deeply affected by mass incarceration or tough-on-crime policies. See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 783 (2006). By increasing the likelihood that more privileged people (or, *everyone*) has contact with the criminal system, perhaps we might alter what Stuntz describes as the “pathological politics of criminal law” and force voters and members of the polity to recognize that they, too, are potential defendants. See Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1103–04 (2015) (“By making it harder to punish, the Blackstone principle concentrates criminal punishment on a more discrete group of people. And it makes the group of people being punished less politically attractive, because it ensures that a higher percentage of them will be guilty (or at least *seen as* guilty). We should thus expect the Blackstone principle to increase political tolerance for harsh treatment of convicted criminals.”).

A discussion of this response falls largely outside the scope of this Article, but two objections are worth noting: First, the identification-based argument for levelling up rests on an empirical assumption—that forcing people to experience the indignities of policing, prosecution, and punishment would lead those same people to become more sympathetic to criminal defendants. I remain skeptical. Borrowing from social cognition theory, legal scholars have argued that many policy decisions are shaped by the “fundamental attribution error”—a tendency to view our own bad conduct as “mistakes” caused by situational factors, while we view others’ bad conduct as blameworthy and the result of some dispositional flaw. See, e.g., Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 25 (2004); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1565 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1205 (1995). That is, there is good evidence to suggest that people might still have a difficult time identifying with other defendants. And, similarly,

Bobby Waldrop's prosecution in Alabama serves as a chilling illustration of what an unrestrained "levelling up" solution to inequality might look like. Waldrop, a white man, was convicted of three counts of capital murder in 1998.²⁵² After trial and a sentencing hearing, the jury voted 10-2 in favor of recommending a life sentence.²⁵³ The trial judge, however, overrode the jury's recommendation and sentenced Waldrop to death.²⁵⁴ On the record, the judge concluded that the aggravating factors outweighed the mitigating factors, thus justifying a death sentence.²⁵⁵ Then, in a hearing to reweigh the factors, the judge stated: "If I had not imposed the death sentence, I would have sentenced three black people to death and no white people."²⁵⁶ In short, the court's reasoning turned the logic of death penalty opponents on its head—a concern about dramatic racial disparities in the capital context could be addressed by levelling up, rather than levelling down or confronting the actual racial injustices in the administration of the death penalty.

The Waldrop death sentence (which was affirmed by the Eleventh Circuit)²⁵⁷ also throws Stevenson's "levelling down" motion into stark relief. Both cases were decided by courts in a state (Alabama) with a long history of racial injustice. And, both cases forced judges to confront that legacy of racial injustice and its contemporary role in the inequality of the criminal system. Yet, the Stevenson motion was rejected out of hand.²⁵⁸ And Stevenson himself speaks of the motion as clearly absurd.²⁵⁹ It's not

other issues of identity (race, class, gender, sexuality, etc.) might continue to make certain defendants less sympathetic and might allow for an identification of certain defendants as more deserving of punishment, less remorseful, etc. Second, even putting the empirical question aside, there is an even bigger question of whether *anyone* should suffer the indignities associated with mass incarceration. For scholars and advocates who are skeptical of the structures and institutions that comprise the carceral state, the answer might well be "no." See generally Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015). Or, even if we are ambivalent about that question of first principles, there might well be means of building broader social or cultural identification with criminal defendants that do not require embracing the prosecutorial and punitive model. See generally Simonson, *supra* note 131 (embracing a model of criminal procedure that would empower the "community" to support and assist criminal defendants).

²⁵² Waldrop v. Comm'r, Ala. Dep't of Corr., 711 F. App'x 900, 902 (11th Cir. 2017).

²⁵³ *Id.* at 904.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 904–05.

²⁵⁶ *Id.* at 916.

²⁵⁷ See generally *id.*

²⁵⁸ Stevenson, *supra* note 244.

²⁵⁹ Stevenson describes it as a "crazy motion." *Id.* Of course, Stevenson and other racial justice advocates view the Waldrop judge's statement and reasoning as similarly absurd. See, e.g., EQUAL JUSTICE INITIATIVE, *EJI Challenges Death Sentence Infected by Racial Bias and*

that judges and other official actors are blind to racial inequality. It's that the recognized means of addressing inequality—at least in the criminal space—tends to involve levelling up. As Gruber puts it, “Viewing the ‘fear of too much justice’ as a fear of leniency indicates that legal decisionmakers are often more sanguine about discrimination claims when they can address them through greater penal severity and without color conscious social engineering.”²⁶⁰

By way of a less dramatic example, Kate Levine has addressed the procedures available to police officers when they are prosecuted; Levine argues that officers generally receive significantly better treatment than non-officer defendants, particularly poor defendants of color.²⁶¹ Levine similarly argues that an impulse to level up is a mistake; rather, critics and commentators should view the treatment of officer-defendants as a model for other, less privileged or powerful defendants.²⁶² Rather than decrying the power and privilege of a defendant and using that power to justify otherwise unjust or flawed institutions, Levine argues, advocates for socially marginalized defendants should seek to leverage the treatment of the privileged defendant.²⁶³ Instead, the risk is that a reaction to a particularly unsympathetic defendant leads to a policy change that might harm the majority of (powerless or socially marginalized) defendants.²⁶⁴

The critique of mens rea reform appears to operate in this register of leveling up. The socially marginalized defendant doesn't get the benefit of the doubt—the argument goes—so why should the CEO? Senator Warren's *Rigged Justice* report raises this specter of a two-tiered system: “If justice means a prison sentence for a teenager who steals a car, but it means nothing more than a sideways glance at a CEO who quietly engineers the theft of billions of dollars, then the promise of equal justice under the law has turned into a lie.”²⁶⁵ Op-eds and editorials opposing

Imposed Despite the Jury's Life Sentence (Aug. 13, 2018), <https://eji.org/news/eji-challenges-bobby-waldrop-death-sentence-by-judge-override> [http://perma.cc/C783-TNTW].

²⁶⁰ Gruber, *supra* note 190, at 1340–41.

²⁶¹ See generally Levine, *supra* note 250; Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1258 (2016).

²⁶² See Levine, *supra* note 250, at 776.

²⁶³ See *id.*

²⁶⁴ See *infra* Part IV.C.

²⁶⁵ RIGGED JUSTICE, *supra* note 159, at 7. The move to analogize corporate conduct to conventional criminality isn't new and, historically, has been the province of more radical leftist strands. See, e.g., Fredric Jameson, *Reification and Utopia in Mass Culture*, SOC. TEXT, Winter 1979, at 130, 145 (1979):

legislative action rely on similar rhetoric suggesting that *mens rea* reform would allow wealth and power to shield defendants deserving of punishment.²⁶⁶

Again, my claim is not that inequality based on the defendant's resources is defensible. Rather, my question is why should *anyone* be treated the way disadvantaged defendants currently are? According to legal historian James Whitman, the defining feature of U.S. criminal justice (as opposed to the practices of France and Germany) is the treatment of "low status" defendants.²⁶⁷ In Whitman's account, France, Germany, and many other European nations pursue an egalitarian commitment to "abolishing historically low-status treatment."²⁶⁸ The exceptional harshness of U.S. criminal policy, by contrast, reflects what Whitman describes as a commitment to "degradation"—all offenders should see their status reduced and be *degraded* by punishment.²⁶⁹

Applying this analysis to the *mens rea* reform debates leads to a troubling observation: it appears that the treatment of "low-status" defendants is being treated as a fixed point by reform opponents. The

When indeed we reflect on an organized conspiracy against the public, one which reaches into every corner of our daily lives and our political structures to exercise a wanton ecocidal and genocidal violence at the behest of distant decision-makers and in the name of an abstract conception of profit—surely [*The Godfather*] is not about the Mafia, but rather about American business itself that we are thinking, American capitalism in its most systematized and computerized, dehumanized, 'multinational' and corporate form. What kind of crime, said Brecht, is the robbing of a bank, compared to the founding of a bank?

Id. Benjamin Levin, *Made in the U.S.A.: Corporate Responsibility and Collective Identity in the American Automotive Industry*, 53 B.C. L. REV. 821, 850 (2012) (describing this theme in radical narratives); Woody Guthrie, *Pretty Boy Floyd, on Folkways: The Original Vision* (Smithsonian Folkways Records 1990) ("I've seen lots of funny men/Some will rob you with a six-gun,/And some with a fountain pen."). Notably, in many of these radical accounts, the response to this inequality is not necessarily an appeal to have bankers or capitalists prosecuted. Rather, it is to offer or ask for a deeper critique of capitalism and the social structures that have empowered corrupt capitalists. *See* Levin, *supra* note 126, at 163–64.

²⁶⁶ *See, e.g.*, Zach Carter, *Opinion, House Bill Would Make It Harder To Prosecute White-Collar Crime*, HUFFINGTON POST (Nov. 16, 2015), https://www.huffingtonpost.com/entry/white-collar-crime-prosecution_us_564a2336e4b06037734a2f84 [<http://perma.cc/LEN4-Z9EA>]; Sam Sacks, *Sen. Warren Shames GOP's Criminal Justice "Reform" Proposals*, D.C. SENTINEL (Feb. 3, 2016), <https://www.districtsentinel.com/sen-warren-shames-gops-criminal-justice-reform-proposals/> [<http://perma.cc/FL99-FJV4>]; *Don't Change the Legal Rule on Intent*, *supra* note 133.

²⁶⁷ WHITMAN, *supra* note 130, at 9.

²⁶⁸ *Id.*

²⁶⁹ *See id.* at 7–10.

“if . . .” statement in *Rigged Justice* reads as though it’s rhetorical,²⁷⁰ but do Senator Warren and other opponents of mens rea reform legislation actually view the current treatment of teenagers in the system as just?²⁷¹ For critics of the criminal system who view the law as a means of reinforcing and creating deep structural inequality,²⁷² the idea that we can make things better by further empowering prosecutors, further expanding criminal liability, and further reducing the possible universe of criminal defenses is puzzling at best and flat-out wrong at worst.²⁷³ Whether a rising tide of criminal justice reform actually would lift all boats and benefit all defendants is an empirical question,²⁷⁴ but, is ensuring that a rich defendant is convicted (on the off chance he is prosecuted) really worth eliminating the possibility that the poor defendant can raise a credible defense?²⁷⁵ If the answer is “yes,” then we have a long way to go if the goal is ending mass incarceration and dialing back the punitive state.

Further, and perhaps even more troubling, it is worth noting once again that the mens rea reform proposals do not foreclose the possibility of prosecuting and harshly punishing a range of corporate (or powerful) actors.²⁷⁶ The proposals simply would require clearer legislative drafting.²⁷⁷ Even if this distinction is less significant as a practical matter than a formal matter, it is important as a means of illustrating just how troubling the level up move can be. Taken on its face, then, the opposition to mens rea reform doesn’t rest on a claim that corporate crime should be punished or

²⁷⁰ See RIGGED JUSTICE, *supra* note 159, at 7 (“If justice means a prison sentence for a teenager who steals a car”).

²⁷¹ Cf. GARRETT, *supra* note 130, at 263–66 (comparing data on corporate prosecutions to other types of prosecutions).

²⁷² See generally Butler, *supra* note 232 (arguing that the criminal system is designed to control poor people of color).

²⁷³ See Gruber, *supra* note 190, at 1383 (expressing concern that these sorts of equality arguments “will lead to level-up solutions that render minority defendants vulnerable to increased policing, prosecution, and incarceration”).

²⁷⁴ See *supra* note 251.

²⁷⁵ Cf. Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273, 332 (2015) (making a similar argument in regard to the proposed elimination of the provocation defense); Benjamin Levin, Note, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 HARV. J. ON LEGIS. 523, 552 (2010) (raising a similar argument in regard to the castle doctrine).

²⁷⁶ See *supra* notes 233–235 and accompanying text.

²⁷⁷ See *supra* Part II. A. As I have noted throughout this Article, I do not mean to discount the practical issues that would result from the passage of *mens rea* reform legislation. At the very least, to the extent that drafters intended an otherwise-silent statute to impose strict liability, Congress would need to go back and amend the statute.

prosecuted as vigorously as non-white-collar crime.²⁷⁸ Instead, it rests on a claim that prosecutors—with judicial assistance—should be able to enjoy the much-criticized advantages that they enjoy in other corners of the criminal practice.

One of the greatest concerns in the critical literature and case law on the criminal system is that existing rules, politics, and practices, empower prosecutors to take advantage of broadly drafted statutes to coerce defendants into plea deals.²⁷⁹ “where the legislature drafts broad criminal statutes and then attaches mandatory sentences to those statutes, prosecutors have an unchecked opportunity to overcharge and generate easy pleas, a form of strategic behavior that exacerbates the structural deficiencies endemic to plea bargaining.”²⁸⁰ Indeed, in her dissent in *Yates v. United States*, Justice Elena Kagan effectively endorses this critique and suggests that it has driven the reasoning of her fellow Justices.²⁸¹ According to Justice Kagan, the statutory provision in question, is an example of “overcriminalization and excessive punishment in the U.S. Code.”²⁸² It is “a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion.”²⁸³ Opponents of *mens rea* reform may not have dismissed such concerns outright, but in their move to level up, they appear to have concluded that such a dynamic is desirable, or at least necessary, to serve equality-based ends.

C. CARCERAL EXCEPTIONALISM

Finally, the case of *mens rea* reform speaks to a related and, perhaps, intractable problem: it is much easier to take a stand in favor of decarceration and criminal justice reform when a given defendant does not seem so bad or where criminal conduct doesn’t seem like such a big deal. It becomes much harder when confronted with the bad defendant or the

²⁷⁸ See *supra* note 234.

²⁷⁹ See, e.g., Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1311 (2018) (“[W]hile such an exchange may sound like an actual bargain, with each party gaining, to quote the Supreme Court, a ‘mutuality of advantage’ from the deal, most knowledgeable observers describe it as something else: a fundamentally coercive practice (occasionally analogized to torture) that produces involuntary pleas, sometimes to crimes the defendant did not commit.”) (footnote omitted); Hessick, *supra* note 78, at 1138.

²⁸⁰ Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 YALE L.J. 1909, 1965 (1992).

²⁸¹ *Yates v. United States*, 135 S. Ct. 1074, 1100 (2015) (Kagan, J., dissenting).

²⁸² *Id.*

²⁸³ *Id.* at 1101; see also *Morrison v. Olson*, 487 U.S. 654, 727–34 (1988) (Scalia, J., dissenting) (critiquing excessive prosecutorial power).

particularly troubling act. The impulse then becomes one of making exceptions.²⁸⁴

Intuitively, this observation may appear straightforward, and the impulse may be deeply human. But, in this final Section, I will suggest that this impulse may help explain some of the deepest challenges in achieving sweeping criminal justice reform and also in understanding some of the ostensible inconsistency in views on the criminal system—particularly among scholars and advocates on the left. Thinking of this phenomenon as carceral exceptionalism (i.e., this defendant is exceptional and therefore deserving of the full force of the carceral state)²⁸⁵ may provide a useful lens through which to view the *mens rea* reform debates.

In a sense, carceral exceptionalism asks us to confront just how sweeping critiques of the criminal system truly are and what critics are worried about when they decry “mass incarceration” (or, for that matter, “overcriminalization”). Is the problem a structural or phenomenological

²⁸⁴ See, e.g., FORMAN, *supra* note 12, at 221–22, 229 (critiquing a reformist impulse that focuses only on “nonviolent offenders”); GOTTSCHALK, *supra* note 135, at 165–69 (criticizing as insufficient reform proposals targeted at “nonviolent, nonserious, nonsex crimes”); Ristroph, *supra* note 196, at 621 (critiquing the line between violent and non-violent crime and the overreliance on that line in crafting policy).

²⁸⁵ Or, more provocatively, carceral NIMBYism (i.e., I can support decarceration until the harm or bad conduct by a defendant threatens me or my values). Such a frame becomes particularly fitting when confronting situations that literally appear to involve progressive commentators affirming their commitments to criminal justice reform or progressive causes while suggesting that crime in their own neighborhoods must be dealt with swiftly and harshly. See, e.g., David Kline et al., *Portland Must Stand Up to Predators*, OREGONIAN (June 6, 2018), https://www.oregonlive.com/opinion/index.ssf/2018/06/portland_must_stand_up_to_pred.html?utm_source=The+Appeal&utm_campaign=6eba011046&utm_medium=email&utm_term=0_72df992d84-6eba011046-58393087 [<http://perma.cc/3PQN-YLT3>] (“Portlanders rightly take pride in their acceptance of all lifestyles. But predatory criminal behavior is not an ‘alternative lifestyle.’ It’s a cancer on the city and a threat to us all, and it’s time for the city to do something about it.”). This June 2018 op-ed in *The Oregonian* provides a striking example of this phenomenon. See *id.* The authors note that they have “all worked in homeless advocacy or other progressive causes” before embarking on a critique of “predatory homeless” people and “over-tolerant” policing in the liberal mecca of Portland. *Id.* I don’t mean to diminish the impact of crime on communities, but, one key mistake of the exceptionalist move is to assume that this one class of crime or one class of defendants is somehow different—or, more pointedly, that many other people don’t also experience the externalities of the effects of criminal conduct. Accepting one of these narratives or arguments effectively opens the floor to others, inviting an approach to criminal justice reform that either: (1) is remarkably narrow in scope, focusing only on criminal conduct that manages to harm or offend almost no one; or (2) a sort of elitist criminal justice reform that grants voice or veto power to victims or third parties with political clout, but none to victims or third parties with no such influence.

one about what punishment looks like and how it operates?²⁸⁶ Or, is the problem one of calibration, where our concern is that the wrong people are being punished and/or that the defendant deserving of punishment is being punished *too much*?²⁸⁷ Elsewhere, I have characterized these two general critical tendencies as the *mass* (structural) and *over* (calibration) approach to criminal law scholarship and reform.²⁸⁸

For many critics on the political left, the language of criminal justice reform sounds in a *mass* register via radical discourses of structural inequality.²⁸⁹ But carceral exceptionalism shows that *mass* critiques often belie *over* tendencies. Take the case of *mens rea* reform: liberal, progressive, or left critics articulate a concern about racial and socioeconomic inequality. The system is rigged. The system is corrupt. And the system preys upon the weak and powerless. But what *is* the system? That is, the critique sounds structural or phenomenological. But the proposed solution (or, at least the objection to proposed legislation) sounds in the discourse of further empowering prosecutors and the same actors and institutions that have driven mass incarceration. As discussed above, to the extent there is something fundamentally wrong with those actors and institutions (e.g., their incentives; their politics; their biases), why should we assume that those flaws will evaporate when they are dealing with a *bad* defendant?²⁹⁰

²⁸⁶ See, e.g., Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 424 (2018) (advocating for interventions in the criminal system that “expand[] the frame beyond police violence, and even criminal justice institutions, to the interlocking set of current and historical systems that propel and draw from anti-Black racism”); Butler, *supra* note 151, at 2183; Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1604–05 (2017) (“[Criminal legal] institutions enforce an undemocratic racial caste system originating in slavery. Making criminal law democratic, then, requires something far more radical than reducing bias or increasing inclusion in this antidemocratic system. Democratizing criminal law requires dismantling its anti-democratic aspects altogether and reconstituting the criminal justice system without them.”).

²⁸⁷ See, e.g., *United States v. Moore*, 851 F.3d 666, 676 (7th Cir. 2017) (Posner, J., dissenting); Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 125 (2008) (“The problem of mass incarceration is entirely produced by the simple mathematics of two pressure points—how many people enter prison and how long they stay there.”); Timothy W. Floyd, *Steven’s Choice*, 10 OHIO ST. J. CRIM. L. 203, 203 (2012) (“Although prisons are a necessary evil, we imprison far too many people in our society, and for far too long.”).

²⁸⁸ See generally Levin, *supra* note 1 (describing these two competing theories of “mass incarceration” and criminal justice reform).

²⁸⁹ See *supra* notes 239–243 and accompanying text.

²⁹⁰ Cf. Benjamin Levin, *Values and Assumptions in Criminal Adjudication*, 129 HARV. L. REV. F. 379, 380 (2016) (“To the extent our criminal justice system already suffers from

Put simply, carceral exceptionalism rests on the belief not only that certain crimes or defendants are exceptional, but also on the belief that the line between the treatment of exceptional areas and “ordinary” crime can hold. Despite the stated focus on distributive concerns that drives opposition to mens rea reform and many other projects of exceptionalism,²⁹¹ exceptionalism tends to discount the distributional realities of strengthening carceral institutions (as well as the ways in which those institutions are embedded in a broader web of unequal social, political, and economic structures).²⁹² And, to many critics adopting a *mass* frame, criminal policy is inextricable from social welfare policy and distributional decisions central to U.S. political economy; regardless of the distributional goals of a given prosecutorial project, such forces make it extremely likely that harsher criminal policies inevitably will harm the least powerful members of society.²⁹³ That is, if we adopt the (increasingly common) view that the criminal system is inextricable from a deeply flawed brand of social control, any move to give that system or its actors more power risks exacerbating, or at least further entrenching, those inequalities.

In the context of mens rea reform, the exception is the realm of white-collar crime, where the state failure is one of *underenforcement* rather than

the assumptions and biases of judges and other official actors, granting those same actors the ability to interpret a wealth of data or ‘facts’ need not dictate a move toward greater justice or greater accuracy.”).

²⁹¹ Examples include intimate-partner violence, sexual violence, hate crimes, and other areas where the pro-criminalization position rests on empowering an otherwise disempowered victim. See generally Aharonson, *supra* note 201.

²⁹² See, e.g., Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds., 2001) (“[T]he modern state is a compulsory association which organizes domination. It has been successful in seeking to monopolize the legitimate use of physical force as a means of domination within a territory.”); White, *supra* note 142, at 786 (“Behind the façade of justifications, the criminal justice system is an institution of social control oriented to the management of dysfunctions inherent in capitalist society—unemployment, poverty, and the like.”).

²⁹³ See, e.g., STUART HALL ET AL., POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER 192 (1978) (“[I]n a class society, based on the needs of capital and the protection of private property, the poor and the propertyless are *always* in some sense on ‘the wrong side of the law’, whether they actually transgress it or not . . . All crime control . . . is an aspect of that larger and wider exercise of ‘social authority’; and in class societies that will inevitably mean the social authority exerted by the powerful and the propertied over the powerless and the propertyless.”); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 85–86 (2007); NICOLA LACEY, THE PRISONERS’ DILEMMA 170–73 (2008); WACQUANT, *supra* note 12, at 1–3; Aziza Ahmed, *Adjudicating Risk: AIDS, Crime, and Culpability*, 2016 WIS. L. REV. 627, 630 (2016).

overenforcement.²⁹⁴ Thinking back to Senator Warren’s rhetoric and the language of the Occupy the SEC petition, white-collar defendants who might benefit from mens rea reform are framed as the deserving targets of state violence and prosecutorial attention. In other contexts, framing procedural or structural protections for defendants as “loopholes” or “technicalities” might be problematic—the province of a reactionary, tough-on-crime right.²⁹⁵ But in this context, left critics have embraced the rhetoric and positions of tough-on-crime politicians.²⁹⁶

Other examples of this phenomenon abound. As discussed above, sexual assault and gender-based violence or sex crimes have remained areas where scholars and advocates on the left have been vocal proponents of expanding the scope and scale of criminal regulation.²⁹⁷ Almost twenty years ago, Stuntz observed the exceptionality of sexual assault:

[C]riminal law’s breadth is old news. It has long been a source of academic complaint; indeed, it has long been the starting point for virtually all the scholarship in this field, which (with the important exception of sexual assault) consistently argues that existing criminal liability rules are too broad and ought to be narrowed.²⁹⁸

Scholars, activists, and politicians who elsewhere decry mass incarceration often support amping up criminal law when it comes to

²⁹⁴ Cf. RANDALL KENNEDY, *RACE, CRIME AND THE LAW* (1997) (tracing the underenforcement of crimes against black defendants). *But see* Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270 (1998) (critiquing the focus on underenforcement).

²⁹⁵ See generally Benjamin Levin, *De-Naturalizing Criminal Law: Of Public Perceptions and Procedural Protections*, 76 ALA. L. REV. 1777 (2013) (describing the relationship between this framing and the rise of “law and order” politics).

²⁹⁶ See Sacks, *supra* note 266 (quoting Senator Warren as stating on the Senate floor: “To anyone in Congress who thinks they can simply talk tough on crime and then vote to make it even harder to crack down on corporate criminals, hear this: I promise you—I promise you—the American people are watching . . . And they will remember.”). Notably, spokespeople for President Obama voiced these sentiments, appealing not just to concerns about white-collar crime, but to fear of terrorism and other targets common in the parlance of tough-on-crime politics. See Zach Carter, *White House Comes Out Against Effort to Block White-Collar Crime Prosecutions*, HUFFINGTON POST (Nov. 19, 2015), at https://www.huffingtonpost.com/entry/white-collar-crime-white-house-response_us_564dd06be4b00b7997f95240 [<http://perma.cc/M6RS-6DZ7>] (quoting a Whitehouse spokesperson: “If the bill became law, a terrorist could only be found guilty for using a weapon of mass destruction if he specifically knew his victims were going to be U.S. nationals, a killer could only be found guilty of certain firearm crimes if he knew the gun traveled in interstate commerce, and a white-collar criminal could only be found guilty of bank fraud if he knew he was robbing a bank that was FDIC-insured”).

²⁹⁷ See *supra* notes 196–198 and accompanying text.

²⁹⁸ Stuntz, *supra* note 6102, at 507.

addressing rape.²⁹⁹ There is a range of explanations for this exceptional treatment including the historical underenforcement of crimes against women and power imbalances resulting from the institutional structures of patriarchal society.³⁰⁰ But, regardless of the justification, the logic of exceptionalism remains: these defendants are more deserving of punishment than others, and procedural protections—rather than critical components of a civil libertarian agenda—are impeding just outcomes.

This tendency to exceptionalize when presented with the specter of more privileged defendants persists. In the context of hate crime legislation, pro-criminalization proponents similarly argue that prosecutors and the moral or expressive force of criminal law can help address pervasive bigotry and victimization of minority defendants.³⁰¹ Likewise, commentators often claim that wealthier or politically-connected

²⁹⁹ See, e.g., John Ehrett, *Public Choice and the Mandatory Minimum Temptation*, 35 YALE L. & POL'Y REV. 603, 610 (2017) (describing the move to embrace mandatory minimum prison sentences for rape in California); Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1156–57 (2018) (critiquing underenforcement of rape law and arguing that more robust enforcement should be a component of criminal justice reform).

³⁰⁰ For historical work that both contributes to and complicates these narratives, see, e.g., Carolyn B. Ramsey, *Domestic Violence and State Intervention in the American West and Australia, 1860-1930*, 86 IND. L.J. 185 (2011); Carolyn B. Ramsey, *The Exit Myth: Family Law, Gender Roles, and Changing Attitudes Toward Female Victims of Domestic Violence*, 20 MICH. J. GENDER & L. 1 (2013).

³⁰¹ See, e.g., Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 462–63 (1999) (tracking debates about the application of hate crime statutes); Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1294 (2004) (advocating for an expansive vision of “hate crimes” to address violence against Muslim Americans and Arab Americans in the wake of 9/11); Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verite and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347, 486 (1996) (“Hate crime legislation is an important effort toward the public approbation of bias-motivated injuries, provided the necessary willingness by law enforcement agencies is forthcoming.”); Frederick M. Lawrence, *The Punishment of Hate: Toward A Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 381 (1994):

Bias crime laws ought to single out criminal conduct that is motivated by racial animus. Discriminatory selection of a victim will ordinarily be part of racial animus. Indeed, the proof of animus in the prosecution of a bias crime will likely begin with evidence relating to victim selection. Elements of proof, however, must not be confused with the gravamen of the crime. The gravamen of a bias crime is the animus of the accused.

Id. But see ADLER, *supra* note 14 (critiquing this model of dealing with violence against queer victims).

defendants should receive harsher treatment.³⁰² Similarly, as discussed above, academics and activists frequently argue that police defendants should receive fewer procedural protections than other defendants and/or should be targeted for more aggressive prosecution.³⁰³ Outside of the mens rea reform context, a range of scholars and advocates has argued that aggressive prosecutorial approaches are appropriate in the context of white-collar crime.³⁰⁴

To be clear, some expressions of carceral exceptionalism don't rely on a claim that structural issues won't persist in a given case or context; instead, the claim is that the benefits will outweigh the costs. That is, one need not be an ardent supporter of incarceration as a solution in order to believe that incarceration is the appropriate fit in a given instance. Nevertheless, while the cost-benefit or distributional analysis is certainly a better approach than simply disregarding structural problems, it still raises some troubling questions and often appears to reflect some problematic assumptions.

In the context of mens rea reform—and elsewhere—the move to exceptionalize requires some sort of comparison or relative calculus. Arguing that a given area is deserving of state violence and the attention of the carceral apparatus while other areas (e.g., drug crime, “nonviolent”

³⁰² See, e.g., Ehrett, *supra* note 299 (tracking the punitive response to the relatively short sentence for sexual offenses committed by former Stanford University swimmer Brock Turner); Aris Folley, *Protesters Chant 'Lock Him Up!' as Manafort Headed into Court*, THE HILL (June 15, 2018), <http://thehill.com/blogs/blog-briefing-room/news/392486-protesters-chant-lock-him-up-as-manafort-heads-into-court> [<http://perma.cc/D9E8-ARBV>].

³⁰³ See *supra* notes 261–264 and accompanying text.

³⁰⁴ See, e.g., Terri Gerstein & David Seligman, *A Response to “Rethinking Wage Theft Criminalization”*, ONLABOR (Apr. 20, 2018), <https://onlabor.org/a-response-to-rethinking-wage-theft-criminalization/> [<http://perma.cc/9HQV-DJJ4>] (arguing that prosecutors should be trusted to exercise discretion appropriately in the context of wage theft cases and stating that: “While we of course appreciate the deep structural flaws of our criminal justice system, we’ve seen how important a tool the criminal law can be in protecting workers from wage theft, and we don’t think that bringing the criminal law to bear on predatory employers who take advantage of vulnerable workers exacerbates the injustices of our criminal justice system.”); Terri Gerstein, *Stealing From Workers Is a Crime. Why Don’t More Prosecutors See It That Way?*, THE NATION (May 24, 2018), <https://www.thenation.com/article/stealing-from-workers-is-a-crime-why-dont-prosecutors-see-it-that-way/> [<http://perma.cc/4YLM-R3JA>] (arguing that criminal justice reform-oriented voters should vote to encourage more aggressive prosecutions of white-collar crime). *But see* Ben Levin, *Rethinking Wage Theft Criminalization*, ONLABOR (Apr. 13, 2018), <https://onlabor.org/rethinking-wage-theft-criminalization/> [<http://perma.cc/2274-B2WD>] (critiquing this argument); Ben Levin, *Prosecutorial Power, Prisons, and the Problem with Wage Theft Criminalization: A Reply*, ONLABOR (Apr. 30, 2018), <https://onlabor.org/prosecutorial-power-prisons-and-the-problem-with-wage-theft-criminalization-a-reply/> [<http://perma.cc/6HFX-HYGB>] (same).

crime, etc.) are not requires implicit or explicit comparative work: this type of conduct must be *worse* or more suited to criminal regulation and penalties than those other areas. Perhaps the clearest case of carceral exceptionalism is the treatment of “violent offenders” as it compares to the treatment of “nonviolent offenders.” Across the political spectrum, it is common to endorse criminal justice reform enthusiastically for “nonviolent offenders,” while supporting continued harsh treatment (and even increasing the harsh treatment) of “violent offenders.”³⁰⁵ Never mind that the majority of people incarcerated are serving time for violent crime or that the line between “violent” and “nonviolent” crime may be surprisingly difficult to draw.³⁰⁶ The exceptional turn allows for commentators to support criminal justice reform vociferously while drawing the line at conduct that sounds “bad,” thus perpetuating the myth that mass incarceration is the result of incarcerating too many “nonviolent drug offenders.”³⁰⁷

That line drawing exercise and the allure of retrenching on “violent crime” should cause concern when it comes to mens rea reform opposition and the desire to make corporate or regulatory crime the exceptions worthy of harsh treatment. In other words, if mens rea reform opponents are claiming that white-collar crime is uniquely deserving of unrestrained prosecutorial power and expansive statutes, logic would dictate that they are claiming that this area of crime is somehow worse or more harmful than other areas. That might be a defensible position—from a left, redistributionist perspective, the crimes of capital might be far worse than the crimes of individuals robbed of choice and opportunity by social inequality;³⁰⁸ alternatively, as a matter of scale, we might view the harms caused by widespread environmental degradation or economic manipulation as more widely shared than the harms caused by most instances of violent interpersonal conduct.³⁰⁹

³⁰⁵ See, e.g., GOTTSCHALK, *supra* note 135, at 165–69 (critiquing this position); FORMAN, *supra* note 12, at 221–22 (same); PFAFF, *supra* note 35, at 8 (same).

³⁰⁶ See, e.g., Johnson v. United States, 135 S. Ct. 2551 (2015) (debating the meaning of “violence”); PFAFF, *supra* note 35, at 15–16, 21 (collecting prison data); Ristroph, *supra* note 196 (describing the fuzzy line between violent and nonviolent crime).

³⁰⁷ See generally PFAFF, *supra* note 35 (critiquing this flawed “standard story” of criminal justice reform).

³⁰⁸ Cf. Jeffrie G. Murphy, *Marxism and Retributivism*, 2 PHIL. & PUB. AFF. 217 (1973) (arguing that pervasive inequality undermines the logic of retributivism).

³⁰⁹ See, e.g., ANDREW HACKER, THE NEW YORKERS: A PROFILE OF AN AMERICAN METROPOLIS 107 (1975):

In all probability, muggers take much less from individuals than do corporate . . . and white-collar criminals. Many executives swindle more on their taxes and expense

It's important to recognize, however, that these arguments can be problematic,³¹⁰ particularly when the point of comparison is violent crime, or, even more so when it's violent crime committed against marginalized or powerless defendants. For scholars and commentators who are comfortable with the current treatment of "violent" offenders, the challenge of proving this comparative point might matter little. But, for those seeking change, these arguments should be worrying. Unless the sorts of regulatory offense at stake here are viewed as worse than "violent crime," it would be difficult to make a case for reducing prosecutorial power and punitive approaches to violence.³¹¹

The literature on prison abolitionism speaks of "the dangerous few," a group of individuals who still might need to be detained or have their liberty restricted in even the most heavily decarcerated society.³¹² Even if society were to reject incarceration wholesale, the argument goes, some individuals might continue to pose an intolerable risk. From a radical decarceration or abolitionist perspective, then, embracing the arguments of Senator Warren and other mens rea reform opponents would require accepting that defendants who (perhaps unknowingly) commit economic, environmental, or regulatory crimes are the true "dangerous few." That may be a defensible position, but it's important to recognize how challenging it would be theoretically—and politically—to take this position while arguing for non-carceral solutions to violent crime or non-carceral treatment of individuals with a long history of violent crimes.³¹³

accounts than the average addict steals in a year. Unfortunately, concentrating on street crime provides yet another opportunity for picking on the poor.

Id.

³¹⁰ Cf. Stuart P. Green & Matthew B. Kugler, *Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud*, 75 LAW & CONTEMP. PROBS. 33, 33 (2012):

We are accustomed to thinking of 'crime' as involving the most blameworthy and antisocial sorts of conduct in which citizens can engage, conduct that is clearly and unambiguously more wrongful than conduct that is not criminal. But the reality is more complex, especially when we look at certain kinds of 'white collar' behavior.

Id.

³¹¹ See Levin, *supra* note 304.

³¹² See, e.g., Liat Ben-Moshe, *The Tension Between Abolition and Reform*, in THE END OF PRISONS: REFLECTIONS FROM THE DECARCERATION MOVEMENT 90 (Mechthild E. Nagel & Anthony J. Nocella II eds., 2013); Jim Thomas and Sharon Boehlefeld, *Rethinking Abolitionism: What Do We Do With Henry?*, in WE WHO WOULD TAKE NO PRISONERS: SELECTIONS FROM THE FIFTH INTERNATIONAL CONFERENCE ON PENAL ABOLITION (Brian Maclean & Harold Pepinsky eds., 1993); McLeod, *supra* note 251, at 1171.

³¹³ For a fascinating examination of the "dangerous few" and the harms of white-collar criminality, see Thomas Frampton, *The Dangerous Few* (unpublished manuscript; draft on file with author).

None of this is to downplay the challenge of applying the decarceral approach to situations that seem particularly bad or to defendants who seem particularly unsympathetic. (To be clear, one explanation for the prevalence of carceral exceptionalism is a resistance or inability to recognize that much criminal conduct has third-party harm.) Rather, it is to say that a truly transformative criminal justice reform movement will require us to stop making exceptions.³¹⁴ A model of criminal justice reform that only helps the truly innocent defendants or that strives for decriminalization and decarceration only for clearly harmless conduct cannot possibly do major work in reducing our massive prison populations.³¹⁵ Indeed, one of the biggest insights of Forman's Pulitzer-Prize-winning book, *Locking Up Our Own* is to stress that crime (and particularly drug-related crime) was a serious problem in many black communities at the dawn of the War on Crime.³¹⁶ But, as Forman argues, recognizing that crime is a problem and that there are real victims—often victims from marginalized communities—does not diminish the lessons of the War on Drugs and the War on Crime that the social costs of a criminal model of regulation can be devastating.³¹⁷ A comprehensive criminal justice reform agenda will require acknowledging the harms of criminal conduct while recognizing the problems with using the carceral solutions.

This may be an unwelcome suggestion or it might push further than some opponents of mens rea reform would want to go: it is not indefensible to oppose some of the worst excesses of the carceral state, but still support some forms of harsh criminal punishment.³¹⁸ Indeed, this is a position that appears to be widely shared by many criminal justice reformers.³¹⁹ But, for those who articulate a stronger or more radical critique—a critique that calls for a reckoning with the way society treats violent crime, or pushes for a broader move away from criminal law as a solution—it is important to resist the punitive impulse when it is our ox that is being gored.

³¹⁴ See, e.g., FORMAN, *supra* note 12, at 221; GOTTSCHALK, *supra* note 135, at 165–69.

³¹⁵ See generally PFAFF, *supra* note 35.

³¹⁶ See generally FORMAN, *supra* note 12.

³¹⁷ See generally FORMAN, *supra* note 12; see also AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION (Mary Louise Frampton, et al., eds. 2008) (describing the consequences of those criminal models of regulation).

³¹⁸ To be clear, rejecting any exceptionalism might well lead to an abolitionist stance not necessarily shared by many of the critics and commentators. Or, at least, it might require scholars to hone in on points of logical or theoretical inconsistency in their critiques of the criminal system.

³¹⁹ See Levin, *supra* note 1, at 265–74 (describing this approach as one of the two primary impulses in criminal justice reform).

CONCLUSION

Ultimately, there may be many reasons to be skeptical about mens rea reform legislation and its politics. Nevertheless, as I have argued, opposition to mens rea reform spells trouble for the future of criminal justice reform. The debates over these legislative proposals raise important questions about the limits of bipartisanship and the interaction of criminal law with other regulatory enterprises. But, they should also force us to confront the continuing lure of criminal punishment and the belief that more punishment is the way to tackle social problems or discipline deviant actors. That siren song has helped build the carceral state. Dismantling it will require resisting those calls.