

# CRIMINAL JUSTICE REFORM AT THE CROSSROADS

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This article borrows from and expands upon other articles I have written on the subject. See John G. Malcolm, *The Pressing Need for Mens Rea Reform*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 160 (Sept. 1, 2015), <http://heritagelaw.org/1IHBOSg> [perma.cc/K8BM-99CY]; John G. Malcolm, *Why Conservative Governors Are Embracing Criminal Justice Reform*, DAILY SIGNAL (Aug. 4, 2015), <http://dailysignal.com/1ImHJk5> [perma.cc/2CWG-8Q3V]; John Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 130 (Aug. 6, 2014), <http://heritagelaw.org/1QXREpQ> [perma.cc/NM8H-KLA6]; John Malcolm, *The Case For the Smarter Sentencing Act*, 26 FED. SENT'G REP. 298 (2014), <http://heritagelaw.org/1X4wy7E> [perma.cc/H6RP-G244]; Criminal Justice Reform, Part II: Testimony before the Committee on Oversight and Government Reform, 114th Cong. (2015) (statement of John G. Malcolm, Director and Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow, Edwin Meese III Center for Legal and Judicial Studies, The Heritage Foundation); see also Michael B. Mukasey & John G. Malcolm, *Criminal Law and the Administrative State: How the Proliferation of Regulatory Offenses Undermines the Moral Authority of Our Criminal Laws*, in LIBERTY'S NEMESIS 283 (Dean Reuter & John Yoo, eds., 2016) (discussing problems that stem from the dramatic proliferation of regulatory crimes).

## I. INTRODUCTION

Criminal justice reform, in its many manifestations, is a difficult and controversial issue. Some “believe that our current sentencing regime is unfair, that too much discretion has been removed from judges, that the pendulum has swung too far in terms of imposing harsh sentences, and that increased incarceration has led to other inequities in our society.”<sup>1</sup> Others believe that increased incarceration and harsh sentences have taken some very dangerous people off of the streets and have resulted in dramatic decreases in crime, and that, if such sentences are cut, crime may well increase to the detriment of society.<sup>2</sup> Some believe that there are too many crimes with weak (or non-existent) criminal intent standards that result in morally blameless individuals and small entities being branded for life with a scarlet letter “C” for “criminal.” Others believe that providing more robust criminal intent standards will enable others, particularly high-level corporate executives, to avoid the consequences of their actions, which can pose health and safety hazards to the environment and the public at large.<sup>3</sup>

Both of these perspectives are reasonable; people of good will disagree passionately about these issues.<sup>4</sup> Yet, there is no question that those who favor criminal justice reform are making progress at the state level and, haltingly, at the federal level.

## II. HOW WE GOT HERE

When crime rates soared in the 1960s, the idea of putting more people in prison for longer periods of time made a lot of sense, and

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1. *Criminal Justice Reform, Part II: Testimony Before the Committee on Oversight and Government Reform*, 114th Cong. 1 (2015) [hereinafter *Hearings*] (statement of John G. Malcolm, Director and Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow, Edwin Meese III Center for Legal and Judicial Studies, The Heritage Foundation).

2. *Id.*

3. See, e.g., John G. Malcolm, *The Pressing Need for Mens Rea Reform*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 160 (Sept. 1, 2015), <http://heritag.org/1HHBOSg> [perma.cc/2QU7-WKNQ].

4. See, e.g., Letter from former U.S. Attorney General Michael B. Mukasey, former U.S. Deputy Attorney General Larry D. Thompson, former FBI Directors William S. Sessions and Louis J. Freeh, and a host of former U.S. Attorneys and federal judges, among others to Hon. Mitch McConnell and Hon. Harry Reid (Jan. 19, 2016), <http://bit.ly/1LJNeAC> [perma.cc/9ESZ-4X5T] (supporting S. 2123, the Sentencing Reform and Corrections Act of 2015); Letter from former U.S. Attorneys General John Ashcroft and William Barr, former Associate Attorney General Rudolph W. Giuliani, former directors of the White House Office of National Drug Control Policy William J. Bennett and John P. Walters, and a number of former U.S. Attorneys, among others, to Hon. Mitch McConnell and Hon. Harry Reid (Dec. 10, 2015), <http://bit.ly/1U4uNbi> [perma.cc/2RDA-ZXBS] (opposing S. 2123, the Sentencing Reform and Corrections Act of 2015).

the idea worked, at least to some extent.<sup>5</sup> Crime rates eventually leveled off and, since the 1990s, crime rates have dropped rather precipitously.<sup>6</sup> While there are certainly places in this country where crime rates are staggeringly and persistently high, we are, for the most part, much safer now than we were then.

According to the Bureau of Justice Statistics (BJS), from 1993 to 2014, violent crime rates fell from 79.8 to 20.1 victimizations per 1,000 people, and property crime rates fell from 351.8 to 118.1 victimizations per 1,000 households.<sup>7</sup> Increased incarceration, especially of violent offenders, certainly deserves some of the credit for this steep drop in crime rates, but just how much is a matter of some debate among criminologists.

At the high end, University of Chicago economist Steven Levitt has estimated that approximately 25% of the decline in violent crime can be attributed to increased incarceration.<sup>8</sup> William Spelman of the University of Texas at Austin estimates that the

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5. *Hearings, supra* note 1 (statement of John G. Malcolm).

6. *Id.*

7. See JENNIFER L. TRUMAN & LYNN LANGTON, DEPT. OF JUST., BUREAU OF JUST. STATS., CRIMINAL VICTIMIZATION, 2013 (2014), <http://1.usa.gov/1v4STGI> [perma.cc/4R3C-GB7S]; FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, PRELIMINARY SEMI-ANNUAL UNIFORM CRIME REPORT JAN.–JUNE 2014 (2015), <http://1.usa.gov/20VGdQy> [perma.cc/V46F-XCAF] (Preliminary data indicates that violent crime and property crime continued to drop through the first half of 2014. The FBI estimates that the number of violent crimes dropped by 4.6% through the first six months of 2014 as compared to figures from the first six months of 2013, and that the number of property crimes dropped by 7.5% through the first six months of 2014, as compared to figures from the first six months of 2013.); FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE U.S. 2013 (2014), Table 1 Data Declaration, <http://1.usa.gov/1X4Aaql> [perma.cc/KBR4-ZTBN] (The FBI's numbers, although different, support this conclusion. The primary reason for the differences is that the BJS and the FBI use different definitions; for example, the BJS includes simple assault but not homicide when calculating violent crime rates, whereas the FBI does just the opposite. Similarly, the BJS includes simple theft when calculating property crime rates, whereas the FBI does not. Furthermore, while the BJS calculates violent and property crime rates per 1,000 victims and households, respectively, the FBI calculates crime rates per 100,000 people in the entire United States. According to the FBI's Uniform Crime Reporting (UCR) Program, the total number of violent crimes dropped from an estimated 1,857,670 in 1994 (a rate of 714 violent crimes per 100,000 people) to an estimated 1,163,146 in 2013 [a rate of 368 violent crimes per 100,000 people]. The total number of property crimes also dropped from an estimated 12,131,873 in 1994 [a rate of 4,660 property crimes per 100,000 people] to an estimated 8,632,512 in 2013 [a rate of 2,731 property crimes per 100,000 people].).

8. Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSPS. 163, 186 (2004). *But see* Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. PUB. ECON. 2043, 2056–62 (2004), <http://bit.ly/1Rvj28Z> [perma.cc/7QPB-M22H] (Levitt acknowledged that the continued increase in the number of drug offenders in prisons may lead to a “crowding out” effect in which the high number of incarcerated drug offenders prevents the incarceration of offenders prone to more serious crime, thereby reducing the effectiveness of incarceration to reduce crime).

figure may be as high as 35%.<sup>9</sup> While hardly insignificant, this means that there are other factors—such as more police officers, the development of wide-scale deployment of COMPSTAT (short for “computer statistics”) policing techniques, community policing, and greater attention by homeowners to self-protection through the installation of locks and burglar alarms, and other measures—that would account for the remaining 65% or more of the reduction in violent crime.<sup>10</sup>

But incarceration, while certainly necessary, is a very expensive option.<sup>11</sup> The cost of incarcerating a single federal prisoner has steadily risen over the past 15 years. In Fiscal Year 2000, the average per capita cost of incarceration for a single federal prisoner was \$21,603.<sup>12</sup> In Fiscal Year 2014, the cost was \$30,619.85.<sup>13</sup> Further, it costs even more to incarcerate a prisoner in the state system.<sup>14</sup> As of Fiscal Year 2010, the average annual cost of incarcerating a state prisoner was \$31,286, with the costs ranging from \$14,603 in Kentucky to \$60,076 in New York.<sup>15</sup>

In addition to large budgetary expenditures, increased incarceration comes with an equally large human cost that should not be ignored. There are now over two million adults behind bars in the United States.<sup>16</sup> As of March 2009, roughly one out of every 31 adults was under some form of correctional control, either through incarceration or supervision; compare this to one out of every 77 adults during Ronald Reagan’s presidency.<sup>17</sup> This impacts both the life prospects of the offenders themselves and the lives of their family members, who are often unintended casualties when their loved ones are incarcerated for a long time. The Pew

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9. William Spelman, *The Limited Importance of Prison Expansion*, in *THE CRIME DROP IN AMERICA* 108 (Alfred Blumstein & Joel Wallman eds., 2000).

10. See Dara Lind & German Lopez, *16 Theories for Why Crime Plummeted in the US*, VOX (May 20, 2015), <http://bit.ly/1yJEPaj> [perma.cc/R287-VB9W]; see generally FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK’S LESSONS FOR URBAN CRIME AND ITS CONTROL* (2013).

11. See CONG. RESEARCH SERV., R42937, *THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS* 15 (2014), <http://bit.ly/1QIISuQ> [perma.cc/E6VZ-CM2U].

12. *Id.*

13. Annual Determination of Average Cost of Incarceration, 80 Fed. Reg. 45, 12523 (Mar. 9, 2015).

14. CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUST., *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS* 8–9 (2012), <http://bit.ly/1C8xE6x> [perma.cc/EP5H-3ABD].

15. *Id.*

16. PEW CTR. ON THE STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS* 1 (2009), <http://bit.ly/1L9n1M0> [perma.cc/4V8Y-D3TA].

17. *Id.* at 5.

Charitable Trusts estimates that, as of 2010, one out of every 28 children had a parent behind bars—up from one out of every 125 children in 1985.<sup>18</sup>

Some parental figures are violent; some commit crimes that endanger their children. Not surprisingly, when these parents are incarcerated, family prospects may actually improve.<sup>19</sup> But that is not the case for the vast majority of families that have a parental figure incarcerated. Parents who commit crimes may not be the best role models, but they often remain positive influences in their children's lives.<sup>20</sup> Without positive role models in their lives, many children flounder. Studies show that the children of incarcerated fathers struggle more in school, act more aggressively, and have difficulty forming positive relationships with their peers.<sup>21</sup> Many studies indicate that children with incarcerated parents often turn to crime themselves.<sup>22</sup> Furthermore, parents who stay out of prison remain breadwinners; it is no surprise that families with fathers in prison experience higher risks of poverty and homelessness.<sup>23</sup>

Nobody in his right mind disputes the fact that there are some people who should go to prison and never return to society because of the continuing threat they pose to public safety. However, most inmates do not fall into that category; indeed, the vast majority (approximately 95%) of them will, in fact, return to our communities.<sup>24</sup>

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18. BRUCE WESTERN & BECKY PETTIT, PEW CHARITABLE TR., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4 (2010), <http://bit.ly/1YjcAau> [perma.cc/8XMP-S5GF]; see also TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 103 (2007); Jeffrey Fagan, *Crime, Law, and the Community: Dynamics of Incarceration in New York City*, in THE FUTURE OF IMPRISONMENT 27, 42–47 (Michael Tonry ed., 2004).

19. *Hearings*, *supra* note 1 (statement of John G. Malcolm).

20. See WESTERN & PETTIT, *supra* note 18, at 21 (Two-thirds of men in state prisons were employed at the time of their incarceration, 44% lived with their children prior to incarceration, and more than half [52% of mothers and 54% of fathers] were the primary earners for their children. The average child's family income decreased by 22% the year after a father was incarcerated.).

21. See, e.g., WESTERN & PETTIT, *supra* note 18, at 21; Amanda Geller et al., *Beyond Absenteeism: Father Incarceration and Child Development*, 1 DEMOGRAPHY 49 (2012), <http://1.usa.gov/1qDj88t> [perma.cc/PS34-VKQZ].

22. See, e.g., Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIM. & JUST.: A REVIEW OF RESEARCH 133 (2008), <http://bit.ly/1p91Xvi> [perma.cc/C6PP-M3TB]; Joseph Murray et al., *Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis*, 138 PSYCHOLOGICAL BULL. 175 (2012), <http://bit.ly/1p920XW> [perma.cc/37RS-GUSD]; ELIZABETH DAVIES ET AL., UNDERSTANDING THE EXPERIENCES NEEDS OF CHILDREN OF INCARCERATED PARENTS: VIEW FROM MENTORS, URBAN INST. (2008), <http://urban.is/1p0iG3e> [perma.cc/LMT4-89LR].

23. *Hearings*, *supra* note 1 (statement of John G. Malcolm).

24. See DEPT. OF JUST., BUREAU OF JUST. STATS., REENTRY TRENDS IN THE U.S. (2016),

### III. STATE REFORM EFFORTS AND PRELIMINARY RESULTS

It used to be that criminal justice reform, like entitlement spending, “was a third rail in politics—touch it, and you could be sure that your next opponent would run a commercial saying you were ‘soft on crime.’ It was a one-way ticket to ‘Loserville,’” especially in conservative states.<sup>25</sup>

But see what some conservative governors are saying now. In a recent interview, former Texas Governor Rick Perry stated, “now we’ve expanded [specialized courts] into prostitution courts and veteran courts [which] gives the courts the flexibility to deal with nonviolent drug-related events.”<sup>26</sup> He added, “That’s not to say that the people didn’t make a mistake, that they weren’t going to be punished for it, but we’re not going to throw them in jail and throw away the key.”<sup>27</sup>

In Alabama, Governor Robert Bentley, after signing a criminal justice reform bill into law, told Congress, “I believe that our prison reform efforts have created a healthy foundation that can, over time, transform the landscape of the entire criminal justice system for the better.”<sup>28</sup> And, upon signing a criminal justice reform bill in his state, Mississippi Governor Phil Bryant, a former law enforcement officer, stated, “We pledged to Mississippians that we would make this the ‘public safety session’, and we have worked hard to develop this ‘Right on Crime’ research-based plan that is tough on crime while using resources wisely where they make the most impact.”<sup>29</sup> After signing a reform bill in the Sooner state, Oklahoma Governor Mary Fallin stated,

[f]or those who have just a problem—they’re not a criminal, but they have a problem—try to get them treatment, try to get them help, keep the family together, let them support their families, let them get back into society with treatment, with help, once they prove they’re willing to do that, and become productive

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<http://1.usa.gov/1TBKV5A> [perma.cc/QFQ6-4Q2A].

25. John G. Malcolm, *Why Are Conservatives Embracing Criminal Justice Reform?*, NEWSWEEK (Aug. 4, 2015), <http://bit.ly/1DtOvYz> [perma.cc/X6R6-9MEC].

26. Samantha-Jo Roth, *Rick Perry: Obama Is Following Our Lead in Texas on Criminal Justice Reform*, HUFFPOST POLITICS (July 13, 2015), <http://huff.to/1CACAb2> [perma.cc/2GL9-SVJY].

27. *Id.*

28. Press Release, Office of the Governor, State of Alabama, Governor Bentley Addresses Congress on Alabama’s Prison Reform Efforts (July 14, 2015), <http://1.usa.gov/21Q8PyX> [perma.cc/U6HH-MC740].

29. Press Release, Office of the Governor, State of Mississippi, Mississippi Enacts Comprehensive, Bipartisan Criminal Justice Reforms (Mar. 31, 2014), <http://bit.ly/1NkQROj> [perma.cc/U7QE-7VNK].

citizens.<sup>30</sup>

And upon signing a sweeping criminal justice reform package, Utah Governor Gary Herbert stated,

Utahns understand our prison gates must be a permanent exit from the system, not just a revolving door. Just like every other area of government, we need to ensure we are getting the best possible results for each taxpayer dollar. We have taken significant steps to rebuild lives with a smarter, more efficient criminal justice system while enhancing public safety.<sup>31</sup>

In his second inaugural address, Georgia Governor Nathan Deal said:

In Georgia, we have taken monumental steps in recent years to give nonviolent offenders a new beginning. As a result, our alternative courts are paying dividends for offenders, their families and taxpayers. . . . For those who are already in our prison system, many of them now have the chance for a new beginning too. Approximately 70 percent of Georgia's inmates don't have a high school diploma. If their lack of an education is not addressed during their incarceration, when they re-enter society they have a felony on their record but no job skills on their résumé. I am here to tell you, an ex-con with no hope of gainful employment is a danger to us all. This is why we must work to get these individuals into a job. Our prisons have always been schools. In the past, the inmates have learned how to become better criminals. Now they are taking steps to earn diplomas and gain job skills that will lead to employment after they serve their sentences. . . . Our message to those in our prison system and to their families is this: If you pay your dues to society, if you take advantage of the opportunities to better yourself, if you discipline yourself so that you can regain your freedom and live by the rules of society, you will be given the chance to reclaim your life. I intend for Georgia to continue leading the nation with meaningful justice reform.<sup>32</sup>

I could cite many similar statements from other conservative governors, but you get the point: attitudes towards criminal justice

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30. Brian Hardzinski, *Fallin Addresses Corrections Reform, 2016 Election During Colorado Governors Panel*, KGOU (July 27, 2015), <http://bit.ly/1SsjRUV> [perma.cc/BQ56-FTL6].

31. Press Release, Office of the Governor, State of Utah, Governor signs 82 bills, education funding, criminal justice reform (Mar. 31, 2015), <http://1.usa.gov/20VVNM3> [perma.cc/E7SM-BHAC]; Robert Gehrke, *Sentences for Some Drug Crimes Reduced Under Newly Signed Utah Law*, SALT LAKE TRIBUNE (Mar. 31, 2015), <http://bit.ly/1I586ii> [perma.cc/S5ZM-YCM4].

32. Greg Bluestein, *Four Keys to Nathan Deal's Inaugural Speech*, AJC.COM (Jan. 12, 2015), <http://on-ajc.com/17AUU5k> [perma.cc/CY6S-LHTJ].

reform have shifted dramatically, and the results speak for themselves. Conservative governors in states like Alabama, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, and Utah, as well as governors in other states, are taking action to reform a broken criminal justice system. Thus far, these measures have proven to be popular with their voters.<sup>33</sup>

So what changed? Several years ago, many states began to face shrinking budgets, rising prison costs, and dangerously overcrowded prisons.<sup>34</sup> Necessity being the mother of invention, governors in red, blue, and purple states began thinking that there might be smarter ways to address their prison systems—ways that would lower costs and might even enhance public safety—and that there might be sensible alternatives to incarceration for some categories of offenders. They began implementing some measured reforms to see what would happen.<sup>35</sup>

The vast majority of states now provide incentives to offenders, particularly in the form of “earned time” credit that can result in sentence reductions.<sup>36</sup> Offenders who complete specified educational, treatment, or vocational training programs, or offenders who engage in productive work assignments within prison or on work crews, may earn some time back.<sup>37</sup> Since 2000, well over half of the states have taken steps to roll back minimum mandatory sentences in drug cases.<sup>38</sup> Most states now authorize diversion of lower-level drug offenders into community supervision and treatment programs. Many states now use risk-and-needs assessments to tailor supervision and treatment programs based on each offender’s recidivism risk and particular treatment needs.<sup>39</sup>

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33. See, e.g., *Public Opinion on Sentencing and Corrections Policy in America*, PUB. OPINION STRAT. & MELLMAN GROUP (2012), <http://bit.ly/1QcpXUJ> [perma.cc/6SJR-D5VG].

34. Malcolm, *supra* note 26.

35. *Id.*

36. *Hearings, supra* note 1 (statement of John G. Malcolm).

37. See ALISON LAWRENCE, NAT’L CONF. OF STATE LEGISLATURES, CUTTING CORRECTIONS COSTS: EARNED TIME POLICIES FOR STATE PRISONERS (2009), <http://bit.ly/1TBcdEv> [perma.cc/SMS2-9XAL]; ALISON LAWRENCE, NAT’L CONF. OF STATE LEGISLATURES, TRENDS IN SENTENCING AND CORRECTIONS: STATE LEGISLATION (2013), <http://bit.ly/1JAJni5> [perma.cc/TNE5-CFRF].

38. RAM SUBRAMANIAN & RUTH DELANEY, VERA INST. OF JUST., PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES (2014), <http://bit.ly/1SqE4Xi> [perma.cc/PXJ4-EH3T].

39. See *Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offender*, PEW CENTER ON THE STATES: SUBJECT SAFETY PERFORMANCE PROJECT (2011), <http://bit.ly/1TjKDA2> [perma.cc/A8JH-SUYT].



Many states have also created specialized courts, such as substance abuse, mental health, and veterans' courts, to address offenders whose criminogenic needs and risk factors stem from those experiences.<sup>40</sup>

And what have the results been so far? In a September 2015 report, The Pew Charitable Trusts found that, over a five-year period (from 2009 to 2014), the ten states that instituted reforms and cut their imprisonment rates the most experienced *greater* drops in crime (16% average crime rate reduction) than the ten states that increased their imprisonment rates the most (13% average crime rate reduction).<sup>41</sup> Some states that were not in the top ten (in terms of cutting their imprisonment rates) also experienced dramatic reductions in crime. Texas, for instance, cut its incarceration rate by 11% over this time period and experienced a 24% reduction in crime.<sup>42</sup> Michigan cut its incarceration rate by 4% and experienced a 26% reduction in crime.<sup>43</sup> Virginia cut its incarceration rate by 7% and experienced a 21% reduction in crime.<sup>44</sup> Wisconsin cut its incarceration rate by 6% and experienced a 17% reduction in crime.<sup>45</sup> And North Carolina cut its incarceration rate by 4% and experienced a 21% reduction in crime.<sup>46</sup>

Of course, every state is different; some anomalies exist. It is also important to remember that a causal relationship cannot be assumed from a mere correlation. Nonetheless, what these results strongly suggest is that we should no longer take it as a given that simply putting more offenders away for longer periods of time is the only—or even the best—way of reducing crime in our communities.<sup>47</sup> When it comes to criminal justice reform, it seems that a number of states are picking up the mantle suggested to them by Supreme Court Justice Louis Brandeis: A “single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the

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40. LAWRENCE, TRENDS IN SENTENCING AND CORRECTIONS: STATE LEGISLATION, *supra* note 37.

41. *Imprisonment, Crime Rates Fell in 30 States over 5 Years*, PEW CHARITABLE TR. (Sept. 28, 2015), <http://bit.ly/1PJLvsh> [perma.cc/8GDB-UPSA].

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Malcolm, *supra* note 25.

rest of the country.”<sup>48</sup> The results, so far, look very promising.

#### IV. FEDERAL REFORM EFFORTS

Congress has recently taken up the issue of criminal justice reform, although it remains to be seen what, if anything, will result from those efforts.<sup>49</sup> While such efforts appeared to be gaining momentum, recent—and, in some cases, dramatic—spikes in violent crime<sup>50</sup> and drug overdoses,<sup>51</sup> and the controversy surrounding *mens rea* reform, among other things,<sup>52</sup> appear to have halted that momentum, at least for the time being.<sup>53</sup>

While many proposals addressing a wide array of important issues have been introduced, this article will focus on three of those: front-end reform (which some refer to as “sentencing reform”), back-end reform (which some refer to as “prison reform”), and *mens rea* (Latin for “guilty mind”) reform.<sup>54</sup> Because

48. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

49. See *Hearings*, *supra* note 1 (statement of John G. Malcolm).

50. See, e.g., Max Ehrenfreund & Denise Lu, *More People Were Murdered Last Year than in 2014, and No One’s Sure Why*, WASH. POST (Jan. 27, 2016),

<http://wapo.st/1nOY79H> [perma.cc/9UW6-GZGK] (noting that preliminary data indicates that 36 cities had more homicides in 2015 than in 2014, while only 13 cities had fewer; citing dramatic increases in homicides in Baltimore, Cleveland, and Washington, D.C., among others, and noting that FBI preliminary crime statistics for the first half of 2015 indicates that homicides increased by 10.8% in jurisdictions with at least one million people and by 12.4% in cities with populations between 500,000 and one million residents); Aamer Madhani, *Chicago Records 51 Homicides in January, Highest Toll Since 2000*, USA TODAY (Feb. 1, 2016), <http://usat.ly/1NMdcOe> [perma.cc/A8LP-XRKY]; Josh Sanburn, *Murders Are Up in Many U.S. Cities Again This Year*, TIME (May 13, 2016), <http://ti.me/1TRx4qG> [perma.cc/SFH2-9KJE] (citing a survey by the Major Cities Chiefs Association that homicides have risen by 9% and non-fatal shootings have risen by 21% in the largest 63 cities in the first quarter of 2016 compared to the first quarter of 2015).

51. See, e.g., Scott Wegener, *James Comey: FBI Director Sees ‘No End in Sight’ to Heroin Epidemic*, WCPO (Oct. 14, 2015), <http://bit.ly/1UKKpBp> [perma.cc/6F7Y-N6MR]; Pete Williams, *DEA Finds Heroin Use Skyrocketing Across U.S.*, NBC NEWS (Nov. 4, 2015), <http://nbcnews.to/1GMv1jS> [perma.cc/HA68-5XT3].

52. Other reasons would include the reluctance of conservatives to compromise with, or appear to make common cause with, those on the left who continue to insist—wrongly in my view—that any inequities (perceived or real) that exist in our criminal justice system are the result of inveterate and systemic racism, as well as the inclusion in some bills of provisions that would likely reduce the sentences of some offenders who have been convicted of violent offenses under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924.

53. See, e.g., Susan Ferrechio, *Senate GOP at War with Itself Over Criminal Justice Bill*, WASH. EXAMINER (Feb. 4, 2016), <http://washex.am/21fu9rK> [perma.cc/59JQ-UGUD]; *Warren’s Criminal Complaint*, WALL ST. J. (Feb. 5, 2016), <http://on.wsj.com/23P3ZAf> [perma.cc/5LZD-5A7K].

54. Some of the important issues that are beyond the scope of this article would include, among other things, civil asset forfeiture reform, the use of body cameras by law enforcement officials, collateral consequences imposed on many offenders upon their release from prison, juvenile justice reform, the appropriate use of solitary confinement, and the sealing or expungement of criminal records for certain types of offenses or offenders. I have, however, written about some of these topics elsewhere. See, e.g., John Malcolm, *Civil*

it is unclear which iteration of these reforms, if any, will survive the sturm und drang (the “storm and stress”) of the legislative process, this article addresses the nature and significance of these types of reforms at a more generic level, rather than the specifics of proposals that may be scrapped or substantially revised.

Front-end reform involves proposals that would reduce the amount of time that certain offenders are sentenced to serve. Most prominently, these proposals seek to reform federal mandatory minimum laws. Back-end reform involves mechanisms that would enable an offender to get time cut off his sentence or to change his conditions of confinement by engaging in productive activities designed to reduce the risk of recidivism based on that offender’s particular needs. While sentencing reform—front-end and back-end—addresses how long people should serve once convicted, *mens rea* reform addresses those who never should have been convicted in the first place—those people who engaged in conduct without any knowledge of, or intent to violate, the law and which they could not have reasonably anticipated would violate a criminal law.

#### V. FRONT-END REFORM

The federal prison population increased dramatically after the enactment of mandatory minimum sentencing laws for drug offenses in the 1980s. There were just over 24,000 offenders in federal prisons in 1980, but, by 2013, the number had grown to nearly 220,000.<sup>55</sup> In February 2016, there were 196,000 offenders in federal prison; 46.5% of those offenders were incarcerated for federal drug-related offenses.<sup>56</sup>

Our federal prisons are not filled with offenders convicted of simple drug possession (and the few who are likely bargained their way down to that charge). Moreover, drug dealing is harmful to society and poses a threat to public safety. The potential for violence, gang involvement, and lethal overdose is inherent in most drug transactions. Therefore, the question is not *whether* drug dealers should be punished, but rather *how long* they should be punished.

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*Asset Forfeiture: Good Intentions Gone Awry and the Need for Reform*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 151 (Apr. 20, 2015), <http://heritagetrust.org/1DzIP8U> [perma.cc/5XQH-8K6K].

55. *Federal Prison System Shows Dramatic Long-Term Growth*, PEW CHARITABLE TR. (2015), <http://bit.ly/1SkEEWF> [perma.cc/7SRA-NSDZ].

56. See FED. BUREAU OF PRISONS, STATISTICS: TOTAL FEDERAL INMATES (2016), <http://1.usa.gov/1QAfkia> [perma.cc/2PD8-JDWD]; FED. BUREAU OF PRISONS, STATISTICS: OFFENSES (2016), <http://1.usa.gov/1VIRkTO> [perma.cc/7QUS-F3VM].

In 2014, 50.1% of all federal drug offenders were convicted of an offense carrying a mandatory minimum sentence<sup>57</sup> (62.1% in 2013),<sup>58</sup> and 48.6% of drug offenders had little or no criminal history<sup>59</sup> (49.6% in 2013).<sup>60</sup> Only 7% of drug offenders in both 2013 and 2014 were sentenced under the “career offender” sentencing guideline, which requires two prior convictions for a drug offense or a crime of violence.<sup>61</sup> And in 2014, only 142 federal drug offenders—0.7%—used violence or the threat of violence in committing their crimes; only 12.3% used or possessed a weapon.<sup>62</sup>

There are dozens of mandatory minimum penalties covering a variety of offenses.<sup>63</sup> Mandatory minimums for drug offenses are primarily triggered by the type and amount of drug involved. For example, if someone possesses with intent to distribute 1 gram of LSD (less than a teaspoon) or 5 grams of pure methamphetamine (a packet), a mandatory minimum of 5 years is triggered for a first offense, 10 years for a second offense, 20 years for a first offense in which death or serious bodily injury resulted, or life for a second offense in which death or serious bodily injury resulted.<sup>64</sup> If the amount is 10 grams of LSD or 50 grams of pure meth (less than 2 ounces), a mandatory minimum of 10 years is triggered for a first offense, 20 years for a second offense or a first offense in which death or serious bodily injury resulted, or life imprisonment for a third offense or a second offense in which death or serious bodily injury resulted.<sup>65</sup> Many drug offenders caught dealing small amounts of narcotics end up being held responsible for much larger amounts, thereby triggering a mandatory minimum penalty, sold by others who are deemed to be their co-conspirators in a drug ring. In general, judges must impose these mandatory minimum

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57. U.S. SENT’G COMM’N, ANNUAL REPORT FISCAL YEAR 2014, at A-5, <http://bit.ly/21Qjmds> [perma.cc/5CHQ-7VA9].

58. U.S. SENT’G COMM’N, ANNUAL REPORT FISCAL YEAR 2013, at A-42, <http://bit.ly/1p0t3E4> [perma.cc/E5S2-65SS].

59. U.S. SENT’G COMM’N, 2014 SOURCEBOOK OF FED. SENT’ STATS., at Table 37, <http://bit.ly/1TBVD8C> [perma.cc/4Y8A-FHNK].

60. U.S. SENT’G COMM’N, 2013 SOURCEBOOK OF FED. SENT’G STATS., at Table 37, <http://bit.ly/1pt55SB> [perma.cc/22T6-PJ3U].

61. See *id.* at Figure B & Table 22, <http://bit.ly/1L9tCG0> [perma.cc/9AGM-PZEN] & <http://bit.ly/1YjCScO> [perma.cc/5BT3-FU7F]; U.S. SENT’G COMM’N, 2014 SOURCEBOOK OF FED. SENT’G STATS., at Figure B & Table 22, <http://bit.ly/1ROe4H6> [perma.cc/QVU7-MC8E] & <http://bit.ly/1p0veaL> [perma.cc/U33D-HEWC].

62. U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS GUIDELINE CALCULATION BASED 28 (2014), <http://bit.ly/1OWU13i> [perma.cc/E3G5-2UBW].

63. See FEDERAL MANDATORY MINIMUMS, FAMILIES AGAINST MANDATORY MINIMUMS (2013), <http://bit.ly/VKrZfV> [perma.cc/S3P6-PV8K].

64. *Id.*

65. *Id.*

sentences although federal drug crimes invariably carry statutory maximum sentences well above these minimums.<sup>66</sup>

Under existing federal law, there are only two ways for an offender convicted of a mandatory minimum offense to avoid receiving the minimum penalty: by persuading the prosecutor to file a motion for a substantial assistance departure with the sentencing judge, or by qualifying for the “safety valve.”<sup>67</sup> Regarding the former, if an offender provides information about others who are engaging in criminal activity and the government successfully uses that information to prosecute those individuals, the government may choose, in its sole discretion,<sup>68</sup> to file a substantial assistance motion.<sup>69</sup> If the motion is granted, the court is permitted to sentence the offender below the mandatory minimum.<sup>70</sup> But, of course, low-level drug offenders would likely have little useful information to provide, which makes it highly unlikely that the government would file such a motion for those offenders.

Under the current “safety valve,”<sup>71</sup> the offender may qualify for a sentence below the mandatory minimum if he satisfies five objective criteria. First, a defendant cannot be an organizer, leader, manager, or supervisor of the drug activity (i.e., he must be a street dealer, a lookout, a “mule,” or otherwise engaged in the kinds of activities that are typically performed by someone at the very bottom of the totem pole in the drug ring).<sup>72</sup> Second, the defendant must provide complete and truthful information to the government (since the defendant is at the lowest level in the organization, the government is likely to already know what the

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66. See, e.g., *id.* (demonstrating that possession with intent to distribute one gram of LSD carries a minimum mandatory sentence of 5 years and a statutory maximum sentence of 40 years; a second offense [or first offense involving 10 grams of LSD] carries a minimum mandatory sentence of 10 years and a statutory maximum sentence of life imprisonment.).

67. See 18 U.S.C. § 3553 (2012) (explaining if a prosecutor engages in “charge bargaining” and never charges the offender with a mandatory minimum offense, then the offender would not be subject to a mandatory minimum penalty); see also U.S. CONST. art. 2, § 2, cl. 1 (noting the president could invoke his Pardon Power authority and grant clemency to reduce the sentence of someone who has received a mandatory minimum penalty, but this would occur—if at all—long after the defendant was sentenced by a judge).

68. The only exception to this rule is if the government’s refusal to file a substantial assistance motion is based on an unconstitutional motive such as the defendant’s race or religion. See *Wade v. United States*, 504 U.S. 181, 185–86 (1992).

69. This is sometimes referred to as a § 5K1.1 motion. See U.S. SENT’G COMM’N, 2011 FEDERAL SENTENCING GUIDELINES MANUAL, Chapter Five, Park K § 5K1.1 Departures (2011).

70. 18 U.S.C. § 3553(e) (2012) (codifying the substantial assistance provision).

71. 18 U.S.C. § 3553(f) (2012) (codifying the safety valve).

72. 18 U.S.C. § 3553(f)(4) (2012).

defendant has to say). Third, the offense cannot have resulted in death or serious bodily injury. Fourth, the offense cannot have involved the use or possession of a dangerous weapon or the making of a credible threat of violence. And fifth, the defendant cannot have more than one criminal history point (i.e. no more than one prior conviction which resulted in a sentence of 60 days incarceration or less). These are stringent criteria to meet and few offenders qualify. In 2014, for example, 66.7% of drug offenders did not receive relief under the safety valve<sup>73</sup> (65.3% in 2013).<sup>74</sup>

In a 2014 speech at Georgetown Law School, Patti Saris, Chief Judge of the United States District Court for the District of Massachusetts and current Chair of the United States Sentencing Commission, stated:

[M]andatory minimum penalties sweep more broadly than Congress likely intended. Many in Congress emphasized the importance of these penalties for targeting kingpins and high-level members of drug organizations. Yet the Commission found that 23 percent of federal drug offenders were low-level couriers who transported drugs, and nearly half of these were charged with offenses carrying mandatory minimum penalties. The category of offenders most often subject to mandatory minimum penalties were street level dealers—many levels down from kingpins and organizers.<sup>75</sup>

Similarly, appearing before the House Judiciary Committee's Subcommittee on Crime and Criminal Justice in 1993, Judge Vincent Broderick testified:

There are few Federal judges engaged in criminal sentencing who have not had the disheartening experience of seeing major players in crimes before them immunize themselves from the mandatory minimum sentences by blowing the whistle on their minions, while the low-level offenders find themselves sentenced to the mandatory minimum prison term so skillfully avoided by the kingpins.<sup>76</sup>

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73. U.S. SENT'G COMM'N, 2014 SOURCEBOOK OF FED. SENT'G STATS., Table 44, <http://bit.ly/1p9iXl6> [perma.cc/AR4C-JBHC].

74. U.S. SENT'G COMM'N, ANNUAL REPORT FISCAL YEAR 2013, at A-42, <http://bit.ly/1p0t3E4> [perma.cc/E5S2-65SS].

75. See Hon. Patti B. Saris, Chair, U.S. Sent'g Comm'n, Address at the Georgetown University Law Center: A Generational Shift For Drug Sentences 4 (Mar. 26, 2014), <http://bit.ly/1XP3Bxh> [perma.cc/7PYL-R3W9].

76. *Federal Mandatory Minimum Sentencing: Hearing before the Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary*, 103rd Cong. (1993) (testimony of Vincent Broderick).

We should also consider the costs of incarceration and its ramifications. In Fiscal Year 2000, the Bureau of Prisons constituted roughly 18% of the Department of Justice's ("DOJ") discretionary budget.<sup>77</sup> Today, it is 26% of DOJ's budget,<sup>78</sup> and it is projected to exceed 28% by Fiscal Year 2018.<sup>79</sup> This does not include the costs of detaining and transferring prisoners, which is currently 6.5% of the Department's budget.<sup>80</sup> This means less money for investigators, prosecutors, victims' services, grants to state and local law enforcement authorities, and other departmental priorities. The growth of the prison system presents other problems as well. In a November 2015 report, DOJ's Office of Inspector General stated: "Though the number of federal inmates has declined for a second year in a row, the Department of Justice . . . continues to face a crisis in the federal prison system. Continued high rates of overcrowding both negatively impact the safety and security of staff and inmates and drive costs upward."<sup>81</sup> The report further noted:

[A]lthough overall overcrowding decreased from 33 percent in June 2014 to 26 percent in August 2015, overcrowding at high security institutions has actually increased from 42 percent to 51 percent. This presents a particularly significant concern because more than 90 percent of high security inmates have a history of violence, making confinement in such conditions especially problematic.<sup>82</sup>

Overcrowding jeopardizes the safety of correctional officers and the prisoners they oversee. It also diverts the attention of treatment staff, which limits the availability of substance abuse and mental health care, as well as other programs designed to reduce recidivism.

Regarding costs, the report stated that the Federal Bureau of Prisons:

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77. *Hearings*, *supra* note 1 (statement of John G. Malcolm).

78. See DEPT. OF JUST., FED. PRISON SYS., FY 2016 BUDGET REQUEST AT A GLANCE, <http://1.usa.gov/1TqkIUK> [perma.cc/V4GR-ABJ2]; DEPT. OF JUST., FY 2016 BUDGET SUMMARY, <http://1.usa.gov/1TZFLxO> [perma.cc/ZQ4Z-SDX4].

79. See Memorandum from Michael E. Horowitz, Inspector General, on DOJ's Top Management and Performance Challenges, to Attorney General (Dec. 11, 2013), <http://1.usa.gov/1Wjwq69> [perma.cc/47G5-42AA].

80. See DEPT. OF JUST., U.S. MARSHALS SERV., FY 2016 BUDGET REQUEST AT A GLANCE, <http://1.usa.gov/1UaaqK> [perma.cc/2HN4-X5NH]; see also DEPT. OF JUST., FY 2016 BUDGET SUMMARY, <http://1.usa.gov/1YNJIqz> [perma.cc/QE6R-WV2P].

81. See Memorandum from Michael E. Horowitz, Inspector General, on DOJ's Top Management and Performance Challenges, to Attorney General (Nov. 10, 2015), <http://1.usa.gov/1WWjRQA> [perma.cc/Q7LF-HU6Q].

82. *Id.*

[C]urrently has the largest budget of any Department component other than the [FBI], accounting for more than 25 percent of the Department's discretionary budget in FY 2015, and employing 34 percent of the Department's staff. The BOP's enacted budget was nearly \$7 billion in FY 2015, an 11-percent increase since FY 2009, despite a decline in the federal prison population from 214,149 in FY 2014 to 206,176 in FY 2015—its lowest level in 6 years. Further, the BOP has requested an additional 6-percent increase for next year, despite projecting that its population will decrease by an additional 12,000 inmates.”<sup>83</sup>

The Department of Justice's budget has declined every year—excluding last year—since 2010.<sup>84</sup> Given current fiscal constraints, it is safe to say that the federal government will not embark on a large scale federal prison expansion project for the foreseeable future. Much as some might wish that the federal government would make cuts elsewhere (while others might wish for tax increases) in order to increase the Justice Department's budget for prison expansion, wishing will not make it so.

Given this reality, each prison cell is very valuable real estate that ought to be occupied by individuals who pose the greatest threat to public safety. Under our current system, too many relatively low-level drug offenders are locked up for 5, 10, and 20 years when lesser sentences would, in all likelihood, more than satisfy the legitimate penological goals of general deterrence, specific deterrence, and retribution.

There are many ways to reform mandatory minimum laws. One way is to restore the discretion of federal judges to sentence an offender below a mandatory minimum sentence, regardless of the type of offense. Another is to reduce the length of the mandatory minimum sentences for all drug offenders or to expand the number of offenders who qualify for the “safety valve” that currently exists, or some combination thereof.<sup>85</sup> While each

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83. *Id.* at 3.

84. DEPT. OF JUST., TOTAL DISCRETIONARY BUDGET AUTHORITY AND FULL-TIME EQUIVALENT, FY 2006–FY 2016, <http://1.usa.gov/26lLEfp> [perma.cc/74YB-F86Z].

85. The safety valve is codified at 18 U.S.C. § 3553(f) (2012). Under the current “safety valve,” the offender may qualify for a sentence below the mandatory minimum if he satisfies five objective criteria. First, a defendant cannot be an organizer, leader, manager, or supervisor of the drug activity (i.e., he must be a “mule” or street dealer; in other words, he must be someone at the very bottom of the totem pole in the drug ring). Second, the defendant must provide complete and truthful information to the government (though, since the defendant is at the lowest level in the organization, the government is likely to know already what the defendant has to say). Third, the offense cannot have resulted in death or serious bodily injury to anyone. Fourth, the offense cannot have involved the use or possession of a dangerous weapon or the making of a credible threat of violence. And, fifth,



approach has its pros and cons, I favor the approach that modestly reduces the length of mandatory minimum sentences for drug offenders to more reasonable levels (except in instances in which the offender's actions resulted in death or serious bodily injury) and expands the safety valve. This will ensure that most of the relief is given to low-level, nonviolent offenders who pose less risk to public safety, are less likely to recidivate, and are more likely to become productive, law-abiding members of society.<sup>86</sup>

Some people fear that reforming mandatory minimum laws will reduce the incentives of low-level drug dealers (so-called "little fish") to cooperate with law enforcement authorities in their efforts to go after the organizers and leaders of such activity (so-called "big fish"). Others fear that loosening mandatory minimum laws will result in the premature release of dangerous criminals, thereby threatening to undermine the gains we have made in terms of reduced crime rates.<sup>87</sup> Both concerns are understandable and legitimate.

Reforming mandatory minimum laws would reduce some of the incentives for "little fish" to cooperate against "big fish," and lowering mandatory minimum sentences or expanding the current safety valve would reduce some of the leverage that prosecutors currently enjoy to induce cooperation. Yet, if our federal mandatory minimum laws were revised, there would still be plenty of incentives for defendants to cooperate against "bigger fish."

First, those who wish to qualify for the existing (or any expanded version of the) safety valve would still have to provide complete and truthful information to the government, given that is one of the existing conditions for qualification.<sup>88</sup> Second, most of the reforms proposed to date would reduce the level of mandatory minimum sentences, but would not eliminate them.<sup>89</sup> Third, it is worth

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the defendant must have no more than one criminal history point (i.e., no more than one prior conviction which resulted in a sentence of 60 days incarceration or less).

86. Some of the proposals that have been introduced in Congress have included mandatory minimum relief for some offenders who have been convicted of violent felony offenses, including armed career criminals. I do not favor such proposals because, in my view, such offenders pose an undue risk to public safety and the benefits of keeping such offenders incarcerated for longer periods of time outweigh any benefit to be derived by reducing their sentences or releasing them early.

87. See, e.g., William G. Otis, *The Case Against the Smarter Sentencing Act*, 26 FED. SENT'G REP. 302-06 (2014).

88. See *supra* note 85.

89. But see S. Res. 353, 114th Cong. § 2 (2015); H.R. 706, 114th Cong. § 2 (2015) (An exception to these proposed reforms is the Justice Safety Valve Act of 2015; the Senate version of this bill, S. 353, was introduced by Sen. Rand Paul (R-KY) and Sen. Patrick Leahy

remembering that we are talking about the *minimum* sentence that a judge must impose; drug crimes invariably carry statutory maximum sentences that are well above these minimums, so a sentencing judge is always free to impose a higher sentence if he believes it is warranted under the circumstances.

Fourth, even if there were no mandatory minimum sentences, there would still be incentives for defendants to cooperate in order to obtain favorable recommendations from prosecutors, which often carry considerable sway with sentencing judges. A sentencing judge is far more likely to look favorably on a defendant when the prosecutor says, “Your honor, the defendant told us everything he knows and is cooperating with our ongoing investigation,” as opposed to when a prosecutor says, “Your honor, we have reason to believe that the defendant has useful information, but he has refused to cooperate with our ongoing investigation.”

And finally, as a general matter, people are sentenced based on what they deserve, considering the gravity of the crimes they commit. If all we cared about was leveraging cooperation against other wrongdoers, then we would make all federal crimes involving more than one person, including all conspiracy charges, mandatory minimum offenses. The reason we do not is because it would result in many disproportionate sentences—which is precisely what too many “little fish” involved in the drug trade currently receive.

Moreover, if Congress were to pursue front-end reform by expanding the number of people who qualify for the safety valve—rather than by lowering mandatory minimum sentences—the concerns of law enforcement officials would be ameliorated, for two reasons. First, as noted above, it is already a requirement that anyone hoping to qualify for the current safety valve must provide complete and truthful information to the government.<sup>90</sup> Second, by limiting the safety valve expansion to relatively low-level drug offenders, the government would still be able to exert the same pressure it currently does, on those with the most information to provide; specifically, those individuals who are most involved would not qualify for the expanded safety valve and who would, therefore, be subject to the current mandatory minimum penalties unless they

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(D-VT), and the House version, H.R. 706, was introduced by Rep. Bobby Scott (D-VA)). It would expand the discretion of sentencing judges to sentence offenders without regard to a mandatory minimum sentence when they believe that such a sentence would be unduly harsh; neither version has, to date, received a vote in the House and Senate Judiciary Committees.

90. See *supra* note 85.

rendered “substantial assistance”<sup>91</sup> to the government.

Additionally, those who fear that reforming mandatory minimum laws would invariably lead to increases in crime should consider the fact that over thirty states have taken steps to roll back mandatory sentences, especially for low-level drug offenders, since 2000.<sup>92</sup> As noted above, crime rates have mostly continued to drop in those states. Michigan, for example, eliminated mandatory minimum sentencing for most drug offenses in 2002, applied the change retroactively, and made nearly 1,200 inmates eligible for immediate release; yet, between 2003 and 2012, violent crime rates dropped 13% and property crime rates dropped 24%.<sup>93</sup> Texas also reduced sentences for drug offenders;<sup>94</sup> its crime rates are at their lowest level since 1968.<sup>95</sup>

## VI. BACK-END REFORM

Our collective faith in the correction system’s ability to successfully rehabilitate offenders has waxed and waned over the years; we have viewed prison as a place for confinement, and, alternatively, as a place that should serve as a correctional institution for those amenable to and capable of being “corrected.” The latter view of the prison is a reasonable one. While some hardened and violent offenders will likely always pose a threat to public safety and should remain incarcerated, many offenders—

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91. See USSG § 5K1.1 (2015); 18 U.S.C. § 3553(e) (2012); 28 U.S.C. § 994(n) (2012).

92. According to the Vera Institute of Justice, at least 29 states have revised their mandatory sentences since 2000. See RAM SUBRAMANIAN & RUTH DELANEY, *supra* note 38. Since then, at least two states (Maryland and Florida) have also revised their mandatory minimum laws. *The State of Sentencing 2014: Developments in Policy and Practice*, SENT’G PROJECT (2015), <http://bit.ly/18ATuIZ> [perma.cc/T5F5-B5TU]; Mike Riggs, *Maryland Passes Mandatory Minimum Sentencing Reform*, FAMILIES AGAINST MANDATORY MINIMUMS (2015), <http://bit.ly/1FdVM9W> [perma.cc/PF7V-U9PP]. For additional information about new sentencing initiatives recently enacted by various states, see Ram Subramanian et al., *Recalibrating Justice: A Review of 2013 State Sentencing and Corrections Trends*, VERA INST. OF JUST. (2014), <http://bit.ly/1r8UzwE> [perma.cc/RU6S-SH88].

93. *Criminal Justice Reform: Suggested Changes for Tennessee: Hearing before the Tennessee Senate Judiciary Committee* (2014) (statement of John G. Malcolm, Heritage Foundation), <http://heritag.org/1SXhOnq> [perma.cc/U2BT-UV4C].

94. Other changes include more substance abuse and mental health treatment programs in prison and post-release programs in communities, intermediate sanctions facilities for probation and parole violators giving them a short-term alternative instead of a direct return to prison for longer periods of incarceration, expanded use of specialty courts (mental health, drugs, veterans, and prostitution), and alternatives for low-level, nonviolent offenders, including some drug offenders.

95. See *Lessons from the States: Responsible Prison Reform: Hearing before Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary*, 113th Cong., 30 (2014) (statement of Jerry Madden, former Chairman, Texas House Corrections Committee).

particularly those with only a modest prior record who take advantage of prison rehabilitation and skills training programs—could become productive, law-abiding members of society. So long as we are realistic and methodical in our approach, and the results are rigorously analyzed and our approaches continuously re-evaluated, we should not give up on those whose lives can be reformed and salvaged.

Most of the proposals under consideration have similar characteristics: first, they direct the U.S. Attorney General to develop a robust, scientifically sound, and statistically valid, post-sentencing risk-and-needs assessment tool that incorporates both static and dynamic factors; second, they require all eligible offenders<sup>96</sup> to undergo regular risk-and-needs assessments to determine whether they represent a low, moderate, or high risk of reoffending; and third, they provide incentives to eligible offenders who participate in and successfully complete programs or engage in other productive activities that are designed to meet their particular needs and which would decrease the likelihood that they would recidivate once released.

These incentives are in the form of “earned time credit”<sup>97</sup> for low- and moderate-risk offenders (with offenders of lower risk receiving greater benefits), which can result in early release or a change in conditions of confinement to a halfway house or home confinement. High-risk offenders, who are deemed too dangerous to be released early or to be confined in less restrictive settings, could earn other benefits that are meaningful to them, such as increased phone use or visitation privileges, that pose no threat to public safety.

Predicting the future, including the risk that a particular offender will reoffend upon release, is a difficult undertaking

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96. Some categories of offenders—such as terrorists, certain repeat offenders, sex offenders, and violent offenders—would be ineligible under most proposals that Congress has considered to date.

97. Earned time credit should be distinguished from good time credit, which is awarded based on being compliant with prison rules and not causing problems, rather than on completing programs or engaging in other productive activities designed to improve the skill sets of inmates which make those inmates less likely to recidivate upon release. *See* 18 U.S.C. § 3624(b) (2015) (“a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner’s life, may receive credit toward the service of the prisoner’s sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner’s term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations.”).

under any circumstances, especially when that prediction is made on a subjective basis. Risk-and-needs assessment tools, which are already being used by several states,<sup>98</sup> are designed to help predict the recidivism risks for different offenders at different points in the criminal justice system, objectively.<sup>99</sup> Although such tools vary somewhat, they typically utilize an actuarial approach based on data compiled in a large number of cases, are designed to assess risks and needs associated with an offender, and are accompanied by a professional evaluation of criminogenic risk factors associated with that offender. Such factors typically include criminal history, employment history, financial stresses, educational background, familial relations, residential stability, substance abuse history, associations with criminal peers, anti-social thinking, mental health history, emotional control and aggression, coping mechanisms, problem solving abilities, and other pertinent personality traits.<sup>100</sup>

Most proposals envision incorporating both “static” and “dynamic” risk factors. Static factors relate to a defendant’s background, past actions, and current conditions that might be predictive of future criminal behavior and which will not change.

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98. See RAM SUBRAMANIAN & RUTH DELANEY, VERA INST. OF JUST., PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES (2014), <http://bit.ly/1SqE4Xi> [perma.cc/PXJ4-EH3T] (listing states that have recently expanded their use of risk-and-needs assessments).

99. For a general discussion of risk-and-needs assessment tools and good time credits, see Paul J. Larkin, Jr., *Managing Prison By The Numbers: Using the Good-Time Laws and Risk-Needs Assessments to Manage the Federal Prison Population*, 1 HARV. J.L. & PUB. POL’Y 1 (2014). Some, including former U.S. Attorney General Eric Holder, have questioned whether the use of such assessments might undermine the values of individualized and equal justice and might exacerbate unjust disparities in sentencing practices. See, e.g., Eric Holder, U.S. Attorney General, Remarks Before the Nat’l Ass’n of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference (Aug. 1, 2014), <http://1.usa.gov/1u785ki> [perma.cc/EY7A-GGJP]; Jesse Jannetta et al., *Could Risk Assessment Contribute to Racial Disparity in the Justice System?* URBAN INST. (Aug. 11, 2014), <http://urban.is/24edMiP> [perma.cc/M9LB-BWLE]; Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 4 STAN. L. REV. 66 (2014); Margaret Etienne, *Legal and Practical Implications of Evidence-Based Sentencing by Judges*, 1 CHAP. J. CRIM. JUST. 43 (2009). Although not as accurate as the “precogs” in the 2002 movie *Minority Report*, when it comes to predicting criminal conduct, the evidence strongly supports the notion that risk assessments can be very effective at identifying risk factors that can be of invaluable assistance in devising educational or treatment programs that may reduce the likelihood of recidivism and increase the likelihood of successful re-entry into society. And, of course, if certain controversial, but predictive, variables associated with protected categories are eliminated from risk assessment tools, the less useful those tools become in terms of assessing the risks of recidivism and the need for certain treatments.

100. See, e.g., John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391 (2006); Edward J. Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 VICTIMS & OFFENDERS 203 (2010); FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 96–97, 318 & n.19 (2003) (listing studies favoring actuarial assessments).

Dynamic factors, on the other hand, can change over time through positive or negative behavior.<sup>101</sup> Dynamic factors are important—at least to the extent they are scientifically sound, are statistically valid, and are not utilized or manipulated solely to reach a certain politically correct result—because they give inmates hope that, by taking positive steps to improve their prospects, they can increase the likelihood of ultimately becoming a productive member of society and can shorten the amount of time before they can leave prison to be reintegrated into society.<sup>102</sup>

This type of reform, however, has critics. Some fear that white-collar criminals will end up spending very little time in prison and that this may exacerbate racial disparities among the prison population.<sup>103</sup> This might happen, but back-end reforms are still worth supporting.

Back-end reform is important because huge numbers of state and federal inmates have mental health problems, substance abuse issues, or both.<sup>104</sup> Both conditions are associated with staggeringly high rates of recidivism, and prison programs addressing these conditions are sparse. As things stand, billions of dollars are spent cleaning up the mess left by recidivating offenders who suffer from untreated alcohol abuse, drug dependency, and mental health problems. We should spend some of that money helping people overcome these problems at a time when we have control over them and at a time when we can provide incentives, both positive (in the case of prisoners) and negative (in the case of probationers), to participate in and complete such programs.<sup>105</sup>

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101. CONG. RESEARCH SERV., R44087, RISK AND NEEDS ASSESSMENT IN THE CRIMINAL JUSTICE SYSTEM (2015), [bit.ly/1U4wl58](http://bit.ly/1U4wl58) [perma.cc/YP6Q-4LRR].

102. *Hearings*, *supra* note 1 (statement of John G. Malcolm).

103. *See, e.g.*, Dara Lind, *The Best Hope for Federal Prison Reform: A Bill That Could Disproportionately Help White Prisoners*, VOX (Feb. 12, 2015), [bit.ly/1X4CIo8](http://bit.ly/1X4CIo8) [perma.cc/TD2J-GBNM].

104. It is estimated that 65% of all inmates meet the medical criteria for substance abuse or addiction, but that only 11% receive treatment at federal and state prisons and local jails. *See Behind Bars II: Substance Abuse and America's Prison Population*, NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUM. UNIV. (Feb. 2010), [bit.ly/1TBzzyI](http://bit.ly/1TBzzyI) [perma.cc/S9N6-MRM7]. Studies have also indicated that over half of inmates have mental health problems. *See, e.g.*, DORIS J. JAMES & LAUREN E. GLAZE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, DEPT. OF JUSTICE, BUREAU OF JUST. STATS. (2006), <http://1.usa.gov/1rtoEvg> [perma.cc/BC9R-FNP9]; KiDEUK KIM ET AL., URBAN INST., THE PROCESSING AND TREATMENT OF MENTALLY ILL PERSONS IN THE CRIMINAL JUSTICE SYSTEM: A SCAN OF PRACTICE AND BACKGROUND ANALYSIS (2015), <http://urbn.is/1g2aISN> [perma.cc/C7TQ-5MFG].

105. Various states have, for example, adopted innovative programs designed to help probationers with substance abuse problems through rigorous testing with the threat of swift and certain, but measured, punishment for those who fail those tests. Such programs include

Without these changes, prisons are likely to remain what they too often are today: revolving doors.

Although it is too early to come to any definitive conclusions, such programs show great promise. Some state experiments with back-end reform are already yielding benefits. In 2013, the RAND Corporation issued a report consisting of a meta-analysis of other studies. Based on an evaluation of what it deemed to be “high quality” studies, RAND concluded that inmates who participated in educational programs while behind bars were 43% less likely to reoffend upon release.<sup>106</sup> RAND also concluded that every dollar invested in correctional education resulted in nearly five dollars in savings that would otherwise go toward the costs of re-incarcerating recidivating offenders.<sup>107</sup> Other studies indicate that incentives may be a powerful tool to motivate people to complete treatment, meet planned goals, and effectuate positive changes in behavior.<sup>108</sup> With hundreds of thousands of state and federal prisoners returning to our communities each year, the cost-savings and public safety improvements over time could be considerable.

Regardless of any immediate impact, helping inmates to overcome addiction and problems with mental illness and teaching them job skills or parenting skills or to be able to read and write, to draft a resume, to complete a job application, to know how to dress for an interview, to know how to respond to questions during an interview, to learn how to balance a checkbook, to know how to respond appropriately to adverse situations at work or in their personal lives—these are all worthwhile endeavors that can change

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Hawaii’s Opportunity Probation with Enforcement (HOPE) program and South Dakota’s 24/7 sobriety program. The Heritage Foundation, *24/7 Sobriety and HOPE: Creative Ways to Address Substance Abuse and Alcohol Abuse*, YOUTUBE (Aug. 21, 2014), <http://bit.ly/23XO7sD> [perma.cc/8ZF7-2MUV] (a videotaped program with Hon. Larry Long (who devised South Dakota’s 24/7 Sobriety program) and Hon. Steven Alm (who devised the HOPE program)); see also Paul Larkin, *The Hawaii Opportunity Probation with Enforcement Project: A Potentially Worthwhile Correctional Reform*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 116 (2014), <http://heritagelaw.org/1e68U9e> [perma.cc/8SE4-KCCU].

106. RAND found that lower-quality studies also indicated reductions in recidivism rates, but those studies did not show as high of recidivism reduction rates. LOIS M. DAVIS ET AL., RAND CORP., *EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS* 57 (2013), <http://bit.ly/1X4MWoF> [perma.cc/W7G2-CG68].

107. *Id.* at 59 (“[E]stimates show that the direct costs of providing education to a hypothetical pool of 100 inmates would range from \$140,000 to \$174,400 with three-year reincarceration costs being between \$0.87 million to \$0.97 million less for those who receive correctional education than for those who do not.”).

108. See D.A. Andrews et al., *The Risk-Need-Responsivity (RNR) Model: Does Adding the Good Lives Model Contribute to Effective Crime Prevention?* 38.7 *CRIMINAL JUSTICE AND BEHAVIOR* 735–55 (2011) (citing numerous studies).

their lives. They are certainly a better use of an inmate's time than sitting around watching TV or, even worse, hanging out with veteran criminals who provide a different sort of training.

#### VII. *MENS REA* REFORM

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.<sup>109</sup> The notion that a crime ought to involve a purposeful culpable intent has solid historical grounding.<sup>110</sup> Under the common law, it was clear that convicting someone of a crime required the union of a prohibited act (the “*actus reus*”) and a guilty mind (“*mens rea*”).<sup>111</sup> Unfortunately, for many crimes today, that is no longer the case.

In 1952, in *Morissette v. United States*, the Supreme Court held:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.<sup>112</sup>

Just last year, in *Elonis v. United States*, the Supreme Court emphasized the need for an adequate *mens rea* requirement in criminal cases.<sup>113</sup> In that case, the Court reversed a man's conviction for violating 18 U.S.C. § 875(c) by transmitting threatening communications after he posted deeply disturbing comments about his estranged wife and others on his Facebook page that she regarded, quite reasonably, as threatening; the defendant, however, claimed that they were self-styled “rap”

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109. See generally, Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745 (2014); Brian W. Walsh, *The Criminal Intent Report: Congress is Eroding the Mens Rea Requirement in Federal Criminal Law*, HERITAGE FOUND. (May 14, 2010), [heritagetrust.org/1OVeGWX](http://heritagetrust.org/1OVeGWX) [perma.cc/2NNTC-ZV62]; BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND., WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW, (2010), [heritagetrust.org/1So4oVS](http://heritagetrust.org/1So4oVS) [perma.cc/GQU7-45JZ].

110. See Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishment Clause*, 37 HARV. J.L. & PUB. POL'Y 1065 (2014); Roscoe Pound, *Introduction to FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW* 8–9 (1927) (“Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between [sic] doing right and doing wrong and choosing freely to do wrong.”).

111. 4 WILLIAM BLACKSTONE, COMMENTARIES 432 (9th ed., Callahan & Co. 1913).

112. *Morissette v. United States*, 342 U.S. 246, 250 (1952).

113. *Elonis v. United States*, 135 S. Ct. 2001, 2002 (2015).



lyrics.<sup>114</sup> The Court noted that the statute was silent as to whether the defendant must have a specific mental state with respect to the elements of the crime and, if so, what that state of mind must be.<sup>115</sup> The Court stated that, “[t]he fact that the statute does not specify any required mental state, however, does not mean that none exists,” and, quoting *Morissette*, continued, the “‘mere omission from a criminal enactment of any mention of criminal intent’ should not be read ‘as dispensing with it.’”<sup>116</sup> The Court, citing to four other cases in which it had provided a missing *mens rea* element,<sup>117</sup> proceeded to read into the statute a *mens rea* requirement and reiterated the “basic principle that ‘wrongdoing must be conscious to be criminal.’”<sup>118</sup> The Court focused on the actor’s intent rather than the recipient’s perception: “Having liability turn on whether a ‘reasonable person’ regards the communication as a threat—regardless of what the defendant thinks—reduces culpability on the all-important element of the crime to negligence.”<sup>119</sup> While the Court declined to identify exactly what the appropriate *mens rea* standard was and whether recklessness would suffice, the Court recognized that a defendant’s mental state is critical when he faces criminal liability and that courts should read federal criminal statutes silent on *mens rea* as incorporating “that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”<sup>120</sup>

If it were a guarantee that courts would always devise and incorporate an appropriate *mens rea* standard into a criminal statute when one was missing, there might be no need for Congress to do so. But, as the *Elonis* Court noted, there are exceptions to the “‘general rule’ . . . that a guilty mind is ‘a necessary element in the indictment and proof of every crime.’”<sup>121</sup> Despite the *Elonis* Court’s recent warning about the need to interpret *mens rea* requirements to distinguish between those who engage in “wrongful conduct” and those who engage in “otherwise innocent conduct,” courts

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114. *Id.*

115. *Id.*

116. *Id.* at 2009 (quoting *Morissette*, 342 U.S. at 250).

117. *Id.* at 2009–10 (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513 (1994); *Liparota v. United States*, 471 U.S. 419 (1985); and *Morissette*, 342 U.S. at 250).

118. *Elonis*, 135 S. Ct. at 2009 (quoting *Morissette*, 342 U.S. at 252).

119. *Id.* at 2011 (citing *U.S. v. Jeffries*, 692 F.3d 473, 483–84 (6th Cir. 2012) (Sutton, J., *dubitante*)).

120. *Id.* at 2010 (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)).

121. *Id.* at 2009 (quoting *United States v. Balint*, 258 U.S. 250, 251 (1922)).

(including the Supreme Court) have, unfortunately, upheld criminal laws lacking *mens rea* requirements based on a presumption that Congress deliberated and made a conscious choice to create a strict liability crime.<sup>122</sup> Although this is a doubtful

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122. See, e.g., *Shevlin-Carpenter Co. v. State of Minn.*, 218 U.S. 57 (1910) (holding that a corporation can be convicted for trespass without proof of criminal intent); *Balint*, 258 U.S. at 254 (holding that a real person can be convicted of the sale of narcotics without a tax stamp without proof that he knew that the substance was a narcotic) (“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.”); *United States v. Behrman*, 258 U.S. 280, 285 (1922) (*Balint* companion case) (holding that a physician can be convicted of distributing a controlled substance not “in the course of his professional practice” without proof that he knew this his actions exceeded that limit); *United States v. Dotterweich*, 320 U.S. 277, 284–85 (1943) (holding that the president and general manager of a company can be convicted of distributing adulterated or misbranded drugs in interstate commerce without proof that he even was aware of the transaction) (“Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.”); *United States v. Park*, 421 U.S. 658 (1975) (upholding conviction of company president for unsanitary conditions at a corporate warehouse over which he had supervisory authority, but not hands-on control); *United States v. Goff*, 517 F. App’x 120, 123 (4th Cir. 2013) (holding that the government need not prove that a defendant knew blasting caps qualified as explosives or detonators, and that government need not prove that a defendant knew that he had stored blasting caps in an illegal manner) (“We cannot believe that Congress set out to police a myriad of dangerous explosives regardless of their explosive power but considered the policing of detonators necessary only when they actually possess an ability to detonate.”); *United States v. Burwell*, 690 F.3d 500, 523 (D.C. Cir. 2012) (holding that the government need not prove that a defendant knew the weapon he carried was capable of firing automatically in order to support sentence enhancement for use of a machine gun while committing a violent crime) (Rogers, J., dissenting) (“Thus, neither of the first two interpretative rules—grammatical rules of statutory construction nor the presence of otherwise innocent conduct—counseled in favor of requiring proof of *mens rea*, and the Court thus held that no such proof was required. In so holding, the Court did not, however, classify the provision as a public welfare offense. Nor did it frame the question before it as a choice between offenses that have *mens rea* requirements and public welfare offenses that do not.”); *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) (holding that the government does not need to prove that a defendant knew of his status as a convicted felon in order to prove knowing possession of a firearm by someone who has been convicted of a felony) (Because “Congress is presumed to enact legislation with . . . the knowledge of the interpretation that courts have given to an existing statute. . . . [W]e may assume that Congress was aware that: (1) no court prior to FOPA required the government to prove knowledge of felony status and/or interstate nexus in prosecutions under [the statute’s] predecessor statutes; (2) the only knowledge the government was required to prove in a prosecution under [the statute’s] predecessor statutes was knowledge of the possession, transportation, shipment, or receipt of the firearm; and (3) Congress created the FOPA version of [the statute] consistent with these judicial interpretations.”); *United States v. Harris*, 959 F.2d 246, 258 (D.C. Cir. 1992) (holding that Congress intended to apply strict liability to the machine gun provision of § 924(c)) (“The language of the section is silent as to knowledge regarding the automatic firing capability of the weapon. Other *indicia*, however, namely the structure of section 924(c) and the function of *scienter* in it, suggest to us a congressional intent to apply strict liability to this element of the crime.”); *United States v. Montejo*, 353 F. Supp. 2d 643, 655–56 (E.D. Va 2005) (holding that a defendant need not have knowledge that identification actually belonged to another

proposition to begin with, the moral stakes are too high to leave such matters to guessing by a court as to whether Congress truly intended to create a strict liability offense or, more likely, in the rush to pass legislation, simply neglected to consider the issue. And even if a court concluded that Congress did not mean to create a strict liability crime, there is an ever-present risk that the court would pick an inappropriate standard that fails to provide adequate protection to the accused.

In May 2013, the U.S. House of Representatives Committee on the Judiciary established an Over-Criminalization Task Force, which held a series of hearings over the course of a year.<sup>123</sup> The need for meaningful *mens rea* reform was a consistent theme throughout those hearings. During the task force's first hearing, Subcommittee Chairman James Sensenbrenner asked four witnesses<sup>124</sup> to name their top priority to address overcriminalization; each wanted: *mens rea* reform.<sup>125</sup> The task force subsequently devoted an entire hearing to the issue, titled "Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law."<sup>126</sup>

There was bipartisan recognition of the problem and support for *mens rea* reform. Republican Chairman Sensenbrenner stated that

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person (rather than being completely false) to be convicted under the Aggravated Identity Theft Penalty Enhancement Act. The Court found against the defendant even though it recognized that the defendant "correctly points out that the conduct that Congress appeared most concerned with when it enacted [the statute] was that of individuals who steal the identities of others for pecuniary gain. . . . However, Congress did not make pecuniary gain and victimization elements of the offense. So long as the language and structure of the statute do not countervail the clearly expressed intent of the legislature—to prevent identity theft and for other purposes—the statute cannot be said to be ambiguous."), *aff'd by* United States v. Montejó, 442 F.3d 213 (2006), *abrogated in part by* Flores-Figueroa v. United States, 556 U.S. 646 (2009); United States v. Averí, 715 F. Supp. 1508, 1509–1510 (M.D. Ala 1989) (holding that the government need not prove a defendant knew about record-keeping requirements as an element of a crime of "knowingly" failing to maintain records) (" . . . Congress may have used the term "knowingly" in [the statute] to mean only that the defendant must have been aware that he was not maintaining reasonably informative records on his usage of controlled substances. . . . [T]his statute falls into 'the expanding regulatory area involving activities affecting public health, safety and welfare' in which the traditional rule of guilty purpose or intent has been relaxed.") (quoting United States v. Freed, 401 U.S. 601, 607).

123. Evan Bernick, et al., *Is Congress Addressing Our Overcriminalization Problem? Reviewing the Progress of the Overcriminalization Task Force*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 131 (Aug. 12, 2014), [heritagelaw.org/1BbVxgh](http://heritagelaw.org/1BbVxgh) [perma.cc/A77T-5353].

124. Deputy Attorney General George Terwilliger, then-Chairman of the American Bar Association's Criminal Justice Section, William Shepherd, then-President of the National Association of Criminal Defense Lawyers, Steven Benjamin, and myself.

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

126. *See 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).

“[t]he lack of an adequate intent requirement in the Federal Code is one of the most pressing problems facing this Task Force . . .”<sup>127</sup> Lending his support to the issue, Ranking Member Robert “Bobby” Scott stated:

The *mens rea* requirement has long served as an important role in protecting those who did not intend to commit a wrongful act from prosecution or conviction. . . . 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.<sup>128</sup>

During another hearing, Congressman Scott added:

The real question before us is how to address not only the regulations that carry criminal sanctions, but also numerous provisions throughout the Criminal Code that also have inadequate or no *mens rea* requirement. . . . Addressing and resolving the issue of inadequate or absent *mens rea* and in all the criminal code would benefit everyone.<sup>129</sup>

Similarly, during a hearing about the scope of regulatory crimes, Democratic Congressman John Conyers stated:

First, when good people find themselves confronted with accusations of violating regulations that are vague, address seemingly innocent behavior and lack adequate *mens rea*, fundamental Constitutional principles of fairness and due process are undermined. . . . Second, *mens rea*, the concept of a “guilty mind”, is the very foundation of our criminal justice system.<sup>130</sup>

Following the completion of the task force’s hearing, the Democratic members of the task force and the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations issued a report in which they stated:

Federal courts have consistently criticized Congress for imprecise drafting of intent requirements for criminal offenses. . . . It is clear that the House and Senate need to do better. We can do so by legislating more carefully and articulately regarding *mens rea* requirements, in order to protect against unintended and unjust

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127. *Id.* at 2 (statement of Rep. James Sensenbrenner).

128. *Id.* at 3 (statement of Rep. Robert Scott).

129. *Regulatory Crime: Solutions: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. 2 (2013) (statement of Rep. Robert Scott).

130. *Regulatory Crime: Identifying the Scope of the Problem: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. 5 (2013) (statement of Rep. John Conyers).

conviction. We can also do by ensuring adequate oversight and default rules when we fail to do so.<sup>131</sup>

There are different *mens rea* standards, providing varying degrees of protection to the accused (or, depending on your perspective, challenges for the prosecution). The following recitation of the different *mens rea* standards is somewhat broad and simplified, and courts often differ in how they define those standards, which can make a huge difference in close cases.<sup>132</sup> The “willfully” standard provides the highest level of protection to an accused, requiring proof that the accused acted with the knowledge that his conduct was unlawful. A “purposefully” or “intentionally” standard requires proof that the accused engaged in conduct with the conscious objective to cause a certain harmful result. A “knowingly” standard provides less protection—how much less depends to a great extent on how that word is defined. Some courts define the term “knowingly” to mean that the accused was aware of what he was doing (i.e., he was not sleepwalking, having a psychotic episode, or something of that nature) and that he was aware to a practical certainty that his conduct would lead to a harmful result.<sup>133</sup> Other courts define the term to only require the former.<sup>134</sup> A *mens rea*

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131. BOBBY SCOTT, DEMOCRATIC VIEWS ON CRIMINAL JUSTICE REFORMS RAISED BEFORE THE OVER-CRIMINALIZATION TASK FORCE & THE SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS 120, (2014), [1.usa.gov/1SozxIO](http://1.usa.gov/1SozxIO) [perma.cc/9FLM-PBHH].

132. See, e.g., MODEL PENAL CODE § 2.02 (1981) (general requirements of culpability); *United States v. Bailey*, 444 U.S. 394, 403–07 (1980) (discussing different standards and noting the difficulty of discerning the proper definition of *mens rea* required for any particular crime); *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (holding that “willfulness” requires proof of “an intentional violation of a known legal duty”) (citing *United States v. Bishop*, 412 U.S. 346, 360 (1973)); *Bryan v. United States*, 524 U.S. 184, 191–92 (1998) (“As a general matter, when used in the criminal context, a ‘willful’ act is one undertaken with a ‘bad purpose.’ In other words, in order to establish a ‘willful’ violation of a statute, ‘the Government must prove that the defendant acted with knowledge that his conduct was unlawful.’”) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994)); *Holloway v. United States*, 526 U.S. 1 (1999) (discussing the use of “intentional” and not reading it to require proof of knowledge of illegality); *United States v. Cooper*, 482 F.3d 658, 667–68 (4th Cir. 2007) (discussing “knowing” standard); *United States v. Sinskey*, 119 F.3d 712, 715–16 (8th Cir. 1997) (discussing “knowing” standard); *United States v. Hopkins*, 53 F.3d 533, 537–41 (2d Cir. 1995) (discussing “knowing” standard); *United States v. Weitzenhoff*, 35 F.3d 1275, 1284 (9th Cir. 1993) (en banc) (discussing “knowing” standard); *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 613 (5th Cir. 1991) (discussing “knowing” standard); *United States v. Ortiz*, 427 F.3d 1278, 1282–83 (10th Cir. 2005) (discussing “negligence” standard); *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999) (discussing “negligence” standard); *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123, 1129 (3d Cir. 1979) (discussing “negligence” standard).

133. *Bailey*, 444 U.S. at 403–05.

134. See, e.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71–73 (1994); *United States v. Cooper*, 482 F.3d 658, 665 (4th Cir. 2007).

standard of “recklessly” or “wantonly” requires proof that the accused was aware of what he was doing, that he was aware of the substantial risk that such conduct could cause harm, and that, despite this knowledge, he acted in a manner that grossly deviated from the standard of conduct that a reasonable, law-abiding person would have employed in those circumstances. Finally, the “negligently” standard, which, save for strict liability, provides the least level of protection for the accused, only requires proof that the accused did not act in accordance with how a reasonable, law-abiding person would have acted under those circumstances. “Negligently” is often utilized in connection with criminal statutes that define *mens rea* based on what a defendant “reasonably should have known.” “Negligence” is a term traditionally used in tort law and is extremely ill-suited to criminal law. Indeed it is arguably not a *mens rea* standard at all; someone who causes an accident because they were slightly careless cannot be said to have acted with a “guilty mind.”

Today, there are nearly 5,000 federal criminal statutes scattered throughout the 52 titles of the federal code<sup>135</sup> and buried within the Code of Federal Regulations, which is comprised of approximately 200 volumes with over 80,000 pages; there are an estimated 300,000 or more criminal regulatory offenses,<sup>136</sup> or so-

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135. *The Crimes on the Books and Committee Jurisdiction: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. 22 (2014) (testimony of John S. Baker, Professor Emeritus, LSU Law School), <http://1.usa.gov/1QyTgku> [perma.cc/TY29-JQK5]; see also Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 37 (1997) (“Legislatures, concerned about the perceived weakness of administrative regimes, have put criminal sanctions behind administrative regulations governing everything from interstate trucking to the distribution of food stamps to the regulation of the environment.”); Paul Larkin, *Regulatory Crimes and the Mistake of Law Defense*, HERITAGE FOUND. (July 9, 2015), [heritage.org/1H8EHmT](http://heritage.org/1H8EHmT) [perma.cc/B4SA-HN8A]; *Morissette v. United States*, 342 U.S. 246, 253–54 (1952) (stating that the Industrial Revolution “multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms” and resulted in “[c]ongestion of cities and crowding of quarters [that] called for health and welfare regulations undreamed of in simpler times.”).

136. There are many instances in which Congress grants a broad delegation to regulatory agencies to promulgate regulations, violations of which can result in criminal prosecution. For example, pursuant to 42 U.S.C. § 6921(a) & (b) (2006), the EPA is granted broad authority to characterize and list “hazardous materials,” which it has done on several occasions: 40 C.F.R. § 261.3 (2016) (generally defining “hazardous waste”); §§ 261.20–261.24(a) (defining as hazardous waste solid waste that has the characteristics of ignitability, corrosivity, reactivity, or toxicity); §§ 261.4, 261.38–261.40 (defining “exclusions” from “hazardous waste”); § 261.5 (defining special requirements for hazardous waste generated by “conditionally exempt small quantity generators”); § 261.6 (defining requirements for “recyclable materials” as an exemption from “hazardous waste”); § 261.10 (specifying criteria for identifying “the characteristics of hazardous waste”); § 261.11 (defining requirements for listing “hazardous waste”); § 261.24(b) (listing “toxic wastes”); § 261.31 (listing hazardous wastes from “nonspecific sources”); and § 261.32 (listing hazardous wastes from “specific

called “public welfare” offenses. It is a dirty little secret that nobody—not even Congress or the Department of Justice—knows precisely how many criminal laws and regulations currently exist.<sup>137</sup> Many of these laws lack adequate, or even any, *mens rea* standard; a prosecutor need not prove that the accused had any intent to violate the law, or even had any knowledge that he was violating a law, in order to convict. That means that innocent mistakes or accidents can—and frequently do—become crimes.

Consider how many people would know that the following are federal crimes:

- To make unauthorized use of the 4-H club logo,<sup>138</sup> the Swiss Confederation coat of arms,<sup>139</sup> or the “Smokey the Bear” or “Woodsy Owl” characters.<sup>140</sup>
- To misuse the slogan “Give a Hoot, Don’t Pollute.”<sup>141</sup>
- To transport water hyacinths, alligator grass, or water chestnut plants.<sup>142</sup>
- To possess a pet (except for a guide dog) in a public building, a beach designated for swimming, or on public transportation.<sup>143</sup>
- To fail to keep a pet on a leash that does not exceed six feet in length on federal park land.<sup>144</sup>
- To dig or level the ground at a campsite on federal land.<sup>145</sup>

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sources”). Violations of provisions pertaining to hazardous waste can subject individuals or entities to criminal prosecution under 42 U.S.C. § 6928 (2012). Similarly, pursuant to 29 U.S.C. § 655(b) (2012), the Department of Labor (DOL) is empowered to establish national occupational health and safety standards. Once established, the DOL may require the use of signs warning employees about particular hazards, the use of particular types of protective gear, and the type and number of medical examinations for particular employees. Violations of such rules can result in criminal prosecution pursuant to 29 U.S.C. § 666 (2012). Also, Congress has empowered the President to list articles and services that are subject to strict export restrictions because of their potential military uses. The State Department has done so under far-reaching International Traffic in Arms Regulations (ITAR), 22 C.F.R. §§ 120–130 (2016), violations of which may result in criminal prosecution.

137. It is worth noting that Congress is currently considering a proposal that would require the U.S. Attorney General and the heads of all federal regulatory agencies to compile a list of all criminal statutory and regulatory offenses, including a list of the *mens rea* requirements and all other elements for such offenses, and to make such indices available and freely accessible on the websites of the Department of Justice and the respective agencies. *See Smarter Sentencing Act of 2015* § 7 (2015). (The Senate version of this bill, which was introduced by Sen. Mike Lee (R-UT) and Sen. Richard Durbin (D-IL), is S. 502, and the House version of this bill, which was introduced by Rep. Raul Labrador (R-ID), is H.R. 920.)

138. 18 U.S.C. § 707 (2014).

139. 18 U.S.C. § 708 (2014).

140. 18 U.S.C. § 711–711a (2014).

141. *Id.* at § 711a (2014).

142. 18 U.S.C. § 46 (2014).

143. 36 C.F.R. § 2.15(a)(1) (2016).

144. *Id.* at (a)(2).

145. 36 C.F.R. § 2.10(b)(1) (2016).

- To picnic in a non-designated area on federal land.<sup>146</sup>
- To poll a service member before an election.<sup>147</sup>
- To manufacture and transport dentures across state lines if you are not a dentist.<sup>148</sup>
- To sell malt liquor labeled “pre-war strength.”<sup>149</sup>
- To write a check for an amount less than \$1.<sup>150</sup>
- To install a toilet that uses too much water per flush.<sup>151</sup>
- To roll something down a hillside or mountainside on federal land.<sup>152</sup>
- To toss a rock into a valley or a canyon on federal land.<sup>153</sup>
- To park your car in a way that inconveniences someone on federal land.<sup>154</sup>
- To ski, snowshoe, ice skate, sled, inner tube, toboggan, or do any “similar winter sports” on a road or “parking area . . . open to motor vehicle traffic” on federal land.<sup>155</sup>
- To “allow . . . a pet to make a noise that . . . frightens wildlife on federal land.”<sup>156</sup>
- To use aircraft on a hunting or fishing expedition on federal land.<sup>157</sup>
- To operate a “motorized toy, or an audio device, such as a radio, television set, tape deck or musical instrument, in a manner . . . [t]hat exceeds a noise level of 60 decibels measured on the A-weighted scale at 50 feet.”<sup>158</sup>
- To “[b]ath[e] or wash[] food, clothing, dishes, or other property at public water outlets, fixtures or pools” not designated for that purpose.<sup>159</sup>
- To “[a]llow[] horses or pack animals to proceed in excess of a slow walk when passing in the immediate vicinity of persons on foot or bicycle.”<sup>160</sup>
- To operate a “snowmobile that makes excessive noise” on federal land.<sup>161</sup>

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146. 36 C.F.R. § 2.11 (2016).

147. 18 U.S.C. § 596 (2014).

148. 18 U.S.C. § 1821 (2014).

149. 27 U.S.C. §§ 205, 207 (2014); 27 C.F.R. § 7.29(f) (2016).

150. 18 U.S.C. § 336 (2014).

151. See Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 751 (2013).

152. 36 C.F.R. § 2.1(a)(3) (2016).

153. *Id.*

154. 36 C.F.R. § 261.10(f) (2016).

155. 36 C.F.R. § 2.19(a) (2016).

156. 36 C.F.R. § 2.15(a)(4) (2016).

157. 36 C.F.R. § 13.450(a) (2016).

158. 36 C.F.R. § 2.12(a)(1) (2016).

159. 36 C.F.R. § 2.14(a)(5) (2016).

160. 36 C.F.R. § 2.16(e) (2016).

161. 36 C.F.R. § 2.18(d)(1) (2016) (“Excessive noise for snowmobiles manufactured after July 1, 1975 is a level of total snowmobile noise that exceeds 78 decibels measured on the A-weighted scale measured at 50 feet. Snowmobiles manufactured between July 1, 1973



- To use “roller skates, skateboards, roller skis, coasting vehicles, or similar devices” in non-designated areas on federal land.<sup>162</sup>
- To “fail to turn in found property” to a national park superintendent “as soon as practicable.”<sup>163</sup>
- To use a surfboard on a beach designated for swimming.<sup>164</sup>

There are, of course, certain kinds of crimes such as murder, rape, arson, robbery, and fraud, which are referred to as *malum in se* (Latin for “wrong in itself”) offenses, that are clearly morally opprobrious. It is completely appropriate and necessary in such cases to bring the moral force of the government in the form of a criminal prosecution in order to maintain order and respect for the rule of law.

As the examples cited above should make clear, however, some criminal statutes and many regulatory crimes do not fit into this category. Such crimes are known as *malum prohibitum* (Latin for “wrong because prohibited”). This category of offenses would not raise red flags to average citizens (or even to most lawyers and judges) and are “wrong” only because Congress or some regulatory authority says they are, not because they are inherently blameworthy.<sup>165</sup> The matter is even more complicated in the case of regulations. Unlike *malum in se* offenses, which are always wrong and always prohibited absent a morally-justified and well-recognized exception or circumstance (such as a legitimate claim of self-defense in a murder case), most regulations *allow* conduct; however, they circumscribe when, where, how, how often, and by whom certain conduct can be done, often in ways that are hard for non-experts to understand or predict. Such regulatory infractions are enforced and penalized through the same traditional process used to investigate, prosecute, and penalize rapists and murderers even though many of the people who commit such infractions were unaware that they were exposing themselves to potential criminal liability.<sup>166</sup>

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and July 1, 1975 shall not register more than 82 decibels on the A-weighted scale at 50 feet. Snowmobiles manufactured prior to July 1, 1973 shall not register more than 86 decibels on the A-weighted scale at 50 feet. All decibel measurements shall be based on snowmobile operation at or near full throttle.”).

162. 36 C.F.R. § 2.20 (2016).

163. 36 C.F.R. § 2.22(a)(3) (2016).

164. 36 C.F.R. § 3.17(b) (2016).

165. Richard L. Gray, *Eliminating the (Absurd) Distinction Between Malum In Se and Malum Prohibitum Crimes*, 73 WASH. U.L.Q. 1369, 1370 (1995).

166. There are additional problems with respect to regulatory crimes, specifically, regulations in which violations are punishable as criminal offenses. In addition to the fact

In *Rogers v. Tennessee*, the Supreme Court cited to “core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct.”<sup>167</sup> The threat of unknowable, unreasonable, and vague laws—all of which pertain to one’s ability to act with a “guilty mind”—troubled our Founding Fathers as well. In Federalist No. 62, James Madison warned, “It will be of little avail to the people that laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood . . . [so] that no man who knows what the law is today, can guess what it will be like tomorrow.”<sup>168</sup> It is a serious problem when reasonable, intelligent people are branded as criminals for violating laws or regulations that they had no intent to violate, never knew existed, and would not have understood to apply to their actions even if they had known about them.

The relationship between criminal and administrative law dates back to the turn of the twentieth century, when Congress established federal administrative agencies, to protect the public from potential dangers posed by an increasingly industrialized society, and a regulatory framework that included both civil and criminal penalties for failing to abide by the rules those agencies promulgated.<sup>169</sup> Those regulations cover many aspects of our lives, including our environment, the food we eat, the drugs we take, our health, transportation, and housing. As the administrative state has grown, so has the number of criminal regulations.

There are, however, important differences between criminal laws and regulations; the most important difference is that they largely serve different purposes.<sup>170</sup> Criminal laws are meant to enforce a commonly-accepted moral code, set forth in language readily

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that many regulations are vague and overbroad, many regulations are so abstruse that they may require a technical or doctoral degree in the discipline covered by the regulations to understand them. Further, because there are so many regulations located in so many places, lay people and small companies subject to those regulations likely have too few resources to locate them, and understand them. In addition to actual regulations, there are also agency “guidance” documents and “frequently-asked-questions” that agencies sometimes try to pass off as having the same legal effect as regulations.

167. 532 U.S. 451, 459 (2001).

168. THE FEDERALIST NO. 62, at 323–24 (James Madison) (George W. Carey & James McClellan eds., 2001).

169. John Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 130 (Aug. 6, 2014), [heritagelaw.org/1QXREpQ](http://heritagelaw.org/1QXREpQ) [[perma.cc/L852-W492](http://perma.cc/L852-W492)].

170. See Larkin, *supra* note 110.

understood by an average person<sup>171</sup> and that clearly identifies prohibited conduct, backed by the full force and authority of the government. Regulations, on the other hand, are meant to establish rules of the road (with penalties attached for violations of those rules) to curb excesses and address consequences in a complex, rapidly evolving, highly industrialized society, which is why they are often drafted using broad, aspirational language designed to provide agencies with the flexibility they need to address societal concerns (e.g., health hazards) and to respond to new problems and changing circumstances, including scientific and technological advances. While large, heavily-regulated businesses may be able to keep abreast of complex regulations as they change over time to adapt to evolving conditions, individuals and small businesses are often less able to do so. When criminal penalties are attached to violations of obscure regulations, these traps for the unwary can have particularly dire consequences.

There is a “significant difference between regulations that carry civil or administrative penalties for violations and regulations that carry criminal penalties.”<sup>172</sup> People “caught up in the latter may find themselves deprived of their liberty and stripped of their right to vote, to sit on a jury, and to possess a firearm, among other penalties that simply do not apply when someone violates a regulation that carries only civil or administrative penalties.”<sup>173</sup> In addition, there is a unique stigma associated with being branded a criminal. A person loses not only his liberty and certain civil rights, but also his reputation—an intangible yet invaluable commodity, precious to entities and people alike, that once damaged, can be nearly impossible to repair.<sup>174</sup> “In addition to standard penalties that are imposed on those who are convicted of crimes, a series of burdensome collateral consequences often imposed by state or federal laws can follow an individual for life.”<sup>175</sup> For businesses, just

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171. See, e.g., *United States v. Harriss*, 347 U.S. 612 (1954) (holding that the government cannot enforce a criminal law that cannot be understood by a person of “ordinary intelligence”); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (referring to persons of “common intelligence”).

172. *Malcolm*, *supra* note 169.

173. *Id.*

174. *Id.*

175. *Id.*; Kelly Moore et al., *The Effect of Stigma on Criminal Offenders’ Functioning: A Longitudinal Mediation Model*, 37 *DEVIANT BEHAVIOR* 196 (2016), [bit.ly/1OVrR4Z](http://bit.ly/1OVrR4Z) [[perma.cc/D72Y-KXDY](http://perma.cc/D72Y-KXDY)]; see generally Devah Pager, *The Mark of a Criminal Record*, 108 *AM. J. SOCIOLOGY* 937 (2003), <http://bit.ly/1vNQBjk> [[perma.cc/K9A8-XYPH](http://perma.cc/K9A8-XYPH)]; American Bar Association, *National Inventory of the Collateral Consequences of Conviction*, (May 19, 2016), <http://bit.ly/1CuyVLL> [[perma.cc/29V4-U4YV](http://perma.cc/29V4-U4YV)]. In short, individuals convicted of crimes

being charged with violating a regulatory crime can sometimes result in the “death sentence” of debarment from participation in federal programs.<sup>176</sup>

As is the case with Congress, some regulators seem to have succumbed to the temptation to criminalize any behavior that occasionally leads to a bad outcome.<sup>177</sup> Many regulators, acting out of an understandable desire to protect the public from environmental hazards, adulterated drugs, and the like, believe it is appropriate—and, indeed, advantageous—to promulgate criminal statutes and regulations with weak *mens rea* standards or with no *mens rea* standards at all, in order to prosecute and incarcerate those who engage in conduct, albeit negligently or totally unwittingly, that causes harm to the public. They will cite to the fact that the Supreme Court has upheld the constitutionality of such crimes on several occasions,<sup>178</sup> despite significant criticism of strict

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face consequences extending beyond the end of their actual sentences, potentially lasting their entire lives. Examples include being barred from entering a variety of licensed professional fields and receiving federal student aid. The Internet has spawned numerous websites designed specifically to catalog, permanently retain, and publicize individuals’ criminal histories—all but guaranteeing perpetual branding as a criminal. These websites can demand payment from individuals in exchange for removing their mug shots and related personal information. For additional discussion about the detrimental nature of collateral consequences, see Nat’l Ass’n of Crim. Def. Lawyers, *Collateral Damage: America’s Failure to Forgive or Forget in the War on Crime* (2014), [bit.ly/1L9niyq](http://bit.ly/1L9niyq) [perma.cc/HTS7-YKRE].

176. See, e.g., Steven D. Gordon & Richard O. Duvall, *It’s Time to Rethink the Suspension and Debarment Process*, [bit.ly/1M1vZpe](http://bit.ly/1M1vZpe) [perma.cc/DR8D-SX5B]; Peggy Little, *The Debarment Power – No Do Business with No Due Process*, FEDERALIST SOC’Y: EXECUTIVE BRANCH REVIEW (Apr. 25, 2013), [bit.ly/1Rvo2uf](http://bit.ly/1Rvo2uf) [perma.cc/S8UZ-4ZAC].

177. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 282–83 (1993):

There have always been regulatory crimes, from the colonial period onward. . . . But the vast expansion of the regulatory state in the twentieth century meant a vast expansion of regulatory crimes as well. Each statute on health and safety, on conservation, on finance, on environmental protection, carried with it some form of criminal sanction for violation. . . . Wholesale extinction may be going on in the animal kingdom, but it does not seem to be much of a problem among regulatory laws. These now exist in staggering numbers, at all levels. They are as grains of sand on the beach.

Indeed, the mere existence of criminal regulations dramatically alters the relationship between the regulatory agency and the regulated power. All an agency has to do is suggest that a regulated person or entity *might* face criminal prosecution and penalties for failure to follow an agency directive, and the regulated person or entity will likely fall quickly into line without questioning the agency’s authority. For an excellent article discussing the pressures that companies face when confronted with the possibility of, and the lengths to which they will go to avoid, criminal prosecution, see RICHARD A. EPSTEIN, HERITAGE FOUND., LEGAL MEMORANDUM NO. 129: THE DANGEROUS INCENTIVE STRUCTURES OF NONPROSECUTION AND DEFERRED PROSECUTION AGREEMENTS, (2014), [heritagelaw.org/1QqMKyc](http://heritagelaw.org/1QqMKyc) [perma.cc/4EZ4-PRUG]; see also James R. Copeland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, 14 CIVIL JUSTICE REPORT 1 (2012), [bit.ly/1oVV0Nu](http://bit.ly/1oVV0Nu) [perma.cc/G57P-CATP].

178. See, e.g., *United States v. Park*, 421 U.S. 658 (1975) (upholding conviction of company president for unsanitary conditions at a corporate warehouse over which he had

liability criminal provisions.<sup>179</sup> These regulators believe, or at least fear, that insisting upon robust *mens rea* standards in our criminal laws will give a “pass” to those who engage in conduct that harms our environment; in their view, those people are most likely wealthy executives working for large, multinational corporations. But this argument is misplaced. There is no question that bad outcomes do occasionally occur and that those who engage in actions that cause harm should be held accountable. But we ought to ask an appropriate follow-up question: what penalties should we impose against these actors?

Congress needs to give greater consideration to *mens rea* requirements when passing criminal legislation, to make sure that they are appropriate for the type of activity involved and to ensure that the standard separates those who are truly deserving of the government’s highest form of condemnation and punishment—criminal prosecution and incarceration—from those who deserve some lesser sanction. Absent extraordinary circumstances, it should not be enough that the government proves that the accused possessed “an evil-doing hand”; the government should also have to

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managerial control, but not hands-on control); *United States v. Dotterweich*, 320 U.S. 277 (1943) (holding that the president and general manager of a company could be convicted of distributing adulterated or misbranded drugs in interstate commerce without proof that he even was aware of the transaction); *United States v. Balint*, 258 U.S. 250 (1922) (holding that a real person can be convicted of the sale of narcotics without a tax stamp without proof that he knew the substance was a narcotic); *United States v. Behrman*, 258 U.S. 280 (1922) (*Balint* companion case) (holding that a physician can be convicted of distributing a controlled substance not “in the course of his professional practice” without proof that he knew that his actions exceeded that limit); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910) (upholding corporation’s conviction for trespass without proof of criminal intent).

179. See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 77 (1969) (“Strict criminal liability has never achieved respectability in our law.”); H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 136, 152 (1968) (“[S]trict liability is odious.”); Francis B. Sayre, *Public Welfare Offenses*, 33 *COLUM. L. REV.* 55, 72 (1933) (“To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure.”); A.P. Simester, *Is Strict Liability Always Wrong?*, *APPRAISING STRICT LIABILITY* 21 (A.P. Simester ed., 2005) (Strict liability is wrong because it “leads to conviction of persons who are, morally speaking, innocent.”); Richard G. Singer, *The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability*, 30 *B.C. L. REV.* 337, 403–04 (1989); Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 *IOWA L. REV.* 1067, 1067–70 (1983); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 *HARV. L. REV.* 1097, 1109 (1952):

The most that can be said for such provisions [prescribing liability without regard to any mental factor] is that where the penalty is light, where knowledge normally obtains and where a major burden of litigation is envisioned, there may be some practical basis for a stark limitation of the issues; and large injustice can seldom be done. If these considerations are persuasive, it seems clear, however, that they ought not to persuade where any major sanction is involved.

prove that the accused had an “evil-meaning mind.”<sup>180</sup>

In addition to undertaking the arduous task of reviewing existing criminal statutes and regulations for adequate and appropriate *mens rea* standards, which ought to be done, Congress should pass a default *mens rea* provision that would apply to crimes in which no *mens rea* has been provided. In other words, if there is an element of a criminal statute or regulation that is missing a *mens rea* requirement, a default *mens rea* standard—preferably a robust one—should be presumed for that element. A number of states, most recently Michigan and Ohio, have enacted default *mens rea* provisions—in some cases, with overwhelming bipartisan support—yet prosecutions have continued apace and defendants in those states are still being convicted of the crimes with which they have been charged.<sup>181</sup> In other words, the sky has not fallen (and the public’s respect for the moral force of the criminal law in those states has likely been enhanced).

A default *mens rea* provision would not prohibit Congress from creating strict liability crimes (so long as Congress made clear that a crime was meant to be strict liability). Such a default provision would only come into play if Congress were to pass a criminal statute that did not contain any *mens rea* requirement whatsoever. Clearly, Congress will, at times, want to pass a strict liability crime, at least with respect to some, if not all, of the elements of that offense. The federal child pornography statute<sup>182</sup>—which currently gives prosecutors the ability to convict someone for producing child pornography without proof that the offender knew that the youth involved was a minor<sup>183</sup>—comes to mind.

Likewise, Congress should clarify that the government should not have to prove any *mens rea* standard for an element of a crime

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180. See *Morrisette v. United States*, 342 U.S. 246, 251–52 (“Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.”).

181. See Josh Siegel, *How Michigan and Ohio Made It Harder to Accidentally Break the Law*, DAILY SIGNAL (Jan. 27, 2016), <http://dailysign.al/21L3b0L> [perma.cc/8F4W-L6J7]; JOHN S. BAKER, JR., FEDERALIST SOC’Y, MENS REA AND STATE CRIMES (2012), <http://bit.ly/1QwwzRq> [perma.cc/5QFF-4AHB] (noting states that have default *mens rea* provisions, including Alaska, Arkansas, Delaware, Hawaii, Illinois, Kansas, Missouri, North Dakota, Oregon, Pennsylvania, Tennessee, Texas, and Utah).

182. 18 U.S.C. § 2251(a) (2014).

183. See, e.g., *United States v. Griffith*, 284 F.3d 338, 349 (2d Cir. 2002); *United States v. Malloy*, 568 F.3d 166, 171–72 (4th Cir. 2009); *United States v. Fletcher*, 634 F.3d 395, 400 (7th Cir. 2011); *United States v. Pliego*, 578 F.3d 938, 943 (8th Cir. 2009); *United States v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 858 F.2d 534, 538 (9th Cir. 1988).

that relates only to subject matter jurisdiction or venue.<sup>184</sup> For example, when a defendant is charged with assaulting, resisting, or impeding a federal officer or employee<sup>185</sup> or with killing a federal officer engaged in the performance of his duties,<sup>186</sup> the government should not have to prove that the defendant knew that the individual he was harming or impeding was a federal officer. Similarly, if a defendant is charged with murdering a U.S. national outside the United States,<sup>187</sup> the government should not have to prove that the defendant knew that the person he was killing was a U.S. national. Likewise, if a defendant is charged with robbing a federally insured financial institution,<sup>188</sup> the government should not have to prove that the defendant knew that the bank was federally insured or that he targeted the victim bank because it was federally insured.<sup>189</sup>

Some have argued that requiring the government to prove that somebody acted with a bad intent would encourage individuals—especially corporate officers—to act recklessly while putting on blinders to consciously avoid learning the law, facts, and circumstances surrounding their actions which would otherwise render them criminally liable; this is commonly referred to in the law as acting with “willful blindness.” Others argue that requiring the government to prove that somebody acted with a bad intent would violate the fundamental precept that “ignorance of the law is no excuse.”

These are straw man arguments. With respect to the first argument, it is well-established in the law that proof of someone acting with willful blindness serves to satisfy the element of criminal intent; in other words, someone who acts with deliberate ignorance is just as culpable and is treated exactly the same under the law as someone who acts with positive knowledge.<sup>190</sup> With respect to the

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184. Just recently, in *Luna Torres v. Lynch*, 136 S. Ct. 1619, 1633–34 (2016), the Supreme Court reiterated that while courts should generally interpret criminal statutes to require that the defendant possess a *mens rea* as to every element of an offense, that presumption does not apply to jurisdictional elements. *See also* *United States v. Yermian*, 468 U.S. 63, 68 (1984) (“Jurisdictional language need not contain the same culpability requirement as other elements of the offense.”); *United States v. Feola*, 420 U.S. 671, 677, n.9 (1975) (“the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.”).

185. 18 U.S.C. § 111 (2014).

186. 18 U.S.C. § 1114 (2014).

187. 18 U.S.C. § 2332 (2014).

188. 18 U.S.C. § 2113 (2014).

189. *See, e.g.*, *Loughrin v. United States*, 134 S. Ct. 2384, 2386–87 (2014); *see also* 18 U.S.C. § 1344(2) (2014).

190. *See, e.g.*, *United States v. Gabriele*, 63 F.3d 61, 66 n.6 (1st Cir. 1995); *United States*

second argument, the law generally does not require proof that a defendant knew his conduct was *unlawful* (if it did require such proof, then there might be some validity to the argument). Rather, intent generally requires proof that the defendant knew his conduct was *wrongful*; that means he did something knowing it was unlawful, that he did something knowing that his conduct would likely cause some harmful result, or that he did something recklessly disregarding the fact that it would likely cause some harmful result.<sup>191</sup> Moreover, as stated above, a legislature could provide that proof of mere negligence—which would not require proof that the accused knew his conduct was unlawful or that he acted knowing that there was a substantial likelihood of harm—would be sufficient to satisfy the criminal intent element.

Indeed, Congress can *always* obviate the need to resort to a default *mens rea* provision by including its own preferred *mens rea* requirement, including a lower one, with respect to the statute or element in question. And on those (hopefully rare) occasions when Congress wishes to pass a criminal law with no *mens rea* requirement whatsoever, it can and should make its intentions clear by stating in the statute itself that Congress has made a conscious decision to dispense with a *mens rea* requirement for the particular conduct in question. Such an extraordinary legislative act—which, when executed, can result in branding someone a criminal for engaging in conduct without any intent to violate the law or to cause harm—should not be accomplished through sloppy legislative drafting or arrived at through guesswork by a court trying to divine whether the omission was intentional or not. This need not, however, be an onerous requirement; Congress could, for example, choose to make its intent clear by adding a provision to a criminal statute (e.g., “This section shall not be construed to require the Government to prove a culpable state of mind with respect to any element of the offense defined in this section.”). Further, there is no magic formulation of words that Congress would need use to make its intent clear, as long as its intent was, indeed, clear.

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v. Goffer, 721 F.3d 113, 126 (2d Cir. 2013); *United States v. Richard Stadtmayer*, 620 F.3d 238 (3d Cir. 2010); *United States v. Schnitzer*, 145 F.3d 721 (5th Cir. 1998); *United States v. Lee*, 991 F.2d 343, 349 n.2 (6th Cir. 1993); *United States v. Carrillo*, 435 F.3d 767, 780 (7th Cir. 2006); *United States v. King*, 351 F.3d 859 (8th Cir. 2003); *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1975); *United States v. Delreal-Ordonez*, 213 F.3d 1263, 1268 (10th Cir. 2000); *United States v. Schlei*, 122 F.3d 944 (11th Cir. 1997).

191. See, e.g., *United States v. Yielding*, 657 F.3d 688, 708 (8th Cir. 2011) (stating that the statute required proof that “the defendant knew that his conduct was wrongful” rather than proof that he knew it violated a known legal duty).



Congress can consider, just as some states have in enacting their own *mens rea* reform measures, whether a default *mens rea* provision should apply only prospectively or whether it should also be applied to existing laws that lack *mens rea* requirements. Choosing to apply a default standard retrospectively could lead to unintended consequences; it could make it tougher to prosecute certain, discrete offenses that, perhaps, ought to be strict liability offenses and that Congress would clearly want to be strict liability offenses. Of course, Congress could always identify those offenses before or after the fact and make clear its intention that they should be strict liability offenses. Nonetheless, reasonable minds can certainly differ on whether the benefits of applying a default standard to existing laws would outweigh the costs. Alternatively, to minimize any unintended deleterious impact from retrospective application of a default *mens rea* provision, Congress could consider an exception, such as the one offered by Senator Orrin Hatch (R-UT), for “any offense that involves conduct which a reasonable person would know inherently poses an imminent and substantial danger to life or limb.”<sup>192</sup>

#### VIII. WHO BENEFITS FROM *MENS REA* REFORM

Will some senior corporate management “fat cats” benefit from stricter *mens rea* requirements, which may make it more difficult to successfully prosecute them? Maybe, but maybe not. After all, most individuals who fall into that category work in heavily regulated industries and are usually given explicit warnings by government officials, typically as a condition of licensure, about what the law requires, including potential criminal penalties. They therefore cannot reasonably or credibly claim that they were not aware that their actions might subject them to criminal liability, so long as they acted with the requisite intent. Moreover, as Paul Larkin, a Senior Legal Research Fellow at the Heritage Foundation, has noted:

Corporate directors, chief executive officers (CEOs), presidents, and other high-level officers are not involved in the day-to-day operation of plants, warehouses, shipping facilities, and the like. Lower level officers and employees, as well as small business owners, bear that burden. What is more, the latter individuals are

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192. See *Mens Rea Reform Act of 2015*, S. 2298, 114th Cong. § 2(a) (2015) (stating that the term “covered offense” does not include “any offense that involves conduct which a reasonable person would know inherently poses an imminent and substantial danger to life or limb.”).

in far greater need of the benefits from [*mens rea* reform] precisely because they must make decisions on their own without resorting to the expensive advice of counsel. The CEO for DuPont has a white-shoe law firm on speed dial; the owner of a neighborhood dry cleaner does not. Senior officials may or may not need the aid of the remedies proposed here; lower-level officers and employees certainly do.<sup>193</sup>

Consider these examples. Wade Martin, a native Alaskan fisherman, sold ten sea otters to a buyer he thought was a native Alaskan; the authorities informed him that was not the case and that his actions violated the Marine Mammal Protection Act of 1972,<sup>194</sup> which criminalizes the sale of certain species, including sea otters, to non-native Alaskans. Because prosecutors would not have had to prove that he knew the buyer was not a native Alaskan, Martin pleaded guilty to a felony charge and was sentenced to two years of probation and ordered to pay a \$1,000 fine.<sup>195</sup>

Lawrence Lewis<sup>196</sup> was the chief engineer at Knollwood, a military retirement home. On occasion, some of the elderly patients at Knollwood would stuff their adult diapers in the toilets, causing a blockage and sewage overflow.<sup>197</sup> To prevent harm to the patients, especially those in the hospice ward on the first floor, Lewis and his staff did what they were trained to do on such occasions.<sup>198</sup> They diverted the backed-up sewage into a storm drain that they believed was connected to the city's sewage-treatment system.<sup>199</sup> It turned out, unbeknownst to Lewis, that the storm drain emptied into a remote part of Rock Creek, which ultimately connects with the Potomac River.<sup>200</sup> Nonetheless, federal authorities charged Lewis with felony violations of the Clean Water Act, which only required proof that Lewis committed the physical acts which constituted the violation, regardless of any knowledge of

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193. Larkin, *supra* note 151, at 792.

194. 16 U.S.C. §§ 1371–1423 (2014).

195. See Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, WALL ST. J. (Sept. 27, 2011), <http://on.wsj.com/23XqDjm> [perma.cc/FNX6-AY84].

196. See Gary Fields & John R. Emshwiller, *A Sewage Blunder Earns Engineer a Criminal Record*, WALL ST. J. (Dec. 12, 2011), <http://on.wsj.com/1XTyyQP> [perma.cc/HS27-EAQV]; *Regulatory Crime: Identifying the Scope of the Problem: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. (2013) (testimony of Lawrence Lewis), <http://1.usa.gov/1Sw76ow> [perma.cc/4WBN-XDP7].

197. Evan Bernick, *Diverted from the Straight and Narrow Path for Diverting Sewage*, THE DAILY SIGNAL (July 5, 2013), <http://dailysign.al/1SoMO3M> [perma.cc/PJ4D-A9KC] (includes videotaped interview with Lawrence Lewis).

198. *Id.*

199. *Id.*

200. *Id.*

the law or intent to violate it on his part.<sup>201</sup> To avoid a felony conviction and potential long-term jail sentence, Lewis pleaded guilty to a misdemeanor and was sentenced to one year of probation.<sup>202</sup>

In 1996, Bobby Unser, a three-time Indianapolis 500 winner, and his friend got lost in a blinding snowstorm while driving a snowmobile; they ended up spending two harrowing nights lost in the New Mexico wilderness.<sup>203</sup> Unser was prosecuted and convicted of violating the Wilderness Act of 1964<sup>204</sup> because, during the blizzard, Unser inadvertently drove on to federal land and, fearing for his and friend's lives, abandoned the vehicle.<sup>205</sup>

Were Wade Martin, Lawrence Lewis, and Bobby Unser high-level corporate executives? Hardly. Yet, they now carry the stigma of a criminal conviction and all the attendant collateral consequences that flow from it. When morally blameless people unwittingly commit acts that turn out to be crimes and are prosecuted for those offenses (instead of merely having to pay for the harms they caused, through the civil justice system), not only are their lives adversely impacted, perhaps irreparably, but the public's respect for the fairness and integrity of our criminal justice system is diminished. This is something that should concern everyone.

In the classic 1933 law review article coining the term "public welfare offenses," Columbia Law Professor Francis Sayre stated: "To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure."<sup>206</sup> Sadly, that has not proven to be the case. In fact, quite the opposite is true; such laws have flourished.

To those who would argue that corporate big wigs might benefit

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201. *Id.*

202. *Id.*

203. See *Bobby Unser Survives Snowmobiling Ordeal*, N.Y. TIMES (Dec. 23, 1996), <http://nyti.ms/1VPh6Qj> [perma.cc/9SXA-RR45]; Jack Thompson, *Bobby Unser Convicted On Wilderness Law*, CHICAGO TRIBUNE (June 13, 1997), <http://trib.in/1Nvdm30> [perma.cc/8WY8-QUHN]; *Reining in Overcriminalization: Assessing the Problems, Proposing Solutions: Making an American Racing Legend Prove He Did Not Commit a "Crime," Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, of the Comm. on the Judiciary*, 111th Cong. (2010) (testimony of Robert "Bobby" Unser), <http://1.usa.gov/1NvcZFQ> [perma.cc/H85T-E2DC]. See generally Heritage Found., *Indy 500 Winner Bobby Unser vs. the U.S. Government*, YOUTUBE (Mar. 10, 2011), <http://bit.ly/1VcpisD> [perma.cc/X82H-TRNA] (Bobby Unser describing his ordeal in a video).

204. See 16 U.S.C. § 1131 (2014).

205. See *supra* note 203.

206. Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 72 (1933).

from *mens rea* reform, Larkin would likely eloquently respond:

To be sure, [*mens rea* reform would] not, and could not be, limited to the lower echelons of a corporation or to persons earning below a certain income. The indigent can demand the appointment of counsel at the government's expense, but the criminal law has never created a similar divide for defenses to crimes, with some available only for the poor. Just as the sun 'rise[s] on the evil and on the good' and it rains 'on the just and the unjust,' [*mens rea* reform] will aid senior corporate executives as well as entry-level employees. But any remedy for any of the ills caused by overcriminalization will have that effect. We ought not to reject remedies for a serious problem because the neediest are not the only ones who will benefit from them.<sup>207</sup>

Some people or entities intentionally pollute our air and water, or deliberately engage in other conduct knowing it will cause harm; in those cases, criminal prosecution is entirely appropriate. But it is unavoidable that bad outcomes will occur from time to time, by sheer accident and by unwitting or negligent acts. The intent of the actor should make a difference in whether he is criminally prosecuted or is dealt with, perhaps severely, through the civil or administrative justice systems—which would likely be sufficient to remedy the problem he caused and to compensate victims—without saddling him with the lifelong burdens that come with criminal conviction. After all, as Oliver Wendell Holmes, Jr., who would later be appointed to the Supreme Court, once observed, “Even a dog distinguishes between being stumbled over and being kicked.”<sup>208</sup>

## IX. CONCLUSION

Whether criminal justice reform, including *mens rea* reform, will advance in Congress over the coming years is an open question. However, such efforts appear to have firmly taken root at the state level, where the preliminary results look promising, and are likely to continue apace. Moreover, while much of the public's attention has been focused on the robust debate going on at the federal level, it is the states that have primary responsibility under our Constitution for exercising “police power”<sup>209</sup> and there are far

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207. Larkin, *supra* note 151, at 792.

208. Oliver Wendell Holmes, Jr., *The Common Law* 3 (1881).

209. See *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) (“In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good—what

more offenders in state prisons than there are in federal prisons. Some of these state reforms are controversial; not all of them will likely work. But if some of these experiments prove unsuccessful, legislators can always return to their old way of doing things. After all, with the exception of alleviating prison overcrowding, these changes are not constitutionally required.

Whether the current spike in crime rates<sup>210</sup> will become a new trend or whether it will prove to be a blip in the overall progress that has been made in combating crime over the past two decades, remains to be seen. If the former, the public's appetite for more reform will likely wane and harsher forms of punishment may return. If the latter, we may end up with the best of both worlds—continued reductions in crime, safer neighborhoods, and a fairer criminal justice system that incarcerates only those who act with criminal intent, that punishes those who commit crimes in an appropriate, yet measured way, and that addresses some of the underlying issues that offenders face, so that they are more likely to eventually become law-abiding, productive citizens.

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we have often called a 'police power.' The Federal Government, by contrast, has no such authority and 'can exercise only the powers granted to it'" (citations omitted) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819)); *see also* *United States v. Morrison*, 529 U.S. 598, 618 (2000); *United States v. Lopez*, 514 U.S. 549, 566–67 (1995).

210. *See, e.g.*, Max Ehrenfreund & Denise Lu, *More People Were Murdered Last Year than in 2014, and No One's Sure Why*, WASH. POST (Jan. 27, 2016), <http://wapo.st/1nOY79H> [perma.cc/9UW6-GZGK]; Andrea Noble, *Police Grasp for Answers as Homicides, Violent Crimes Spike in U.S. Cities*, WASH. TIMES (May 15, 2016), <http://bit.ly/1XGb1Vy> [perma.cc/RNQ5-QPUV].