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# Decarceration and Default Mental States

Benjamin Levin\*

## INTRODUCTION

On June 14, 2013, the House Judiciary Committee’s Overcriminalization Task Force convened a hearing on “Defining the Problem and Scope of Over-Criminalization and Over-Federalization.”<sup>1</sup> The hearing featured testimony from four witnesses: George J. Terwilliger, III, a white-collar defense attorney and former U.S. Attorney and Acting Attorney General, William N. Shepherd of the American Bar Association, John G. Malcolm of the Heritage Foundation, and Steven D. Benjamin of the National Association of Criminal Defense Lawyers.<sup>2</sup>

In introducing the hearing, Representative Jim Sensenbrenner, the Task Force Chairman, argued that “[t]he need for reform becomes particularly apparent when you read the stories of well-meaning Americans whose lives have been turned upside down when they run afoul of an obscure Federal statute.”<sup>3</sup> Sensenbrenner provided examples of such federal overreach:

In Virginia, a little girl saved a woodpecker from the family cat and was fined \$535 because under the Federal Migratory Bird Act it is a crime to take or transport a woodpecker. In Texas, a 66-year-old retiree had his home raided by a SWAT team and spent almost 2 years in prison because he didn’t have the proper paperwork for some of his prized orchids, all of which were legally imported.<sup>4</sup>

The testimony that followed included similar anecdotes and accounts of absurd statutes or their absurd applications: racecar driver Bobby Unser who was convicted of unlawful operation of a snowmobile within a national forest

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

2. *Id.* at 7–49.

3. *Id.* at 2.

4. *Id.* at 2.

wilderness area after getting lost during a snowstorm;<sup>5</sup> John Yates, a fisherman who was convicted of violating the Enron-era document-destruction provisions of the Sarbanes-Oxley Act (a felony) for disposing of undersized grouper to avoid citation.<sup>6</sup> And, in recommending legislative solutions, each witness endorsed mens rea reform.<sup>7</sup> To prevent undeserving people from being convicted and punished, the witnesses argued, prosecutors should be required to prove beyond a reasonable doubt that the defendants intentionally or knowingly acted unlawfully, even if the statute was silent as to the mental state necessary for the offense.<sup>8</sup>

The June 2013 hearing provides a window into mens rea reform, its appeal, and also its limitations. In the literature on overcriminalization and mens rea reform, similar cases and statutes are frequently identified as illustrations of criminal law run amok.<sup>9</sup> (The prospect of a felony prosecution for the unauthorized use of the Forest Service mascot, Woodsy Owl, is a favorite example.<sup>10</sup>) But it strikes me as misguided to suggest that these cases and the unknowing commission of federal crimes lie at the heart of the carceral state and the flawed institutions of the U.S. criminal system.<sup>11</sup> The

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5. *Id.* at 4–5.

6. *Id.* at 21–22. *See generally* Yates v. United States, 574 U.S. 528 (2015).

7. *See Defining the Problem, supra* note 1, at 65–66.

8. *See generally id.* Mens rea reform proposals generally include two components: a default mental state requirement, and a requirement that defendants know that they are acting unlawfully. *See, e.g.,* Criminal Code Improvement Act of 2015, H.R. 4002, 114th Congress (2015).

9. *See, e.g.,* MIKE CHASE, HOW TO BECOME A FEDERAL CRIMINAL: AN ILLUSTRATED HANDBOOK FOR THE ASPIRING OFFENDER (2019); DOUGLAS N. HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 35 (2008); Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 520–21 (2019); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 704 (2005); John G. Malcolm, *Criminal Justice Reform at the Crossroads*, 20 TEX. REV. L. & POL. 249, 279–80 (2016); Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 652 (2006).

10. *See, e.g.,* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 760 n.65 (2005); Luna, *supra* note 9, at 704; O’Sullivan, *supra* note 9, at 652; Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 589–90 (2005); Mila Sohoni, *The Idea of “Too Much Law”*, 80 FORDHAM L. REV. 1585, 1606 n.118 (2012); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 517 (2001).

11. *See* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 17 (2019) (critiquing the focus on “anecdotes about particularly egregious cases” in conversations about reform). I use “criminal system” or “criminal legal system” in this Essay advisedly, as scholars increasingly stress that the administration of criminal law in the United States rests on a range of local actors, politics, and institutions that are not unified by a coherent theory or overarching set of principles. *See, e.g.,* LAWRENCE M. FRIEDMAN,

federal system accounts for only ten percent of the people incarcerated, and roughly forty percent of people incarcerated nationwide are being held for crimes classified as violent.<sup>12</sup> With an unprecedentedly large number of people held in cages, with dramatic enforcement disparities across race and class, and with an ever-expanding criminal system, it's hard to believe that the big fix is to require prosecutors to prove knowledge or intent so that "well-meaning Americans" aren't convicted.<sup>13</sup>

To be clear, though, that doesn't mean mens rea reform is objectionable from a policy perspective or that it wouldn't advance the interests of justice. The criminal system has many flaws, and just because a given policy solution isn't responsive to the greatest evils certainly doesn't make it unworthy.<sup>14</sup> Similarly, that a given policy might not target the most vulnerable defendants or might advance a policy agenda beyond or apart from reducing the prison population (here, de-regulation), shouldn't be fatal strikes against it. Indeed, I have critiqued at length opposition to mens rea reform from progressives committed to facilitating white-collar prosecutions.<sup>15</sup>

In this Essay, I offer a critical account of the debates over mens rea reform. I argue that the current terms of the debate represent (from both supporters and opponents) an overly narrow vision of criminal justice reform.

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CRIME AND PUNISHMENT IN AMERICAN HISTORY 461 (1993); DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 25–27 (2010); PHILIP GOODMAN, JOSHUA PAGE & MICHELLE PHELPS, BREAKING THE PENDULUM: THE LONG STRUGGLE OVER CRIMINAL JUSTICE 7 (2017); Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1475 n.7 (2020); Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419, 421 (2018); Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 558 (2016) ("The criminal justice system lags behind most other government agencies when it comes to data tracking, for a very simple reason: the 'system' is not a system at all. Instead, it is a loose affiliation among independent law enforcement agencies, individual counties, local jails, and state prisons."); Benjamin Levin, *Rethinking the Boundaries of "Criminal Justice"*, 15 OHIO ST. J. CRIM. L. 619, 619–20 (2018); Sara Mayeux, *The Idea of "The Criminal Justice System"*, 45 AM. J. CRIM. L. 55, 65 (2018); John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1089 (2013).

12. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/3N8R-HZYX>].

13. *But see* Michael Serota, *Strict Liability Abolition* (July 27, 2021) (unpublished manuscript) (on file with author) (arguing that a shift away from strict liability is a key component of combatting the distributional inequities of mass incarceration).

14. See JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 229 (2017) (arguing that mass incarceration resulted from "a series of small decisions, made over time, by a disparate group of actors" and so "mass incarceration will have to be undone the same way").

15. See generally Levin, *supra* note 9.

Elsewhere, I have described two competing impulses, strands, or frames in scholarship and advocacy on U.S. criminal policy: *over* critiques and *mass* critiques.<sup>16</sup> The *over* frame suggests that “[t]here is an optimal rate of incarceration and an optimal rate of criminalization, but the current criminal system is sub- (or, perhaps extra-) optimal in that it has criminalized too much and incarcerated too many;”<sup>17</sup> in contrast, the *mass* frame rejects the focus on miscalibration and suggests “that criminal law is doing ill by marginalizing populations and exacerbating troubling power dynamics and distributional inequities. Every incarcerated person might have been guilty of the charged offense, and the critique would still hold.”<sup>18</sup>

Common arguments for and against mens rea reform reflect an *over* approach: much disagreement seems to rest on the question of whether the class of defendants who might benefit from such reforms are deserving or undeserving of such lenience.<sup>19</sup> Proponents argue that these reforms would shield those undeserving of punishment, while opponents argue that reforms would shield those deserving of punishment. *Mass*-style critiques and accounts, though increasingly ubiquitous in the academy and in activist and advocacy circles,<sup>20</sup> are conspicuously absent from the mens rea discourse, inviting the impression that mens rea reform shouldn’t matter to *mass* critics.<sup>21</sup>

Ultimately, therefore, I offer a different frame for mens rea reform and for understanding the stakes of the debate that might resonate with *mass* critiques. I suggest that mens rea reform can be analogized to the rule of lenity

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16. See generally Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018).

17. *Id.* at 262–63.

18. *Id.* at 263 (footnote omitted).

19. See *infra* Parts I & II.

20. See, e.g., BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Ruairí Arrieta-Kenna, *The Deep Roots—and New Offshoots—of ‘Abolish the Police’*, POLITICO (June 12, 2020), <https://www.politico.com/news/magazine/2020/06/12/abolish-defund-police-explainer-316185> [https://perma.cc/ZXS6-WGFC]; Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L. J. 1419 (2016); Introduction, *Developments in the Law—Prison Abolition*, 132 HARV. L. REV. 1568 (2019) (describing the increasing interest in abolitionist approaches); Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [https://perma.cc/YZY2-UXS9]; Edward Ongweso Jr., *‘Defund the Police’ Actually Means Defunding the Police*, VICE (June 9, 2020), [https://www.vice.com/en\\_us/article/ep4xy7/what-does-defund-and-abolish-the-police-mean](https://www.vice.com/en_us/article/ep4xy7/what-does-defund-and-abolish-the-police-mean) [https://perma.cc/R5NA-7ASA]; Dylan Rodríguez, *Abolition As Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575 (2019).

21. See Levin, *supra* note 9, at 519–23.

and the libertarian, liberal, or anti-statist aspects of the Bill of Rights—these rules are not solely focused on sorting the guilty and the innocent; rather, I suggest, they can be viewed as “anti-criminalization” rules,<sup>22</sup> directives to put a thumb on the scale in favor of defendants and against the state, state violence, and criminal punishment.<sup>23</sup> Framed in this way, I argue that mens rea reform should be appealing to commentators concerned about mass incarceration, state violence, and the sweeping reach of criminal law and its enforcement. Perhaps more provocatively, I also argue that mens rea reform could be understood as consistent with more radical calls for abolition or dismantling of the carceral state.

My argument unfolds in three parts. In Part I, I describe the conventional case for mens rea reform and critique its focus on individual responsibility and moral culpability. I address the ways in which this frame erases or understates inequality and social context. Additionally, I argue that this frame appears to reflect a narrow conception of what’s wrong with the criminal system that might continue to allow for a massive carceral state and in doing so might exacerbate distributional inequality. In Part II, though, I critique the conventional case against mens rea reform. Focusing on progressives who view proposed legislation as a shield for greedy and irresponsible white-collar defendants, I argue that the reliance on criminal law as a regulatory tool is flawed. Similarly, I suggest that the willingness to carve-out a specific class of defendant and allow for sloppy legislating and haphazard prosecution reflects a vision of criminal justice reform that is also troublingly narrow. Finally in Part III, I offer an alternative frame for mens rea reform, suggesting that these efforts can and should be embraced by commentators with a more radical, anti-carceral approach. That the bills might benefit wealthier defendants doesn’t mean that such bills—or other efforts to restrict state prosecutorial power—should be rejected by anti-carceral commentators or “criminal law skeptics;”<sup>24</sup> instead, I argue that recognizing the anti-statist dimensions of default mental state requirements should suggest that they

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22. Cf. Máximo Langer, Response, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 73–74 (2020) (describing “the ultima ratio principle [that] would still require that the criminal law statute not be passed, and not be enforced once passed, if noncriminal responses or measures were sufficient to adequately advance a legitimate goal such as addressing harmful behavior”); Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207, 214 (2004).

23. Cf. Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263 (2005) (making a similar argument regarding the proportionality principle).

24. See generally Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 NEW CRIM. L. REV. 27 (2020) (describing and critiquing the rise of “criminal law skepticism”).

belong in a broader pantheon of pro-defendant doctrines that help provide some check on society's punitive impulses.

### I. THE LIMITS OF INDIVIDUAL RESPONSIBILITY

Like much of the literature on overcriminalization, arguments for mens rea reform tend to sound in a decidedly *over* register—they foreground the blamelessness of the defendant or the lack of seriousness of the conduct. Perhaps the defendant who unknowingly breaks a law is morally blameless and therefore is undeserving of punishment. Or perhaps punishing individuals who don't know they are breaking the law will do little to deter future lawbreaking. Without wading into the vast scholarly literature on strict liability and the importance of mens rea, it is sufficient to recognize that “[t]he vision of punishing a hapless, choiceless defendant is perhaps the most powerful buttress of the argument against strict liability.”<sup>25</sup> And such a vision underpins the Model Penal Code's adoption of a default mental state (recklessness) when statutes are silent.<sup>26</sup> As Kenneth Simons has argued, this default “is important as a matter of principle.”<sup>27</sup> Demanding that the state prove some heightened state of awareness “expresses the classic liberal idea that moral culpability is, and criminal liability should be, based on a conscious choice to do wrong.”<sup>28</sup>

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25. Mark Kelman, *Strict Liability: An Unorthodox View*, in 4 ENCYCLOPEDIA OF CRIME & JUSTICE 1512 (Sanford H. Kadish ed., 1983); see also Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1075–76 (1997) (“Strict liability appears to be a straightforward case of punishing the blameless, an approach that might have consequential benefits but is unfair on any retrospective theory of just deserts.”). Of course, there remain significant questions about how to assess knowledge and ignorance and just how great an emphasis either should play in determining criminal culpability. Compare DOUGLAS HUSAK, *IGNORANCE OF LAW: A PHILOSOPHICAL INQUIRY* (2016), with Gideon Yaffe, *Is Akrasia Necessary for Culpability? On Douglas Husak's Ignorance of Law*, 12 CRIM. L. & PHIL. 341 (2018).

26. See, e.g., Luis E. Chiesa, *Mens Rea in Comparative Perspective*, 102 MARQ. L. REV. 575, 581 (2018) (describing the default mental state of recklessness as “defin[ing] the limits between advertent and inadvertent wrongdoing.”); Stuntz, *supra* note 10, at 583 n.276 (“By most accounts, the single most important rule in the MPC is the establishment of recklessness . . . as the default mens rea . . . .”); Kimberly Thomas, *Reckless Juveniles*, 52 U.C. DAVIS L. REV. 1665, 1688 n.96 (2019) (“[M]any would suggest that criminal liability not extend (or rarely extend) to those who do not choose to do wrong.”)

27. Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 188 (2003).

28. *Id.*; cf. R.A. Duff, *Perversions & Subversions of Criminal Law*, in THE BOUNDARIES OF THE CRIMINAL LAW 88, 100 (R.A. Duff et al. eds., 2010) (“The criminal law addresses us as responsible agents: it reminds us what we have normally conclusive reason not to do, and intervenes coercively only if we fail to act as those reasons require.”).

This scholarly concern about people unwittingly breaking the law is reflected in much of the advocacy for mens rea reform. The National Association of Criminal Defense Lawyers and the Heritage Foundation have argued that the absence of mental state requirements coupled with otherwise broad statutory language have “allow[ed] prosecutors to obtain convictions of persons who are *not truly blameworthy* . . . .”<sup>29</sup> Similarly, Representative Bobby Scott has argued that “without [mens rea requirements] in our criminal laws, *honest citizens* are at risk of being victimized and criminalized by poorly crafted legislation and overzealous prosecutors.”<sup>30</sup> And Senator Orrin Hatch has argued that the Mens Rea Reform Act of 2017 would “ensure that *honest, hardworking* Americans are not swept up in the criminal justice system for doing things they didn’t know were against the law.”<sup>31</sup>

Put differently, proponents often suggest that mens rea reform would operate as a means of re-sorting defendants—*i.e.*, a world of broad statutes without strong mental state requirements allows for the prosecution and conviction of defendants who are less deserving of punishment, whereas a world of heightened mental state requirements would refocus state violence on defendants who should be held (criminally) responsible. In this way, the arguments advanced by reform proponents appear to imply a punitive corollary: defendants who do satisfy heightened mens rea requirements *deserve* criminalization, prosecution, and punishment. The evil to be avoided in many of these accounts is not so much criminalization and punishment as such, but the criminalization and punishment of people who don’t believe that they are breaking the law.

To the extent that the problem with the criminal system is that people aren’t on sufficient notice of what conduct is criminal and/or are frequently arrested, prosecuted, or punished for making mistakes, the individual responsibility frame would do more work. But, as noted at the outset of the Essay, that strikes me as a troublingly narrow critique of U.S. criminal legal institutions.<sup>32</sup> I don’t intend to offer a critique of the theoretical work that

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

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

31. Press Release, U.S. Senate, Senators Hatch, Lee, Cruz, Perdue, and Paul Introduce Bill to Strengthen Criminal Intent Protections (Oct. 2, 2017), <https://www.lee.senate.gov/2017/10/senators-hatch-lee-cruz-perdue-and-paul-introduce-bill-to-strengthen-criminal-intent-protections> [<https://perma.cc/X7T8-QGTA>] (emphasis added).

32. To be clear, though, just because it is too narrow certainly doesn’t render those critiques unfounded or un-compelling. That is, I agree that failure to provide notice and criminally punishing people who unwittingly break the law are not desirable.

undergirds many arguments in favor of imposing a default mental state. But I do think it's worth noting that some of these claims about personal responsibility and notice are far from uncontroversial.

Scholars have critiqued these sorts of choice-based arguments as reinforcing an inaccurate vision of society that understates inequality and over-states freedom of choice.<sup>33</sup> Further, while I disagree with progressive arguments in favor of using criminal law to further ends associated with the regulatory state,<sup>34</sup> it would be a mistake to discount claims that foreground harm as opposed to moral culpability. That is, the logic of mens rea reform advocacy often appears to accept an uncritical embrace of criminal law to address low-level but intentional wrongdoing (*e.g.*, simple assault, theft, etc.) while rejecting criminal law as the vehicle to respond to environmental catastrophes or largescale workplace harms. I remain skeptical (at best) about the use of criminal law to address harm caused by negligent actors, employers unknowingly flouting regulations, etc. But it's not at all clear to me that punishment is less justified in those cases than it is in a host of cases where defendants knowingly or intentionally break the law but cause much less harm.

Accepting this language or frame of individual responsibility as the justification for mens rea reform, then, risks embracing a logic under which society should be concerned about protecting "marginal middle-class misbehavior,"<sup>35</sup> but should be free to criminalize the known lawbreaking of the lower classes.

## II. THE LIMITS OF CARCERAL PROGRESSIVISM

The limitations of the mainstream case for mens rea reform should be particularly evident for readers concerned about the distributive consequences of criminal law. It is striking that the June 2013 hearing

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33. See, *e.g.*, Jody Armour, *Nigga Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, 12 OHIO ST. J. CRIM. L. 9, 11 (2014); Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 1003 (1992) ("Criminal law's preoccupation with rationality and free choice, no matter how compromised these concepts are in theory and how diluted in practice, represents a remarkably narrow view of the constituents through which individuals become the responsible authors of objects and events."); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Jeffrie G. Murphy, *Marxism and Retributivism*, 2 PHIL. & PUB. AFF. 217 (1973); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1566 (1983); *cf.* Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1333 (2006) (arguing that assessments of culpability are often affected by assorted biases).

34. See generally *infra* Part II.A.

35. Stuntz, *supra* note 10, at 509.

focused primarily on regulatory crime, that mens rea reform has been a favorite cause of right-leaning politicians and advocates, and that some of mens rea reform's strong backers appear uninterested in reforms more clearly targeted towards addressing disparate enforcement and the mine run of criminal law's administration. Put simply, it's hard to disagree with characterizations of mens rea reform as a darling of right-, conservative-, and libertarian-leaning reformers focused on deregulation.<sup>36</sup> But should these reforms be opposed just because they might not target the deepest structural flaws of the criminal system?<sup>37</sup>

The progressive case against mens rea reform tends to rely on a critique of the reformers' political goals and the ways in which proposed statutes might shield rich, powerful defendants from prosecution, particularly in the realms of environmental and financial crime.<sup>38</sup> For example, Massachusetts Senator Elizabeth Warren, a staunch opponent of mens rea reform, has argued that such changes in the law would "make it much harder for the government to prosecute hundreds of corporate crimes—everything from wire fraud to mislabeling prescription drugs."<sup>39</sup> Illinois Senator Dick Durbin, has argued

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36. Certainly, mens rea reform and default mental state provisions more generally enjoy much greater support among academics, regardless of political or ideological commitments. *See, e.g.*, Rachel E. Barkow & Mark Osler, *Designed To Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 422 (2017) ("[T]he mens rea reform provision had its own bipartisan support in the House, and most criminal law scholars and professional bar associations have lamented for years that strict liability laws have no place in the criminal sphere.") (footnotes omitted); Darryl K. Brown, *Criminal Law's Unfortunate Triumph over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 672 (2011) ("Scholars and others have widely endorsed a provision of this sort as a partial remedy for federal criminal law."). But, it's worth noting that even such academic defenses often rest on a similar discourse of personal responsibility and moral culpability.

37. I have discussed this question at length elsewhere. *See* Levin, *supra* note 9, at 517–27.

38. *See, e.g.*, Mike Debonis, *The Issue that Could Keep Congress from Passing Criminal Justice Reform*, WASH. POST (Jan. 20, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/01/20/the-issue-that-could-keep-congress-from-passing-criminal-justice-reform/> [https://perma.cc/WUX9-LH93]; Deborah W. Denno, *Concocting Criminal Intent*, 105 GEO. L.J. 323, 378 (2017) (collecting sources); Editorial, *Don't Change the Legal Rule on Intent*, N.Y. TIMES (Dec. 5, 2015), <https://www.nytimes.com/2015/12/06/opinion/sunday/dont-change-the-legal-rule-on-intent.html> [https://perma.cc/9XTE-ML87]; Levin, *supra* note 9, at 523–27 (collecting sources); Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 866 n. 89 (2017) (arguing that mens rea reform proposals could "undermine public safety and harm progressive goals"); Alexander F. Sarch, *Beyond Willful Ignorance*, 88 U. COLO. L. REV. 97, 100 (2017) (collecting sources).

39. Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 169 (2017); *see also* STAFF OF SEN. ELIZABETH WARREN, *RIGGED JUSTICE: 2016 HOW WEAK ENFORCEMENT LETS CORPORATE OFFENDERS OFF EASY* (2016),

that proposed mens rea reform legislation “should be called the White Collar Criminal Immunity Act.”<sup>40</sup> And activists associated with Occupy Wall Street similarly have contended that efforts to impose heightened default mental states were nothing but “A ‘Get Out of Jail Free’ Card for White Collar Criminals.”<sup>41</sup>

In this Section, I identify two concerns about this progressive position: (1) that it reflects a problematic elision of regulation and criminal punishment; and (2) that it reflects a troubling move to accept flawed institutional dynamics when presented with a particularly pressing problem or a particularly unsympathetic class of defendants.

### A. Carceral Progressivism

Underlying many criticisms of mens rea reform remains a concern that the state regularly fails to discipline capital or to hold industry accountable. I share that concern. But it requires a logical leap to conclude that the number of criminal prosecutions in a sector or the average prison sentence for a corporate executive is the right way to gauge accountability or regulatory success.<sup>42</sup> While criminal prosecution and carceral sentences often may function in popular discourse as metrics of “justice” or “accountability,” that equation isn’t natural, inevitable, or necessary. And rejecting that equation or the elision between those concepts has become a hallmark of left, anti-carceral activism and scholarship.<sup>43</sup>

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[https://www.warren.senate.gov/files/documents/Rigged\\_Justice\\_2016.pdf](https://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf)

[<https://perma.cc/BAW7-C3TB>].

40. Matt Ford, *Could a Controversial Bill Sink Criminal-Justice Reform in Congress?*, ATLANTIC (Oct. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/10/will-congress-reform-criminal-intent/544014/> [<https://perma.cc/5ESB-3YFA>].

41. *Join Occupy the SEC in Urging the Congress To Oppose H.R.A 4002*, PETITION 2CONGRESS, <https://www.petition2congress.com/ctas/join-occupy-sec-in-urging-congress-to-oppose-hr4002-criminal-code> [<https://perma.cc/V23H-KXWS>].

42. On the question of the relative advantages and disadvantages of criminal and non-criminal regulatory approaches, see, for example, Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 581 (2012); Husak, *supra* note 24; Victor Tadros, *Criminalization and Regulation*, in THE BOUNDARIES OF THE CRIMINAL LAW 163–90 (R.A. Duff et al. eds., 2010).

43. See, e.g., AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION (2020); JUSTIN MARCEAU, BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT (2019); DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR (2019); *Community Accountability Working Document*, INCITE! (Mar. 5, 2003), <https://incite-national.org/community-accountability-working-document/> [<https://perma.cc/8NN5-6796>]; Mariame Kaba & Andrea J. Ritchie, *We Want More Justice for Breonna Taylor than the System that Killed Her Can Deliver*, ESSENCE (July 16, 2020), <https://www.essence.com/feature/breonna-taylor-justice-abolition/>

By embracing this rhetorical slippage, progressive opponents of mens rea reform reveal a limited conception of criminal justice reform, or perhaps more accurately, reveal their limited interest in dialing back criminal legal institutions. Just as the commentators discussed in Part I demonstrate a faith in criminal institutions when directed at the right defendants, these progressive lawmakers and commentators appear to retain faith and reliance in criminal law as a desired regulatory vehicle. Perhaps that turn to criminal law is simply pragmatic—a reflection of interest convergence and an acceptance of the challenges of regulating using non-criminal channels.<sup>44</sup> Or perhaps the turn to criminal law reflects an earnest belief that criminal law reflects a necessary moral judgment about powerful actors' misconduct and does important work both in deterring that conduct and sending a message about shared community values.<sup>45</sup> Either way (or even if the line between principle and pragmatism isn't always clear), the reliance on criminal law as regulatory tool should be troubling to anyone concerned about the carceral state and its metastasization.

Certainly, regulatory crime has not been the driver of prison populations and is not the precipitator of most police violence or the explanatory force behind widespread race- and class-based disparities in the criminal system. But embracing the logic of accountability=criminal punishment means accepting the baseline rationale that has facilitated mass incarceration. Turning to criminal law here not only risks crowding out non-criminal and non-carceral approaches to addressing environmental or financial regulation; it also makes it much more difficult to argue for non-criminal (or, at least, non-carceral) responses to a host of other social problems.

### *B. Sloppy Drafting and Prosecutorial Discretion*

A certain amount of the debate about mens rea reform reflects a different, but similarly frustrating elision: the one between imposing a default mental state requirement and eliminating strict liability. The progressive arguments highlighted above are accurately read as arguments in favor of strict

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[<https://perma.cc/Z34R-E9CW>]; Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429, 1429 (2021); Kate Levine, *Police Prosecutions*, 98 WASH. U. L. REV. 997, 997 (2021); Katie Way, *Can't Imagine a World Without Police? Start Here*, VICE (June 25, 2020), [https://www.vice.com/en\\_us/article/9353ky/what-is-transformative-justice-police-abolition](https://www.vice.com/en_us/article/9353ky/what-is-transformative-justice-police-abolition) [<https://perma.cc/38SW-2LVF>] (collecting sources).

44. See, e.g., Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1365 (2018).

45. See, e.g., GRUBER, *supra* note 43; Levin, *supra* note 43.

liability,<sup>46</sup> or perhaps other mental state requirements below the knowledge or intent threshold.<sup>47</sup> Criminal law scholars have debated the desirability of strict liability, negligence standards, and other lower mental state requirements at great length.<sup>48</sup> And it may well be that proponents of mens rea reform also would oppose the criminalization of conduct that lacked a heightened mental state requirement. Yet no federal mens rea reform bill I have seen precludes the imposition of criminal strict liability; the proposals simply require that legislators specify that they want silence to be read as signaling strict liability.<sup>49</sup>

Certainly, such proposals might create legislative headaches, forcing lawmakers to revisit a host of criminal statutes to determine if they meant to (or now want to) impose strict liability. And revisiting those statutes might reopen debate and upset the tenuous political compromise that had allowed for the bills' passage in the first place.<sup>50</sup> But (efficiency concerns aside), why is that such a bad thing?

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46. See *supra* notes 38–41 and accompanying text.

47. For example, Senator Warren has introduced legislation that would impose criminal penalties for negligent conduct in the financial sector. See Corporate Executive Accountability Act, S. 1010, 116th Cong. (2019); cf. Carissa Byrne Hessick & Benjamin Levin, *Elizabeth Warren's Proposal To Imprison More Corporate Executives Is a Bad Idea*, SLATE (Apr. 4, 2019), <https://slate.com/news-and-politics/2019/04/elizabeth-warren-corporate-fraud-prison-negligence-mass-incarceration.html> [<https://perma.cc/H5MU-BK2D>] (critiquing the criminal negligence standard in such proposed legislation).

48. See, e.g., MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 147–53 (2005); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 152 (1968) (describing the frequent argument that “strict liability is odious, and appears as a sacrifice of a valued principle”); R.A. Duff, *Strict Liability, Legal Presumptions, and the Presumption of Innocence*, in *APPRAISING STRICT LIABILITY* 125 (A.P. Simester ed., 2005); Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 314 (2003); George P. Fletcher, *The Fall and Rise of Criminal Theory*, 1 BUFF. CRIM. L. REV. 275, 280 (1998) (describing the relationship between theories of strict liability in tort and criminal law); Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1534 (2018); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 402 (1993) (“For years, courts and commentators have struggled with the criminal strict liability doctrine.”); Stephen J. Morse, *The Moral Metaphysics of Causation and Results*, 88 CALIF. L. REV. 879, 879 (2000) (“[V]irtually all criminal law theorists agree that moral fault is at least a necessary condition of blame and punishment . . . .”); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 62 (1933); Simons, *supra* note 25, at 1075–76.

49. The same holds true for mental states that fall below the threshold of knowledge or intent—*i.e.*, legislators would need to specify negligence, recklessness, etc. as the required mental state, rather than having a judge read it into otherwise silent or ambiguous statutory text.

50. And one certainly might conclude that upsetting this balance is a goal of some reformers—mens rea reform would provide a second bite at the apple to defeat disfavored criminal statutes.

Decades of scholarship have critiqued expanding criminal codes and legislators' willingness to draft incredibly broad statutes at the behest of prosecutors.<sup>51</sup> Despite the incredibly high stakes of criminalizing conduct and granting prosecutors and police significant discretion, lawmakers don't have a strong track record when it comes to drafting precise criminal statutes. To be clear, as noted above, I don't think that greater statutory clarity or precision in drafting would remedy the evils and injustices of the carceral state. But accepting the arguments advanced by progressive opponents of mens rea reform would require us to accept that this deeply problematic approach to lawmaking and law enforcement—*i.e.*, criminalize broadly and trust prosecutors and police to make the right enforcement calls—is acceptable, so long as it facilitates (or potentially facilitates) punishing the right class of defendants.<sup>52</sup>

If progressive lawmakers and advocates believe that the only way to discipline capital or address industry misconduct is not only to criminalize,<sup>53</sup> but to allow prosecutors to obtain convictions without proving defendants' heightened mental states, then lawmakers should be forced to pass statutes that expressly impose strict liability. I am not so naïve about the realities of U.S. electoral politics that I believe it's easy to pass legislation or adopt policies that run counter to the interests of the wealthy or powerful. Yet, in a nation grappling with its massive carceral footprint and the abuses of mass criminalization, defending and legitimating the practice of legislative

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51. See, e.g., Husak, *supra* note 9, at 34; Gregory M. Gilchrist, *Regulation by Prosecutor*, 56 AM. CRIM. L. REV. 315, 338 (2019); Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 353 (2019) (“[I]n the case of overly broad laws, no one expects the laws to be enforced as written. Instead, we rely on prosecutors to use their discretion to weed out cases involving only trivial behavior.”); Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 695–96 (2017); Kay L. Levine, *The External Evolution of Criminal Law*, 45 AM. CRIM. L. REV. 1039, 1043 (2008); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2136 (1998) (“Most legal academics . . . would probably also agree that there are too many criminal statutes on the books, and that those statutes are frequently too broad and too vague.”); Stuntz, *supra* note 10, at 510 (“[T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes . . .”).

52. Scholars frequently have critiqued the distributive consequences of broad criminal statutes that facilitate discretionary enforcement. See, e.g., Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173 (2017); Jamelia Morgan, *Rethinking Disorderly Conduct*, CALIF. L. REV. (forthcoming); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999).

53. See generally Part II.A., *supra*.

deference to prosecutors and law enforcement strikes me as a bad idea.<sup>54</sup> Or, perhaps more pointedly, embracing the institutions of tough-on-crime politics legitimates tough-on-crime politics, even if the left/right valence appears different or the imagined defendants are not society's poorest or most marginalized.

### III. MENS REA REFORM AS AN ANTI-CRIMINALIZATION RULE

As the two previous Parts illustrate, I find the current debate over mens rea reform to be fairly limited. While proponents and opponents come from different places and arrive at different places, they (at least theoretically or rhetorically) appear to share a foundational assumption: reforming the U.S. criminal system requires a re-sorting and recalibration.<sup>55</sup> To the reform proponents, criminal law, incarceration, and the institutions of the U.S. criminal system are necessary for dealing with "real criminals," but overcriminalization, strict liability crimes, and sloppily drafted statutes cause undeserving and "otherwise law-abiding" people to suffer. To reform opponents, the criminal system might be flawed (*see, e.g.*, the War on Drugs, racial disparities, police violence, etc.), but that doesn't mean it is illegitimate or without important uses. The brutalities of the system's treatment of marginalized people don't indicate an irredeemable system; rather, prosecutors could right the balance by shifting their attention to the wealthy and "white collar" offenders, and lawmakers and judges could grease the wheels of these prosecutions by reducing the burden on prosecutors to prove mens rea elements. Similarly, the problem with using criminal law as a dominant regulatory paradigm is less that criminal law is the dominant regulatory paradigm; rather it's that these criminal regulatory approaches must be better fine-tuned in their application.

Neither position, though, offers much to those who come to this debate with a stronger-form opposition to criminalization, incarceration, or the mechanisms of "governing through crime."<sup>56</sup> Maybe that gap or lack makes

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54. I use "legitimation" in the Gramscian sense. *See, e.g.*, DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE (1997); ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2189 (2013); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 429–32 (1995).

55. Elsewhere I have described and critiqued this reformist frame. *See* Levin, *supra* note 16, at 262–63.

56. *See generally* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2009).

sense from a political advocacy perspective—lawmakers might be wary of appearing opposed to criminal law/criminalization, as opposed to appearing concerned about criminalizing the “right” people or conduct. So proposing reforms couched in the language of widespread decarceration or “criminal law skepticism” might be a great recipe for failed advocacy. And, for scholars and lawmakers who harbor some prosecutorial or punitive impulses, this approach validates or make room for such impulses—this position or frame still allows for deserving targets of state violence, just criminal statutes, and well-directed prosecutions. But, as noted in the previous two Parts, these arguments legitimate many problematic, flawed, and abusive aspects of the carceral state. And, as noted at the outset of the Essay, they don’t speak to increasingly common totalizing critiques of the U.S. criminal system. Therefore, in this Part, I offer an alternative case for mens rea reform as an anti-criminalization rule or norm.

In describing this rationale, I offer two different approaches: first, I suggest that understanding mens rea reform as an anti-criminalization rule resonates with a range of other substantive and procedural rules that might be justified in civil libertarian, liberal,<sup>57</sup> or anti-statist terms.<sup>58</sup> Second, I suggest that mens rea reform can be understood as a piece of a larger anti-criminalization, decarceration, or abolitionist agenda that understands criminalization, prosecution, and criminal punishment as evils to be avoided if at all possible. Notably, in both Sections, I argue that these frames or justifications do not require us to accept the logic that conduct accompanied by a higher mens rea should be criminalized and that defendants acting with a higher mens rea should be punished (or are more deserving of punishment than defendants with lower mens rea). Instead, these frames suggest that mens rea reform might operate as a potential check on state power and the metastasization of the criminal system.

### *A. Anti-Statism*

Fear of an arbitrary, authoritarian, or abusive state recurs in case law and scholarship about the administration of criminal law. From the void-for-

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57. As in rights-regarding.

58. Of course, there might be significant debate about what role the state should play in exercising its non-criminal powers. *See, e.g.*, Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 *LAW & PHIL.* 437, 445 n.28 (2004) (noting that libertarians “have the virtue of consistency on these topics”); Takei, *supra* note 39, at 172 (“For libertarians, the motivation to decarcerate stems from a general hostility to government powers and large bureaucracies. In certain powerful respects, this intersects with the left’s concern about police and prosecutorial abuses of power. However, the libertarian critique is equally suspicious of institutions like a social safety net . . .”).

vagueness doctrine to the rule of lenity and the right to a jury trial, it's hard not to discern a lurking uncertainty about unrestrained state violence, even in the context of otherwise conservative opinions.<sup>59</sup> As one leading criminal procedure casebook puts it, many of the rights guaranteed by the Fourth and Fifth Amendments “are fundamentally to control government, rather than to enhance accuracy or fairness.”<sup>60</sup> I am hesitant about the prospect of seeking radicalism in judicial opinions or constitutionalism.<sup>61</sup> And it's important to stress that judges (despite announcing these anti-statist rationales) routinely expand state power and restrict the rights of criminal defendants.<sup>62</sup> But I do think there's reason to parse out a certain theoretical or rhetorical strand in criminal law and procedure in part because of what it *doesn't say*. Much discussion of judicial interventions on behalf of criminal defendants focuses on the risk of wrongful convictions. The so-called Blackstone Ratio, for example, suggests that pro-defendant rules are justified even if they lead to “the guilty going free”<sup>63</sup> primarily because of the great evil of society convicting and punishing an innocent defendant. But numerous doctrines that favor defendants reveal a focus on *protecting the guilty*, or at the very least a lack of emphasis on the guilt/innocence distinction.

The exclusionary rule and Fourth Amendment restrictions on unreasonable searches and seizures don't speak the language of reliability—*i.e.*, there's no reason to think evidence seized in a warrantless search is somehow less reliable than evidence seized pursuant to a warrant. Rather,

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59. See, e.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 417 (1974); Cynthia Barmore, *Authoritarian Pretext and the Fourth Amendment*, 51 HARV. C.R.-C.L. L. REV. 273, 311 (2016) (collecting sources); Roberts, *supra* note 52, at 775–77 (describing the role of vagueness in curbing aggressive, race-based policing).

60. JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES* 44 (6th ed. 2017).

61. As abolition and other more explicitly radical approaches to the criminal system have begun to gain traction in the legal academy and public discourse, some scholars have sought to reimagine the judiciary as a potential site for radicalism or at least to push on the tension between constitutionalism and abolition/radicalism. E.g., Matthew Clair, *Getting Judges on the Side of Abolition*, BOS. REV. (July 1, 2020), <https://bostonreview.net/law-justice/matthew-clair-getting-judges-side-abolition> [<https://perma.cc/BNL8-MMEF>]; Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 105–22 (2019).

62. See, e.g., *Virginia v. Moore*, 553 U.S. 164, 169 (2008) (noting Founding Era concerns about state power before ruling for the government on a Fourth Amendment claim).

63. Cf. Benjamin Levin, *De-Naturalizing Criminal Law: Of Public Perceptions and Procedural Protections*, 76 ALB. L. REV. 1777, 1780 (2013) (critiquing the “trope of the guilty going free” as reflecting an inaccurate understanding of criminal law and criminal legal institutions as natural and pre-political).

these rights are justified in terms of a fear of state power run amok.<sup>64</sup> Bars on forcing a defendant to testify against herself and the conferral of many jury-related rights similarly are couched (at least in some contexts) in terms of preventing arbitrary enforcement and limiting state power.<sup>65</sup> Similarly, judges deploying the rule of lenity and the void-for-vagueness doctrine generally nod to concerns about arbitrary or discriminatory enforcement.<sup>66</sup>

An anti-statist frame might share some similarities with the conventional case for mens rea reform, in part because of its resonance with many liberal/libertarian arguments described in Part I.<sup>67</sup> But the anti-statist frame or justification that I suggest here is distinct from most of those arguments, because it rejects a focus on the defendant and her culpability (or lack thereof) and focuses exclusively on the state and the prosecutorial burden. Defendants could be unquestionably factually guilty and that wouldn't diminish the logic of these anti-statist rules.<sup>68</sup>

My suggestion, then, is that we could understand mens rea reform as an anti-criminalization rule,<sup>69</sup> rooted in the same rationales commonly invoked in the context of constitutional criminal procedure and of interpreting

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64. See, e.g., *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967) (“The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which ‘is basic to a free society.’” (quoting *Wolf v. Colorado*, 338 U.S. 25 (1949))).

65. E.g., *Miranda v. Arizona*, 384 U.S. 436, 442–43 (1966); *Wooster v. Plymouth*, 62 N.H. 193, 195 (1882); Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 161 (2001) (“In a series of well-publicized cases before the Revolution, the jury was hailed as a fundamental check on the abuses of the Crown.”).

66. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *United States v. Kozminski*, 487 U.S. 931, 952 (1988); cf. Guyora Binder & Brenner Fissell, *A Political Interpretation of Vagueness Doctrine*, 2019 U. ILL. L. REV. 1527, 1530 (characterizing the void-for-vagueness doctrine as vehicle for restricting the scope of criminal law).

67. Cf. Ian Haney López, *Freedom, Mass Incarceration, and Racism in the Age of Obama*, 62 ALA. L. REV. 1005, 1016 (2011) (describing contemporary, right-leaning libertarianism as distinct from “your typical 19th century libertarianism deeply concerned with the coercive power of the government, especially as wielded through the criminal apparatus (think of the values that animate the Fourth, Fifth, Sixth, and Eighth Amendments—four out of the ten amendments constituting our Bill of Rights aim to protect individuals from government overreaching in the criminal law area)”).

68. Of course, harmless-error review, widespread judicial deference to law enforcement, and a host of questionable doctrines tend to de-fang these rules. But that doesn't mean that these rules (at least nominally) speak to a deeper concern about the marginal or powerless defendant subjected to state violence.

69. Cf. Ristorph, *supra* note 23 (making a similar argument regarding the proportionality principle).

criminal statutes.<sup>70</sup> If framed in this way, a default mental state speaks less to who should be punished than it does to the need to impose a higher bar on the prosecution.<sup>71</sup>

### B. Abolition

In the last few years, the language of abolition has attracted greater public attention, with calls to abolish prisons, ICE, and other manifestations of the carceral state creeping into the mainstream.<sup>72</sup> And, as Doug Husak has argued, “criminal skepticism” appears to be on the rise in academic circles, with more scholars expressing “doubt that the criminal law as it is constituted at present should continue to survive at all.”<sup>73</sup>

Mens rea reform hardly has been a cause embraced by abolitionist activists, nor is its scholarly treatment framed in abolitionist terms. For a range of pragmatic reasons, that makes sense to me: time, resources, and political capital are limited, and to the extent that mens rea reform really is a piece of a right-leaning deregulatory agenda that would affect few criminal defendants, it should not come as a surprise that radical left activists wouldn’t embrace it. Nevertheless, in this Section I suggest that mens rea reform can be seen as consistent with broader abolitionist or anti-carceral commitments.

Most contemporary U.S. abolitionist claims are explicitly grounded in distributive concerns:<sup>74</sup> criminal law, policing, and punishment are

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70. While this frame suggests a stronger normative anti-criminalization and anti-punishment frame, it is consistent with Carissa Byrne Hessick and Joseph Kennedy’s call for “criminal clear statement rules.” See generally Hessick & Kennedy, *supra* note 51.

71. The analysis in this Section and the Section that follows might also be consistent with certain theories or positions associated with “criminal law minimalism.” See Langer, *supra* note 22, at 11–12 (collecting sources).

72. See, e.g., Kim Kelly, Opinion, *What the Prison-Abolition Movement Wants*, TEEN VOGUE (Dec. 26, 2019), <https://www.teenvogue.com/story/what-is-prison-abolition-movement> [<https://perma.cc/XVG4-VV3Q>]; Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/4XVT-B6R2>]; José Martín, *Six Ideas for a Cop-Free World*, ROLLING STONE (Jun. 2, 2020), <https://www.rollingstone.com/politics/politics-news/police-brutality-cop-free-world-protest-199465/> [<https://perma.cc/ZN58-SGZJ>].

73. Husak, *supra* note 24, at 30.

74. Non-U.S. abolitionist accounts less steeped in the specific inequities of U.S. political economy and racial capitalism do not necessarily reflect a similar distributive frame. See, e.g., WILLIAM DE HAAN, *THE POLITICS OF REDRESS: CRIME, PUNISHMENT, AND PENAL ABOLITION* (1990); THOMAS MATHIESEN, *THE POLITICS OF ABOLITION REVISITED* (2015); Langer, *supra* note 22, at 5–8. But, for present purposes, those accounts (grounded perhaps in humanism, religious commitments, or other less race- or class-based concerns) sound less like what has

objectionable largely because they operate to marginalize already marginalized populations across a range of axes (class, race, sexuality, etc.).<sup>75</sup> As a result, the case for abolition and abolitionist arguments tends to get trickier when the distributive stakes shift and the targets of state violence are also targets of abolitionist critique: For example, if abolitionism is opposed to police, then why should abolitionist arguments shield violent police from criminalization, prosecution, and punishment?<sup>76</sup> If abolitionism is anti-racist and opposed to bigotry, then why should abolitionist arguments shield (violent) racists and bigots from criminalization, prosecution, and punishment?<sup>77</sup> If abolitionism is anti-capitalist, then why should abolitionist arguments shield exploitative capitalists and abusive bosses from criminalization, prosecution, and punishment?<sup>78</sup>

At first blush, a cause (*mens rea* reform) often associated with regulatory crime and helping industry and “otherwise law-abiding people,” might seem a non-obvious fit for an abolitionist approach. But I think *mens rea* reform could (and should) be justified on abolitionist terms for three primary reasons; the first is fairly straightforward and requires little discussion, while the latter two are worth unpacking.

First, following from the anti-statist case articulated in the previous Section, *mens rea* reform should make it harder for the state to criminalize, convict, and punish. To the extent one adopts an “abolitionist ethic,”<sup>79</sup> favors

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become the increasingly dominant use of “abolition” or “abolitionism” in U.S. activist, advocacy, and academic discourse. So given the topic of this Symposium and the focus on U.S. criminal law, my discussion here focuses on the distributive abolitionist frame.

75. See, e.g., Butler, *supra* note 20; Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684 (2019); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1622 (2019); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1604–05 (2017); Roberts, *supra* note 52, at 7–8.

76. On this tension, see generally Levine, *supra* note 43; see also Elisabeth Epps, *Amber Guyger Should Not Go to Prison*, THE APPEAL (Oct. 7, 2019), <https://theappeal.org/amber-guyger-botham-jean/> [<https://perma.cc/T89P-L444>]; McLeod, *supra* note 75, at 1640.

77. On this tension, see generally Morgan Bassichis, Alexander Lee & Dean Spade, *Building an Abolitionist Trans & Queer Movement with Everything We’ve Got*, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 15 (Eric A. Stanley & Nat Smith eds., 2011).

78. On this tension, see generally, Levin, *supra* note 43.

79. See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161–62 (2015) (“By a ‘prison abolitionist ethic,’ I intend to invoke and build upon a moral orientation elaborated in an existing body of abolitionist writings and nascent social movement efforts, which are committed to ending the practice of confining people in cages and eliminating the control of human beings through imminently threatened police use of violent force.”).

decarceration, or simply has embraced “criminal law skepticism,”<sup>80</sup> any move that makes the prosecution’s task harder would appear to be a step in the right direction.<sup>81</sup> That is, even if mens rea reform wouldn’t help many defendants and might not even reach the corners of the system or classes of defendants most in need of assistance (or closest to the hearts of left commentators), it still would throw a wrench into the machinery of criminal punishment. To the extent that abolition suggests a commitment to decarceration and moving away from using “criminalization and cages as catchall solutions to social problems” for all,<sup>82</sup> then rules that make it harder for the state to criminalize or for prosecutors to succeed at trial should be seen as positives.<sup>83</sup>

Second, it’s not actually clear that the progressive critics of mens rea reform are correct in their characterization of it as a project that would benefit exclusively or primarily wealthier defendants charged with regulatory crimes exclusively or predominantly.<sup>84</sup> As Darryl Brown has argued, “in the context of federal regulatory or white-collar crime prosecutions, federal courts have a clear pattern of interpreting hundreds of criminal statutes to contain strict mens rea requirements.”<sup>85</sup> So it is possible that—despite libertarian and anti-regulatory rhetoric—mens rea reform wouldn’t have a sweeping impact in the “white-collar” realm, even if that were its desired effect. Instead (or in addition), it may be that default mental state requirements would benefit a range of other defendants charged with a very different class of crimes. During a July 2014 hearing of the Congressional Over-Criminalization Task Force, when asked about mens rea reform, federal defender David Patton observed (over much laughter from Task Force and audience members) that

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80. See Husak, *supra* note 24, at 29–30 (“[T]he thrust of criminal law skepticism is more sweeping and radical; it presents reasons to doubt that the criminal law as it is constituted at present should continue to survive at all. If the criminal law is indeed ‘broken,’ or a ‘lost cause,’ as some commentators allege, no simple fix is possible.”).

81. As noted above, this position also might be consistent with some versions or visions of criminal law minimalism. See, e.g., sources cited in note 22, *supra*.

82. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 2* (2007).

83. And, even if abolitionists are primarily focused on distributive consequences, the logic of abolition would indicate that shifting away from *all* criminal governance projects is desirable. See Epps, *supra* note 76 (“If you champion abolition for certain people and situations but not others, then yours is not a call for abolition but for sentencing reform. If your strategy to end mass incarceration is putting more white collar criminals in prison and freeing folks caged only on petty drug offenses, then you don’t want fewer people in prison, you just want different people in prison.”).

84. To be clear, for a range of other reasons discussed in this Part and in Part II, even if those characterizations were correct (in part or whole), that wouldn’t undercut general anti-carceral or pro-defendant benefits.

85. Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 262–63 (2007).

“I am sure that it won’t come as a surprise to you . . . that most of our clients are not facing regulatory misdemeanors.”<sup>86</sup> Yet Patton went on to note the importance of mens rea and the possibility that these reforms would have more sweeping effects.<sup>87</sup> For example, possessory gun offenses—a category of crimes often enforced against poor men of color<sup>88</sup>—often lack clarity when it comes to mental state requirements.<sup>89</sup> Similarly, a range of statutes criminalizing drug possession in school zones and camping without a license frequently lack clearly articulated mental state requirements.<sup>90</sup>

Third and relatedly, even if mens rea reform primarily were to reach defendants charged with regulatory crimes, it’s not clear what that would mean from a distributional standpoint. Put differently, the mere characterization of a crime as “white-collar” or “regulatory” doesn’t mean that the defendants would be white, wealthy, or stationed atop the social and economic hierarchy. To the extent that such categorizations of crime are sweeping, and to the extent that structural biases pervade each stage of the criminal process, there might be good reason to worry that decisions about arrest, charging, and sentencing would re-inscribe societal inequalities.<sup>91</sup>

But even if they didn’t, and even if mens rea reform only were to help some set of wealthy and powerful defendants, abolitionist opposition to reform would be misplaced.<sup>92</sup> To the extent that abolitionist arguments or an abolitionist ethic focus on doing away with carceral institutions for *everyone*, this should be an easy case. And, even to the extent that some might focus

86. *Agency Perspectives: Hearing Before the Over-Criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. 86 (2014) (statement of David Patton, Executive Director, Fed. Defs. of N.Y., E. & S. Dists. of N.Y.).

87. *See id.* at 103.

88. *See generally* Benjamin Levin, *Guns and Drugs*, 84 *FORDHAM L. REV.* 2173 (2016).

89. *See, e.g.*, *United States v. O’Brien*, 560 U.S. 218, 222 (2010) (“The issues in the present case do not require the Court to consider any contention that a defendant who uses, carries, or possesses a firearm must be aware of the weapon’s characteristics.”); *Rogers v. United States*, 522 U.S. 252, 255 (1998); *Staples v. United States*, 511 U.S. 600, 606 (1994); *State v. Ndikum*, 815 N.W.2d 816, 818 (Minn. 2012); *People v. Marrero*, 507 N.E.2d 1068, 1072 (N.Y. 1987); Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 *J. CRIM. L. & CRIMINOLOGY* 829, 892 (2001) (collecting cases); Stephen F. Smith, *Proportional Mens Rea*, 46 *AM. CRIM. L. REV.* 127, 129 (2009) (discussing the interplay of mens rea and gun possession in *Staples*); Stephanie Siyi Wu, Note, *Unknown Elements: The Mens Rea Question in 18 U.S.C. § 924(c)(1)(b)(II)’s Machine Gun Provision*, 114 *COLUM. L. REV.* 407, 408 (2014). On mens rea in possession cases, see generally Gideon Yaffe, *In Defense of Criminal Possession*, 10 *CRIM. L. & PHIL.* 441, 453 (2016).

90. *See generally* Kaitlin Bigger, *White Collar Crime Policy*, *CHAMPION*, September/October 2017, at 47 (collecting sources).

91. *See generally* Levin, *supra* note 43 (arguing that the cultural imagination of white-collar crime and its actual enforcement practices may diverge markedly).

92. To be clear, as stated above, I see this as a different claim from saying that abolitionists should champion mens rea reform or make it a priority.

primarily on the extent to which carceral institutions and institutions of social control harm marginalized communities, there's no good way to cabin a carceral turn. Put differently, why should we think that the progressive arguments against mens rea reform and in favor of pro-prosecutorial practices in the white-collar realm wouldn't extend or migrate to other areas and harm other defendants?<sup>93</sup> At the very least, these arguments would prop up the style of politics and governance that define mass incarceration.<sup>94</sup>

Finally, one reason that I suggest the frame or arguments advanced in this Part is that I share a possible concern about the ways in which mens rea reform (if framed or explained in conventional terms) might also serve a legitimating function. Abolitionists and other radical critics of the carceral state often distinguish between “reformist reforms” and reforms that are “non-reformist” or “transformative.”<sup>95</sup> Reforms that fall in the former category might appear to advance important interests but actually serve to grow the criminal apparatus and strengthen flawed institutions. In contrast, reforms that fall in the latter category might be incremental at times but serve to undermine objectionable interests and institutions.

Mainstream arguments in favor of mens rea reform make the proposals sound like reformist reforms—the goal is to make sure that the system's sorting function works better. In that respect, such arguments resonate with a universe of calls for reform that focus on “non-violent offenders” and implicitly (and occasionally explicitly) strengthen the case for harsh treatment of “violent offenders.”<sup>96</sup> Punishing knowing lawbreakers in this frame is justified; punishing unknowing lawbreakers would be unjust.

But shifting the frame, I argue, allows us to appreciate mens rea reform's *non-reformist* or *transformative* potential (at least in a limited capacity). Understanding default mental states as a sort of anti-criminalization rule

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93. Cf. Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 321–22 (2002) (“Because punishment is part of a system of institutional authority, it is not amenable to a simple moral analysis. The legitimacy of punishment is bound up with the legitimacy of the norm it enforces and of the institutions promulgating the norm, imposing the punishment, and inflicting it.”).

94. See, e.g., Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3213 (2015) (“Liberal faith in the criminal apparatus as a solution to the problems of racial and gender subordination may serve to legitimize our status quo criminal system, strengthen the discourse of individualism that prevents greater institutional change, and distribute scholarly capital away from emphasizing the structural nature of racial and gender oppression.”).

95. See, e.g., ANDRÉ GORZ, STRATEGY FOR LABOR 7 (Martin A. Nicolaus & Victoria Ortiz trans., 1967); Ruth Wilson Gilmore, *Foreword* to DAN BERGER, THE STRUGGLE WITHIN, at vii, vii–viii (2014).

96. See, e.g., FORMAN, *supra* note 14, at 221–22; MARIE GOTTSCHALK, CAUGHT 165–69 (2014); cf. Alice Ristroph, *Farewell to the Felony*, 53 HARV. C.R.-C.L. L. REV. 563, 566–67 (2018) (critiquing the naturalization of criminal categorizations).

suggests that they can and should be seen as challenging pro-punitive defaults. Perhaps more broadly, they could be seen as sending a message that it should be difficult for the state to criminalize and punish and that it is a social good to make it even more difficult.

#### IV. CONCLUSION

In any discussion of criminal law, it's inevitable that we must confront the question of over-inclusivity versus under-inclusivity. That is, try as they might, legislators, judges, and academics never can or will craft the perfect rule. On the one hand, criminalize too broadly, and you invite the sorts of absurd applications discussed at the outset of the Essay, not to mention inequitable, discriminatory, and disparate enforcement. On the other hand, criminalize too narrowly, and eventually the Very Bad Defendant will be acquitted or perhaps not even prosecuted in the first place.

One of the major pathologies of the U.S. criminal system is a seemingly inescapable cultural fear of under-inclusivity, of the guilty defendant going free, of the morally culpable person being unpunished, and even the person released on bail, parole, or probation committing a heinous crime because she isn't incarcerated. Public backlash and the resonance of individual bad cases has led to some of the worst excesses of the criminal system, from three-strikes laws, to sex offender registries, to the normalization of lengthy sentences and pretrial detention. A recognition of this pathology has driven so much of the advocacy and scholarship on overcriminalization, not to mention broader critical accounts of mass incarceration and the nation's apparent addiction to punishment.

In this Essay, I have argued that, while mens rea reform is probably less deserving of enthusiasm, attention, and political capital than it has received in some corners, it also represents a welcome step away from that fear of under-inclusiveness. Recognizing that society can't (and shouldn't) lock up everyone who does something bad or causes harm has been, is, and will be a hard lesson to learn. Perhaps heightened mental state requirements will mean that more unsympathetic defendants will avoid conviction or that powerful defendants who have done great harm will be able to deploy a new set of arguments in their defense. But, to dismantle the carceral state and reverse the course of mass incarceration, that's a risk that's both necessary and well worth taking.