No. 20-1280

United States Court of Appeals
For the First Circuit

ALFRED MORIN
Plaintiff - Appellant

v.

WILLIAM LYVER, in his official capacity as Northborough Chief of Police;
COMMONWEALTH OF MASSACHUSETTS
Defendants - Appellees

APPEAL FROM A JUDGMENT OF THE UNITES STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS, THE HON. TIMOTHY S. HILLMAN
(18-CV-40121-TSH)

REPLY BRIEF FOR THE PLAINTIFF - APPELLANT ALFRED MORIN

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Dated: January 11, 2021

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INTRODUCTION

The fundamental issue at stake is whether Dr. Morin has lost his rights under the Second Amendment for the mistake of being unaware that the District of Columbia would not recognize his Massachusetts license to carry firearms. While intending to innocently carry his firearm into the District of Columbia under his MA license, he unknowingly broke the District's laws by assuming firearms law worked similar to the driver license scheme.

STANDING BASED ON *MENS REA* REQUIREMENT

For the first time, on appeal, the Commonwealth has raised the issue of standing, apparently using the definition of *mens rea* as "an intention to do an act which is made penal by statute or by the common law," *Black's Law Dictionary* 1006 (8th ed. 2004), rather than the classical meaning intended by the plaintiff of "guilty mind." Id. From here forward, the Appellant will use the definition seemingly in use by the Commonwealth. In the Court below, the Commonwealth did not argue the defendant did not have standing, and relegated the discussion of *mens rea* to a footnote. The Second Circuit has "held that an argument made only in a footnote was inadequately raised for appellate review," Norton v. Sam's Club, 145 F.3d 114 (2nd Cir. 1998), and thus this issue should not be considered on appeal.

The Commonwealth has proposed placing Dr. Morin outside the protection of the core of the Second Amendment, claiming that he is not "law-abiding" due to not just his plea to a misdemeanor "violation of [law] regulating the [possession, ownership and/or transportation] of weapons or ammunition for which a term of imprisonment may be imposed; (M.G.L. 140 § 131(d)(i)(D)), but further justify that lifetime bar by claiming that so long as there is *mens rea* to the actions leading to the conviction, no matter how minimal, the lifetime bar is constitutional. They argue that "Under the law of the District of Columbia, those crimes are considered general intent crimes rather than specific intent crimes" and cites Bsharah v. United States, 646 A.2d 993, 999-1000 (D.C. 1994) for the proposition that possession of an unregistered firearm is a general intent crime); McMillen v. United States, 407 A.2d 603, 604-05 (D.C. 1979) for the proposition that CPWL is a general intent crime; and further claims that general intent crimes have a *mens rea* element; they are not like strict liability statutes citing Dauphine v. United States, 73 A.3d 1029, 1032 (D.C. 2013) for the proposition that "It is well settled that the general intent to commit a crime means the intent to do the act that constitutes the crime." That there is a *mens rea* requirement that prevents sleepwalkers from being convicted of

unlicensed possession of a firearm[1] is not justification for treating that crime on par with aggravated assault with a deadly weapon.

Although McMillen does, indeed, state CPWL is a general intent crime, this does not reflect on the level of *mens rea* involved. A thorough reading of McMillen shows the analysis behind that proposition: "Carrying a pistol without a license is a crime unknown to the common law, and therefore the common law criminal intent element does not apply. See Logan v. United States, D.C.App., 402 A.2d 822, 825 (1979); Mitchell v. United States, D.C.App., 302 A.2d 216 (1973)." McMillen at 604. Diving deeper into Dauphine v. United States shows that *mens rea* is not a subset of general intent. In fact, general intent is a subset of *mens rea*. The sentence immediately preceding the line in Dauphine quoted by the Commonwealth explains the relationship. "Regalado established the *mens rea* for cruelty to animals as general intent with malice.", referring to Regalado v. United States, 572 A.2d 416 (D.C.1990).

Applied to the instant case, Dr. Morin may have intended to possess a firearm in the District of Columbia, may have known he did not have a license in the District of Columbia and may have known he hadn't registered his handgun in the District of Columbia. Charitably, these are the only three elements using a "knowingly" standard of *mens rea* conceivable in the two charges Dr. Morin pled

[1] See *Morally Innocent, Legally Guilty: The Case for Mens Rea Reform*, The Federalist Society Review, Volume 18 P40-47 (2017) (Plaintiff's Addendum 1-8).

to, though it appears that all the District of Columbia requires is knowing possession. Hammond v. United States, 77 A.3d 964, 969 (D.C. 2013) (quoting Washington v. United States, 53 A.3d 307, 309 (D.C. 2012)) (describing the elements of possession of an unregistered firearm).

There is nothing in the factual record to suggest Dr. Morin intended to maliciously use his firearm and to the contrary, the Court accepted that Dr. Morin mistakenly believed his LTC issued by the Commonwealth of Massachusetts authorized his possession in the District of Columbia, similar to the way a driver operates his car, registered in his home state, using his home state driver's license, in the 50 other states or D.C. without fear of prosecution.

The Commonwealth's position on *mens rea* reinforces Appellants argument that such a crime where the *mens rea* is so low as to protect sleep walkers and few others, for a crime that, as Logan (1979) clearly articulates was not a common law crime or a crime regularly found in the text and tradition of this nation's laws, a conviction of which can't constitutionally give rise to a lifetime bar on the practice of a fundamental right.

To be clear, Appellant Dr. Morin claimed that the law to which he pled guilty required no malicious intent and that it was *malum prohibitum* in nature. This was in support of the argument that it can not be constitutional to enact a lifetime bar on the practice of a right for a crime with no violence or malicious intent. The

argument that Dr. Morin has no standing in this case because of a supporting argument is facially absurd. Dr. Morin seeks to possess a handgun for lawful purposes such as self-defense and Commonwealth law definitively prevents him from doing that by operation of criminal penalty.

FACTUAL RECORD

The appellant is challenging the conclusions of law based on the facts as found by the Court below. The Commonwealth, rather than using the facts as found by the District Court, insists on putting forth the facts it presented as undisputed to the Court below. The Commonwealth did not appeal the findings of fact from the Court below, and we therefore request this Honorable Court consider the facts as presented by the District Court.

The Commonwealth is also attempting to bring new evidence in its brief. This court's inquiry is limited to the summary judgment record before the trial court: the parties cannot add exhibits, depositions, or affidavits to support their positions on appeal. Topalian v. Ehrman, 954 F.2d 1125 n.10 (5th Cir. 1992). Here, the Commonwealth has included another study purporting to support its position that more gun laws reduce violence. See (Commonwealth's Addendum 24-25). Had this exhibit been before the Court below, the plaintiff would have had the opportunity to rebut it.

CAUSATION

The Commonwealth has cited various studies that purport to show that someone convicted of non-violent misdemeanor is more likely in the future to commit a crime. It has made no effort to explain the causation between this category of persons and the increased likelihood of criminal activity. They claim that Dr. Morin is more likely to commit a violent crime because he mistakenly believed his Massachusetts license was recognized in D.C. The state has simply lumped him into a group of criminals, because the statistics illustrates a minor correlation without any discussion of causation. They did not produce any studies showing that Massachusetts residents convicted of misdemeanor, non-violent, weapons offenses with a potential jail penalty went on to commit crimes of violence. Many groups of citizens have been shown to be more likely to be convicted of a crime in the future yet history has taught us that we cannot simply exclude a class of persons from an activity because they have definable characteristics correlated to criminal activity.

CATEGORICAL RESTRICTIONS

The Commonwealth argues that "This Court Has Upheld Categorical Restrictions on Firearms Possession by Persons with Misdemeanor Convictions and by Persons with Convictions for Non-Violent Offenses," and cites United

States v. Booker, 644 F.3d 12, 23 (1st Cir. 2011) (quoting United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc)).

It is beyond dispute that categorical restrictions on the possession by those convicted of traditional common law felony crimes comport with the Second Amendment. "The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," District of Columbia v. Heller, 554 US 570 (2008), nor does the appellant seek to challenge restrictions on violent misdemeanants like Booker or Skoien. Dr. Morin seeks to challenge categorical restrictions on firearms possession by non-violent misdemeanants, a restriction this court has never upheld.

NORTHBOROUGH'S ARGUMENT

Federal law makes a state official liable if he acts under color of law and "subjects, or causes to be subjected," any person "to the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Liability extends to "those individuals who participated in the conduct that deprived the plaintiff of his rights." Cepero-Rivera v. Fagundo, 414 F.3d 124, 129 (1st Cir. 2005). Here, the Complaint alleges that Defendant Police Chief Lyver acted pursuant to a state law – M.G.L. c. 140, § 131 – and that in so doing, he denied Plaintiff Alfred Morin of a federal constitutional right – specifically, his Second Amendment right to keep and bear arms. See Complaint ¶ 42. The

Complaint thus states a valid claim against Defendant Chief Lyver under 42 U.S.C. § 1983.

The Complaint also states a valid claim against the Town of Northborough. The claims against Chief Lyver all concern actions he took in his official capacity as the Northborough Police Chief. It is well established that when a lawsuit challenges a person's actions in an official capacity, it "generally represent[s] only another way of pleading an action against an entity of which an officer is an agent." Goldstein v. Galvin, 719 F.3d 16, 23 (1st Cir. 2013) (quoting Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690 n.55 (1978)). Thus, because the Complaint states a valid claim against Chief Lyver in his official capacity, it likewise states a valid claim against the Town of Northborough, on whose behalf Chief Lyver was acting. And because the lawsuit seeks only prospective injunctive and declaratory relief, rather than money damages, there is no need for "the separate roles of individual defendants [to] be sorted out." Battista v. Clarke, 645 F.3d 449, 452 (1st Cir. 2011).

Defendants' claim that they are not liable because they merely executed a non-discretionary state law are meritless – and indeed, accepting these claims would turn more than 100 years' worth of civil rights jurisprudence on its head. These claims all flow from Defendants' failure to recognize the basic distinction between retrospective claims for money damages and prospective claims for

declaratory and injunctive relief. While it is true that municipal defendants cannot be held liable to pay money damages merely because they executed a state law in a manner that violated the federal Constitution, ever since the Supreme Court's 1908 decision in Ex Parte Young, 209 U.S. 123, plaintiffs have been able to use § 1983 to "proceed against state officers in their official capacities to compel them to comply with federal law." Vaqueria Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464, 478 (1st Cir. 2009). The limitation is that these lawsuits can only seek "prospective injunctive or declaratory relief," rather than "retroactive monetary damages or equitable restitution." Id. Of course, the Complaint here seeks only prospective injunctive and declaratory relief – not retroactive monetary damages. See Complaint, Prayer for Relief.

Defendants' claims of non-liability dissolve as soon as one uses these basic and well established principles to analyze them. The Town cites Bd. of Cty. Comm'rs of Bryan County v. Brown, 520 U.S. 397, 404 (1997), claiming that the Town is only liable when it has been deemed the "moving force" behind the injury. Simply reading the first line of the decision, "Respondent Jill Brown brought a claim for damages against petitioner Bryan County" shows that this was a claim for damages, and not prospective injunctive and declaratory relief, and is inapplicable to the instant case.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the District Court.

Respectfully submitted,
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By his attorney,

/s/ J. Steven Foley

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Morally Innocent, Legally Guilty: The Case for Mens Rea Reform

By John G. Malcolm

Note from the Editor:

This article discusses the concept of mens rea, argues that too few federal laws contain adequate mens rea standards, and urges Congress to take up mens rea reform.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Leslie R. Caldwell, Assistant Attorney General, Criminal Division, Statement before the Senate Judiciary Committee, Hearing on the Adequacy of Criminal Intent Standards in Federal Prosecutions (Jan. 20, 2016), https://www.judiciary.senate.gov/imo/media/doc/01-20-16%20Caldwell%20Testimony.pdf.

• Robert Weissman, President, Public Citizen, Written Testimony for the Senate Judiciary Committee, Hearing on the Adequacy of Criminal Intent Standards in Federal Prosecutions (Jan. 20, 2016), https://www.citizen.org/sites/default/files/weissman-senate-judiciary-testimony-january-2016.pdf.

• Video, Senate Judiciary Committee, Hearing on the Adequacy of Criminal Intent Standards in Federal Prosecutions (Jan. 20, 2016), https://www.c-span.org/video/?403246-1/adequacy-criminal-intent-standards-federal-prosecutions.

• Rena Steinzor, *Dangerous Bedfellows*, American Prospect (May 11, 2016), http://prospect.org/article/dangerous-bedfellows.

About the Author:

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In 1997, three-time Indy 500 winner Bobby Unser was convicted of a federal crime that exposed him to a $5,000 fine and a six-month prison sentence. He and a friend were riding a snowmobile and got caught in a horrific blizzard in the woods. They abandoned the snowmobile and sought shelter. They were trapped for two days and two nights and nearly died from hypothermia.

What heinous thing did Unser do that incensed the federal government and justified his punishment? He had abandoned his snowmobile in a federal wilderness area, which is a crime. Unser had not known that this was a crime, and certainly had no intention of violating federal law—he was merely seeking shelter to save his own life. Nevertheless, the justice system found him guilty of a federal offense.[1]

Proof of mens rea—a guilty mind—has traditionally been required to punish someone for a crime because intentional wrongdoing is more morally culpable than accidental wrongdoing; our justice system has usually been content to evaluate accidents that injure others as civil wrongs, but criminal punishment has been reserved for people who do bad acts on purpose. But that has changed as legislators and regulators have begun to see the criminal justice system, not as a forum for ascertaining moral blameworthiness and meting out punishment accordingly, but as just another tool in the technocratic toolbox for shaping society and preventing social harm. Mens rea reform, if Congress implements it, would constitute an important step toward restoring justice by preventing criminal punishment for actions like Bobby Unser's leaving his snowmobile on federal land during a snowstorm. Ensuring that there are adequate mens rea standards in our criminal laws is one of the greatest safeguards against overcriminalization—the misuse and overuse of criminal laws and penalties to address every societal problem. While some critics argue that mens rea reform would only benefit wealthy corporations and their executives who flout environmental and other health and safety regulations, the truth is that such corporations and their high-ranking executives are able to hire lawyers to navigate complex regulations and avoid prosecution, while individuals and small businesses lack the time, money, and expertise to avoid accidentally violating obscure rules. Mens rea reform is necessary to ensure that our criminal justice system punishes in accordance with commonly held beliefs about right and wrong, which is important if it is to maintain its legitimacy in the eyes of all Americans.

I. Historical Justification for the Necessity of Mens Rea

The notion that a crime ought to involve a culpable intent has a solid historical grounding. 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. 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

1 *See* Conn Carroll, *Bobby Unser vs the Feds*, Daily Signal (Mar. 14, 2011), http://dailysignal.com/2011/03/14/bobby-unser-vs-the-feds/.

> understood . . . [so] that no man who knows what the law is today, can guess what it will be like tomorrow."[2]

Long before the growth of the administrative state and the proliferation of regulatory crimes, the Founders recognized that there is a serious problem when people are branded as criminals for violating laws or regulations that they did not know existed, had no intent to violate, and would not have understood to apply to their actions even if they had known about them.

Supreme Court Justice Robert Jackson—a former U.S. Attorney General and special prosecutor during the Nuremberg trials—wrote in 1952 in *Morissette v. United States*:

> 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.[3]

In 2001, in *Rogers v. Tennessee*, the Supreme Court of the United States cited "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."[4] By having adequate mens rea standards, we ensure that moral blameworthiness is front and center in the criminal justice system.

II. How Mens Rea Standards Have Changed

Traditionally, the criminal law held that that commission of a criminal act requires both mens rea, or "a guilty mind," and an actus reus, or "a bad act." Neither element on its own was sufficient to justify criminal sanctions; it was only when both of these elements were present that a case would be dealt with in the criminal system. A bad act without a guilty mind (e.g., a car accident where you are at fault) would go to the civil tort system if it caused injury, and a guilty mind without a bad act (e.g., your desire to kill someone that you never act on) would be a matter for your conscience or religious confession.[5] Today, with increasing frequency, the system has turned away from this requirement, severely weakening or abandoning altogether the mens rea standards that were once commonplace.

This change has come about as the orientation of the criminal justice system has evolved. In addition to seeking to punish those who act out of willfulness or malice, the system now seeks to punish those who do things that result in some harm that we do not like, regardless of any intentionality or malice on their part. The scope of the criminal justice system has expanded beyond the prosecution of traditional, common law offenses known as "malum in se" offenses—acts that are bad in themselves like rape, murder, robbery, and fraud—to the prosecution of regulatory offenses known as "malum prohibitum" offenses—acts that are bad simply because the law prohibits them. Absent sufficient mens rea standards, prosecuting malum prohibitum violations can result in unwitting individuals being labeled as criminals and incarcerated for committing acts that are not inherently immoral and that a reasonable person might not realize could subject them to criminal liability. Under traditional common law, if someone claimed not to know it was against the law to commit murder or robbery, it could fairly be said, to quote a great legal maxim, that "ignorance of the law is no excuse." If a person knew something was morally blameworthy when he did it, it shouldn't surprise him to discover it was also a crime too.

That is no longer the case. Today, the United States Code and the Code of Federal Regulations contain an estimated nearly 5,000 statutes[6] and more than 300,000 regulations that carry criminal penalties for violations.[7] These figures rise each year, and that's just at the federal level. With so many criminal laws and regulations on the books, it stretches credulity to assume that every citizen is

2 The Federalist No. 62, at 323–24 (James Madison) (George W. Carey & James McClellan eds., 2001).

3 342 U.S. 246, 250 (1952).

4 532 U.S. 451, 459 (2001).

5 Paul Rosenzweig, *Congress Doesn't Know Its Own Mind—And That Makes You a Criminal*, Heritage Foundation Legal Memorandum No. 98 (July 18, 2013), *available at* http://www.heritage.org/research/reports/2013/07/congress-doesnt-know-its-own-mind-and-that-makes-you-a-criminal.

6 *The Crimes on the Books and Committee Jurisdiction: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2014) (testimony of John Baker), *available at* http://judiciary.house.gov/_cache/files/44135b93-fe36-43dc-a91b-3412fe15e1f4/baker-testimony.pdf. *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."). For an interesting discussion about the emergence and expansion of regulatory crimes, see Paul J. Larkin, Jr., *Regulatory Crimes and the Mistake of Law Defense*, Heritage Foundation Legal Memorandum No. 157 at 2-3 (July 9, 2015), *available at* http://www.heritage.org/research/reports/2015/07/regulatory-crimes-and-the-mistake-of-law-defense; Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 Harv. J. L. & Pub. Pol'y 1065, 1072–77 (2014). *See also Morissette*, 342 U.S. at 253–54 (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").

7 *See, e.g.,* John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memorandum No. 26 (June 16, 2008); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991); Larkin, *Regulatory Crimes and the Mistake of Law Defense*, *supra* note 6 ("[T]he number of regulations affecting the reach of the criminal code has been estimated to exceed 300,000."); *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) (testimony of Former Attorney General Dick Thornburgh), *available at* http://judiciary.house.gov/_files/hearings/pdf/Thornburgh090722.pdf. The CFR spans 50 titles and approximately 200 volumes and is more than 80,000 pages long. *See* U.S. Government Printing Office, Code of Federal Regulations (CFRs) in Print, http://bookstore.gpo.gov/catalog/laws-regulations/code-federal-regulations-cfrs-print#4.

aware of them all. Consider how many people would know that the following are actually federal crimes:

- To make unauthorized use of the 4-H club logo,[8] the Swiss Confederation coat of arms,[9] or the "Smokey the Bear" or "Woodsy Owl" characters.[10]
- To transport water hyacinths, alligator grass, or water chestnut plants.[11]
- To keep a pet on a leash that exceeds six feet in length on federal park land.[12]
- To picnic in a non-designated area on federal land.[13]
- To poll a service member before an election.[14]
- To sell malt liquor labeled "pre-war strength."[15]
- To write a check for an amount less than $1.[16]
- To roll something down a hillside or mountainside on federal land.[17]
- To park your car in a way that inconveniences someone on federal land.[18]
- To "allow . . . a pet to make a noise that . . . frightens wildlife on federal land."[19]
- To "fail to turn in found property" to a national park superintendent "as soon as practicable."[20]

In the case of these crimes and numerous others, prosecutors rarely need to prove both an individual's mens rea and his actus reus; often, the bad act alone is enough to result in jail time. This is because many criminal laws lack an adequate—or *any*—mens rea requirement, meaning that a prosecutor does not even have to prove that the accused knew he was violating a law or that he was doing something wrong in order to convict him. Thus, innocent mistakes or accidents can become crimes.

It is important to clarify that, with respect to malum in se crimes, it is completely appropriate to bring the moral force of the government to bear in the form of a criminal prosecution in order to maintain order and respect for the rule of law, even if an individual were to claim, for example, that he did not know arson was a crime. However, as the examples above illustrate, some criminal statutes and many regulatory crimes do not fit into this category. These are malum prohibitum offenses because they are not inherently blameworthy; an average citizen would not stop to consider whether picnicking in an undesignated area in a federal park is a crime before opening up her lunchbox. Such conduct is prohibited—and prosecutable—only because a legislature or bureaucrat has said that it is. In recent decades, this category of offenses has become so voluminous that no one, not even Congress or the Department of Justice, knows precisely how many criminal laws and regulatory crimes currently exist.[21] Many of these offenses are vague, overly broad, or highly technical, and they criminalize conduct that is not obviously morally wrong. This results in a vast web of criminalized conduct that creates risks for an unwary public. Numerous morally blameless individuals and companies end up unwittingly committing acts which constitute crimes, and some of them get prosecuted for that conduct.[22]

There are different mens rea standards providing varying degrees of protection to the accused (or, depending on one's perspective, challenges for the prosecution). The following recitation of is somewhat broad and simplified—and courts often differ in how they define these standards, which can make a huge difference in close cases—but it gives a general idea of the different mens rea standards:[23]

- The standard that provides the highest level of protection to an accused is "willfully," which essentially requires proof

8 18 U.S.C. § 707 (2014).

9 18 U.S.C. § 708 (2014).

10 18 U.S.C. § 711–711a (2014).

11 18 U.S.C § 46 (2014).

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

13 36 C.F.R. § 2.11 (2016).

14 18 U.S.C. § 596 (2014).

15 27 U.S.C. §§ 205, 207 (2014); 27 C.F.R. §7.29(f) (2016).

16 18 U.S.C. § 336 (2014).

17 36 C.F.R. §2.1(a)(3) (2016).

18 36 C.F.R. § 261.10(f) (2016).

19 36 C.F.R. § 2.15(a)(4) (2016).

20 36 C.F.R. § 2.22(a)(3) (2016).

21 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. 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 the bill, which was introduced by Rep. Raul Labrador (R–ID), is H.R. 920.

22 There are additional problems with respect to regulatory crimes, that is, regulations in which violations are punishable as criminal offenses. In addition to the fact that many regulations are vague and overbroad, many are so abstruse that they may require a technical or doctoral degree in the discipline covered by the regulations to understand them. Further, there are so many regulations located in so many places that lay people and small companies subject to those regulations would be unable to locate them, much less understand them, even if they had the resources to do so. In addition to actual regulations, there are also agency guidance documents and frequently asked questions that agencies sometimes claim have the same legal effect as regulations.

23 *See, e.g.*, Model Penal Code § 2.02 (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) (term "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) (footnote omitted)); Holloway v. United States, 526 U.S. 1 (discussing the use of "intentional" and not reading it to require

that the accused acted with the knowledge that his or her conduct was unlawful.

- A "purposely" 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, but the precise level of protection depends on how knowledge is defined. Some courts have required the prosecution to prove (1) that the accused was aware of what he was doing (e.g., he was not sleepwalking) and (2) that he was aware to a practical certainty that his conduct would lead to a harmful result. Other courts have defined the term to require only the former.
- A 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 his conduct could cause harm, and that he nevertheless acted in a manner that grossly deviated from the standard of conduct that a reasonable, law-abiding person would have employed in those circumstances.
- Another standard that does not offer much protection at all is "negligently," which requires proof that the accused did not act in accordance with how a reasonable, law-abiding person would have acted in the same circumstances. "Negligently" is the relevant standard in 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 ill-suited to criminal law because it deals with accidents, even though they are accidents due to carelessness that might be somewhat blameworthy. Arguably, negligence is not a mens rea standard at all, since someone who simply has an accident by being slightly careless can hardly be said to have acted with a "guilty mind."

Numerous regulatory crimes and other malum prohibitum offenses do not incorporate adequate—or any—mens rea standards among their elements, leaving defendants without this fundamental protection against prosecution if they accidentally commit one of these crimes.

III. Why and How Mens Rea Reform Should Be Enacted

Harm will inevitably occur from time to time, whether through willfulness, negligence, or sheer accident; however, the intent of the actor who causes the harm should make a difference in whether that person is criminally prosecuted or dealt with, perhaps even severely, through the civil or administrative justice systems. As Oliver Wendell Holmes, Jr., who was later appointed to the Supreme Court, once observed, "even a dog distinguishes between being stumbled over and being kicked."[24]

In 2015, in *Elonis v. United States*, the Supreme Court emphasized the need for an adequate mens rea requirement in criminal cases. 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 some deeply disturbing comments about his estranged wife and others on his Facebook page that the wife quite reasonably regarded as threatening.[25] The Court noted that while the statute clearly required that a communication be transmitted and contain a threat, it was silent as to whether the defendant must have any mental state with respect to those elements and, if so, what that state of mind must be. 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 from *Morissette*, observed that the "'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'"[26]

The Court, citing to four other cases in which it had provided a missing mens rea element,[27] proceeded to read into the statute a mens rea requirement and reiterated the "basic principle that 'wrongdoing must be conscious to be criminal.'"[28] The Court focused on the actor's intent rather than the recipient's perception: "Having the liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks—'reduces the culpability on the all-important element of the crime to negligence.'"[29] While the Court declined to identify exactly what the appropriate mens rea standard is under that statute and whether recklessness would suffice, it recognized that a defendant's mental state is critical when he faces criminal liability and that when a federal criminal statute is "silent on the required mental state," a court should read the statute as incorporating "that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"[30]

If it were a guarantee that courts would always devise and incorporate an appropriate mens rea standard into every criminal statute when one was missing, there might be no need for Congress to do so. As the *Elonis* Court noted, however, there are exceptions to the "'general rule' . . . that a guilty mind is 'a necessary element in the indictment and proof of every crime.'"[31] Courts, including the Supreme Court, on occasion

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).

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

25 Elonis v. United States, 135 S.Ct. 2001 (2015).

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

27 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); *Morissette*, 342 U.S. 246.

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

29 *Id.* at 2011.

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

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

have upheld criminal laws lacking a mens rea requirement based on a presumption that Congress must have deliberated and made a conscious choice to create a strict liability crime.[32]

Although this is a doubtful proposition to begin with, the moral stakes are too high to leave it up to a court to guess 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. Even if a court concludes that Congress did not mean to create a strict liability crime, there is also the ever-present risk that a court will pick an inappropriate standard that does not provide adequate protection, given the circumstances, to the accused.

By turning to the state level, we see that successful mens rea reform is possible. In a number of states, most recently Michigan and Ohio, legislatures have enacted default mens rea provisions—in which a designated mens rea standard is automatically inserted into any criminal statute that lacks one unless the legislature evinces a clear intent to enact a strict liability offense. These reforms have been adopted with overwhelming bipartisan support. Even in states with such provisions, prosecutions have continued apace and defendants are still being convicted of the crimes with which they have been charged.[33] Not only has the criminal justice system continued without interruption, but the public's respect for the moral force of the criminal law in those states has also likely been enhanced.

Given the importance of the goals of mens rea reform and the fact that several laboratories of democracy[34] have already proven its effectiveness, Congress should follow a three-part approach to mens rea reform.

First, it is critical that Congress give greater consideration to mens rea requirements when passing criminal legislation, both to make sure that they are appropriate for the type of activity involved and to ensure that the standard separates those who truly deserve the government's highest form of condemnation and punishment—criminal prosecution and incarceration—from

32 *See, e.g.*, Shevlin-Carpenter Co. v. Minnesota, 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 (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 Fed. Appx. 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 (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 machinegun 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 (E.D. Va 2005) (holding that a defendant need not have knowledge that identification actually belonged to another person 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."); United States v. Averi, 715 F. Supp. 1508, 1509 (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 (1971)).

33 *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., *Mens Rea and State Crimes*, Federalist Society White Paper (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).

34 *See* New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

those deserving a lesser form of sanction. Absent extraordinary circumstances, it should not be enough for the government to prove that the accused possessed "an evil-doing hand"; the government should also have to prove that the accused had an "evil-meaning mind."[35]

Second, Congress should begin the arduous task of reviewing existing criminal statutes and regulations to see whether they contain adequate and appropriate mens rea standards, and it should pass a default mens rea provision that would apply to crimes in which no mens rea has been provided. In other words, if an element of a criminal statute or regulation is missing a mens rea requirement, a default mens rea standard—preferably a robust one—should automatically be inserted with respect to that element.[36] It is important to remember that such a provision would come into play only if Congress passes a criminal statute that does not contain any mens rea requirement. Congress can always obviate the need to resort to this provision by including its own preferred mens rea element with respect to the statute in question.

Third, on those (hopefully rare) occasions when Congress wishes to pass a criminal law with no mens rea requirement whatsoever—a strict liability offense—it should make its intentions clear by stating in the statute itself that Members have made a conscious decision to dispense with a mens rea requirement for the particular conduct in question. Such an extraordinary act—which can result in branding someone a criminal for engaging in conduct without any intent to violate the law or cause harm—should not be the result of sloppy legislative drafting or guesswork by a court trying to divine whether the omission of a mens rea requirement in a statute was intentional or not. This should not be an onerous requirement. Congress could, for example, choose to make its intent clear by adding a provision to a criminal statute such as: "This section shall not be construed to require the Government to prove a state of mind with respect to any element of the offense defined in this section."

IV. Beneficiaries of Mens Rea Reform

Like Congress, regulators have succumbed to the temptation to criminalize any behavior that may lead to a bad outcome.[37] Such individuals and agencies, acting out of an understandable desire to protect the public, believe it is appropriate—indeed, advantageous—to promulgate criminal statutes and regulations with weak mens rea standards or none at all (so-called strict liability offenses) in order to prosecute those who engage in harmful conduct, whether they mean to or not. They point out that, while a number of commentators have criticized strict liability criminal provisions,[38] the Supreme Court of the United States has upheld the constitutionality of such criminal provisions on several occasions.[39] They believe, or at least fear, that insisting

35 *See Morissette*, 342 U.S. at 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.").

36 Of course, such a requirement could be dispensed with if the element involved was purely jurisdictional or related to establishing the proper venue. For more on the erosion of mens rea requirements and the establishment of a default mens rea requirement, see Brian W. Walsh and Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, Heritage Foundation Special Report No. 77 (May 5, 2010), *available at* http://www.heritage.org/research/reports/2010/05/without-intent; Rosenzweig, *supra* note 5.

37 *See* Lawrence M. Friedman, *Crime and Punishment in American History*, Heritage Foundation Legal Memorandum 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, *The Dangerous Incentive Structures of Nonprosecution and Deferred Prosecution Agreements*, Heritage Foundation Legal Memorandum No. 129 (June 26, 2014), *available at* http://www.heritage.org/research/reports/2014/06/the-dangerous-incentive-structures-of-nonprosecution-and-deferred-prosecution-agreements. *See also* James R. Copeland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, Manhattan Inst. for Policy Research (May 2012), *available at* http://www.manhattan-institute.org/html/cjr_14.htm.

38 *See, e.g.*, Lon L. Fuller, The Morality of Law 77 (rev. ed. 1969) ("Strict criminal liability has never achieved respectability in our law."); H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, *in* H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 136, 152 (1968) ("strict 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?*, *in* Appraising Strict Liability 21 (A. P. Simester ed., 2003) (Strict liability is wrong because it "leads to conviction of persons who are, morally speaking, innocent."); 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."); 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).

39 *See, e.g.*, *Shevlin-Carpenter,* 218 U.S. 57 (holding that a corporation can be convicted for trespass without proof of criminal intent); *Balint,* 258 U.S. 250 (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); *Behrman*, 258 U.S. 280 (*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); *Dotterweich,* 320 U.S. 277 (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); *Park*, 421 U.S. 658 (upholding conviction of a company president for unsanitary

upon robust mens rea standards in our criminal laws will give a pass to those who engage in conduct that harms our environment or society—most likely, in their view, wealthy executives working for large, multinational corporations. Mens rea reform, according to many of these critics, is not about protecting the "little guy."

These critics are wrong. After all, many executives at large corporations work in heavily regulated industries. They can hire lawyers on retainer to keep abreast of complex regulations as they change over time to adapt to evolving conditions. Their corporations are normally given explicit warnings by government officials, usually as a condition of licensure, about what the law requires and the potential criminal penalties for violating it. Therefore, they cannot reasonably or credibly claim that they were not aware that their actions might subject them to criminal liability, and would therefore be unlikely to benefit from more protective mens rea standards. In contrast, individuals and small businesses are far less likely to be able to afford expert lawyers to advise them; as my Heritage Foundation colleague Paul Larkin has asserted:

> 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 in far greater need of the benefits from [mens rea reform[40]] 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.[41]

Consider two examples. Wade Martin, a native Alaskan fisherman, sold 10 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,[42] which criminalizes the sale of certain species, including sea otters, to non-native Alaskans. Because prosecutors would not have to prove that he knew the buyer was not from Alaska, Martin pleaded guilty to a felony charge and was sentenced to two years' probation and ordered to pay a $1,000 fine.[43]

Lawrence Lewis was chief engineer at Knollwood, a military retirement home in Washington, DC.[44] Some of the elderly patients at Knollwood would stuff their adult diapers in the toilets, causing a blockage and sewage overflow. To prevent harm to the patients, Lewis and his staff would divert the backed-up sewage into a storm drain that they believed was connected to the city's sewage-treatment system, as they were trained to do. It turned out, however, that the storm drain emptied into a remote part of Rock Creek, which ultimately connects with the Potomac River. Although Lewis was unaware of any of this, federal authorities charged him with felony violations of the Clean Water Act, which required only proof that Lewis committed the physical acts that constitute the violation, regardless of any knowledge of the law or intent to violate it. To avoid a felony conviction and potential long-term jail sentence, Lewis was persuaded to plead guilty to a misdemeanor and was sentenced to one year of probation.[45]

Wade Martin and Lawrence Lewis were not corporate executives, the alleged beneficiaries of mens rea reform, yet the absence of mens rea standards in the laws under which they were prosecuted means that both carry the stigma of a criminal conviction and all of its attendant collateral consequences. If corporate bosses are advised as to what the law is and they intentionally violate it, they should be prosecuted. Mens rea reform is about protecting people who unwittingly commit acts that turn out to be crimes and are prosecuted for those offenses.

When society turns to the criminal law to address harms that are better left to the civil justice system, not only are lives adversely and perhaps irreparably affected, but the public's respect for the fairness and integrity of our criminal justice system is diminished. That diminished respect and trust should concern everyone. As Columbia Law Professor Francis Sayre said in a classic law review article in 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."[46]

There is a significant difference between regulations that carry civil or administrative penalties for violations and those that carry criminal penalties. People caught up in the latter may find

conditions at a corporate warehouse over which he had managerial control but not hands-on control).

40 In his article, Larkin discusses "remedies" for the problem of overcriminalization; however, the same argument applies with respect to mens rea reform, which Larkin and former U.S. Attorney General Michael Mukasey have endorsed elsewhere. *See* Michael B. Mukasey & Paul J. Larkin, Jr., *The Perils of Overcriminalization*, Heritage Foundation Legal Memorandum No. 146 (Feb. 12, 2015), *available at* http://www.heritage.org/research/reports/2015/02/the-perils-of-overcriminalization.

41 Paul J. Larkin, Jr, *Public Choice Theory and Overcriminalization*, 36 Harv. J. L. & Pub. Pol'y 715, 792 (2013) (footnotes omitted).

42 16 U.S.C. §§ 1371–1423.

43 *See* Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, Wall St. J., Sept. 27, 2011, *available at* http://online.wsj.com/articles/SB10001424053111904060604576570801651620000.

44 To hear Lawrence Lewis describe what happened to him in his own words, see https://www.youtube.com/watch?v=CqEtlp0x50s.

45 See Gary Fields & John R. Emshwiller, *A Sewage Blunder Earns Engineer a Criminal Record*, Wall St. J., Dec. 12, 2011, http://online.wsj.com/articles/SB10001424052970204903804577082770135339442; *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), *available at* http://judiciary.house.gov/_files/hearings/113th/10302013/Lawrence%20Lewis%20Testimony.pdf. For a videotaped interview with Lawrence Lewis, see http://dailysignal.com/2013/07/05/diverted-from-the-straight-and-narrow-path-for-diverting-sewage/.

46 Sayre, *supra* note 38 at 72.

themselves deprived of their liberty and stripped of their rights to vote, sit on a jury, and possess a firearm, among other penalties that simply do not apply when someone violates a regulation that carries only civil or administrative penalties. There is also a unique stigma that is associated with being branded a criminal. A person stands to lose 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. 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 a person for life.[47] These affect not only the guilty party, but his or her dependents as well. For businesses, just being charged with violating a regulatory crime can sometimes result in the "death sentence" of debarment from participation in federal programs.[48] In the current system, all of these consequences can descend on individuals who did not even know they were breaking the law. With so much on the line, absent extraordinary circumstances, a criminal conviction should be reserved only for those who commit morally blameworthy acts with some awareness that they were doing something that was wrong when they acted.

V. Conclusion

The differences between criminal laws and regulations are many, the most important of which is that they largely serve different purposes.[49] Criminal laws are meant to enforce a commonly accepted moral code that is set forth in language the average person can readily understand[50] and that clearly identifies the prohibited conduct, backed by the full force and authority of the government to punish those who engage in such conduct. Regulations, on the other hand, are meant to establish rules of the road to curb excesses and address consequences in a complex, rapidly evolving, highly industrialized society. This is why laws authorizing regulatory actions are often drafted using broad, aspirational language: They are designed to provide agencies with the flexibility they need to address health hazards and other societal concerns, respond to new problems, and adapt to changing circumstances, including scientific and technological advances.

Rather than continue the current system's acceptance of criminal penalties for unwitting violations of little-known regulations, we should reserve the severity of a criminal penalty for those who act with mens rea, a guilty mind. Some people or entities *intentionally* pollute our air and water, or deliberately engage in other conduct *knowing* that there is a substantial risk it will cause harm; in those cases, criminal prosecution is entirely appropriate. However, it is inevitable that bad outcomes will occur from time to time, by sheer accident or by negligent acts. In these cases, the intent of the actor should make a difference in whether he is criminally prosecuted or is dealt with through the civil or administrative justice systems. Restoring moral blameworthiness to greater prominence in our criminal laws through mens rea reform will revitalize our criminal justice system and preserve its moral authority, which, in turn, will engender respect for the rule of law.

47 An inventory of collateral consequences is maintained by the American Bar Association. *See* American Bar Association, National Inventory of the Collateral Consequences of Conviction, *available at* http://www.abacollateralconsequences.org/. In short, individuals convicted of crimes 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 *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime*, Nat'l Ass'n of Crim. Defense Lawyers (May 2014), *available at* http://thf_media.s3.amazonaws.com/2014/pdf/Collateral%20Damage%20FINAL%20Report.pdf.

48 *See*, *e.g.*, Peggy Little, *The Debarment Power—No Do Business With No Due Process*, Executive Branch Review (Apr. 25, 2013), http://executivebranchproject.com/the-debarment-power-no-do-business-with-no-due-process/#sthash.ord4YN0x.dpuf; Steven Gordon & Richard Duvall, *It's Time To Rethink the Suspension and Debarment Process*, Mondaq (July 3, 2013), http://www.mondaq.com/unitedstates/x/248174/Government+Contracts+Procurement+PPP/Its+Time+To+Rethink+The+Suspension+And+Debarment+Process.

49 *See* Larkin, *supra* note 6.

50 *See*, *e.g.*, United States v. Harriss, 347 U.S. 612, 617 (1954) (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").