MESS REA

by
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The disarray of the law on criminal mental state is in need of clarification and reform. Mens rea requires that culpability attach to each element of an offense before a defendant can be punished. This requirement has deep common law roots stretching back to medieval times. However, judicial and prosecutorial subjectivity has tainted the doctrine with a quagmire of unclarity. The Model Penal Code attempted to organize this messy doctrine, but it was never adopted by the federal government. In frustration with the labyrinth of federal mens rea law, which can contain conflicting definitions or none at all, the Supreme Court frequently turns to the MPC for guidance. This Note compares the MPC approach to English and American common law precedents and determines that the MPC departed from the historical common law insofar as it relaxed mens rea protections. Due to the disorganized nature of federal mens rea law, the Supreme Court is likely to continue relying on the MPC. If this practice indeed continues, then the Court should use the MPC mental state of knowingly to separate culpable from non-culpable conduct because knowingly best represents the common law concept of mens rea and provides principled clarity to courts, prosecutors, and defendants.

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I. INTRODUCTION

In our free society, each defendant is evaluated individually and is not punished until every single element of the crime in question is proven beyond a reasonable doubt. This is a myth. The reality is that most people incarcerated in the federal system, a disproportionate number of whom are Black, have not been convicted on this standard because their indictment ultimately resulted in a plea deal which waived this right.[1] When a defendant does go to trial, the criminal intent element of a crime, or mens rea, in theory prevents punishment from being imposed where it is not deserved.[2] This is a core protection extended to criminal defendants, and a significant foundation of America's theory of legitimate criminal justice,[3] but it is one that is routinely ignored in favor of expediency at the legislative level through both conscious omission and imprecise drafting.[4]

The government's power to arbitrarily make its citizens criminals was a major fear for the Founding Generation.[5] This concern's historical roots also reach deep

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[1] THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 5 (2021), https://www.sentencingproject.org/publications/trends-in-u-s-corrections/; John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RES.: FACT TANK (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

[2] *See* Molly J. Walker Wilson, *Retribution as Ancient Artifact and Modern Malady*, 24 LEWIS & CLARK L. REV. 1339, 1373–77 (2020) (discussing the evolutionary basis for theories of just deserts); Kenneth Einar Himma, *Luck, Culpability, and the Retributivist Justification of Punishment*, 22 LEWIS & CLARK L. REV. 709, 724 (2018) (describing moral debts and deserts as the most widely accepted justification for punishment).

[3] Wilson, *supra* note 2, at 1342.

[4] *See infra* Section III; *see also* Emilio S. Binavince, *The Ethical Foundation of Criminal Liability*, 33 FORDHAM L. REV. 1, 1–2 (1964) (analogizing the expansion of strict liability crimes in the United States to Hitler's security measures in the Third Reich).

[5] John Phillip Reid, *The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth and Eighteenth Centuries*, *in* The ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW

into English history.[6] The idea that justice is blind, and hence also colorblind, advances the promise that the government deals equally with its citizens and punishes only the deserving, an idea that also reinforces the legitimacy of government.[7] One need only look at the disparate impacts of the American carceral state on Black communities to refute the idea that this promise has been kept.[8] Just a few ways in which the criminal justice system disproportionately impacts some groups more than others include the difficulty some Black people face in getting an attorney,[9] the ways that entanglements with the criminal justice system trap poor people in cycles of poverty,[10] and how even after an acquittal it is hard to avoid insurmountable court fees in some jurisdictions.[11]

The expansive discretion of prosecutors to bring and pursue charges deeply impacts these realities because, whether or not the intent behind a policing or charging decision is to perpetuate racial hierarchies, the effects often do precisely that.[12] Although some limits to prosecuting based on race do exist,[13] for the most part, prosecutors' decisions about seeking charges are unfettered.[14] The requirement that the prosecution must prove every element of a crime, including the mental state

147, 194–95 (Ellis Sandoz ed., 1993); John D. Bessler, *The Concept of "Unusual Punishments" in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual*, 13 NW. J.L. & SOC. POL'Y 307, 324–26 (2018).

[6] *See infra* Section II.A.

[7] *See* E.P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 PAST & PRESENT 76, 78–79; *see also* Benjamin Justice & Tracey L. Meares, *How the Criminal Justice System Educates Citizens*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 159, 160 (2014).

[8] THE SENTENCING PROJECT, *supra* note 1; CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62–63 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf; *see* Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 L. & CONTEMP. PROBS. 221, 223 (2003).

[9] Brian Libgober, *Getting a Lawyer While Black: A Field Experiment*, 24 LEWIS & CLARK L. REV. 53, 54–57 (2020).

[10] Tonya L. Brito, *Producing Justice in Poor People's Courts: Four Models of State Legal Actors*, 24 LEWIS & CLARK L. REV. 145, 150–51 (2020).

[11] Matt Taibbi, *S—t Public Defenders See: Innocent, but Fined*, TK NEWS (Nov. 27, 2020), https://taibbi.substack.com/p/s-t-public-defenders-see-innocent.

[12] *Id.*; *see* Paul Butler, *Starr is to Clinton as Regular Prosecutors are to Blacks*, 40 B.C. L. REV. 705, 712–14 (1999) (discussing the connection between prosecutorial discretion and the disproportionate incarceration of Black Americans); Taslitz, *supra* note 8, at 223.

[13] *See* United States v. Armstrong, 517 U.S. 456, 458 (1996) (holding that to prove selective prosecution, a Black defendant must come forward with evidence that similarly situated individuals of a different race could have been prosecuted but were not).

[14] *See* Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) ("There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse.").

element, exists to protect defendants of every race from governmental overreaching.[15] One subtle, though pervasive, expansion of a given prosecutor's power to pursue certain defendants over others is the relaxation of the culpability standards embodied in common law mens rea.

Although this Note does not specifically focus on race, racial injustice is in the shadows of every aspect of criminal law and procedure. Encounters with the criminal justice system can create intergenerational harm, so any reduction in exposure will confer a benefit on negatively impacted communities.[16] One avenue to remedy the problem of selective prosecutions based on race—and thus reduce criminal exposure for communities of color—is to hold prosecutors, courts, and legislatures to their burden on mens rea requirements. That burden is nothing short of what the Model Penal Code (MPC) defines as knowingly.[17]

The erosion of this requirement stretches back to a Reconstruction-era decision by the Supreme Court to protect individuals accused of disenfranchising Black voters,[18] but the substantive protection itself derives from English common law.[19] Legislatures, in enacting criminal codes, largely purported to be enacting common law offenses that stretched back to the early days of the Republic.[20] There are now 52 criminal codes in the United States, and the common law backdrop—with the exception of Louisiana—is a feature they all share.[21] In defining the elements of criminal liability, commentators, scholars, and courts agree that normally a crime has two aspects: the *actus reus*, or act elements, and the mens rea, or mental state.[22] Although the prosecution must prove both in order to convict, it is this second piece that determines guilt in the sense of conscious culpability.[23] Criminal codes can be as varied as the jurisdictions in which defendants find themselves,[24] but one problem

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[15] *See* Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1651–52 (2020) (critiquing the mens rea requirement as aspirational rather than descriptive).

[16] *See generally* Brito, *supra* note 10 (describing the harmful cycle of court involvement that even minor infractions can trigger).

[17] *See infra* Section V.

[18] *See infra* notes 230–36 and accompanying text.

[19] WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 83 (2011).

[20] *See* Martin R. Gardner, *The* Mens Rea *Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 682 (1993).

[21] STUNTZ, *supra* note 19, at 83; Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 319 (2007).

[22] JAMES J. ROBINSON, CASES ON CRIMINAL LAW AND PROCEDURE 421, 424 (1941); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932).

[23] Gardner, *supra* note 20, at 643.

[24] *Compare* United States v. Geisen, 612 F.3d 471, 487 (6th Cir. 2010); United States v. Shah, 44 F.3d 285, 289 (5th Cir. 1995); United States v. Heuer, 4 F.3d 723, 732 (9th Cir. 1993), *and* Arthur Pew Constr. Co. v. Lipscomb, 965 F.2d 1559, 1576 (11th Cir. 1992), *with* United States v. Jacobs, 212 F. App'x 683, 684 (9th Cir. 2006); United States v. Ranum, 96 F.3d 1020,

that exists across all jurisdictions is what to do with a statute that does not define its mental state.[25]

Defining a mental state which triggers criminal liability is a difficult challenge; at times, the very terminology cannot be agreed on.[26] This second aspect of criminal liability has been labelled as the mens rea, *scienter*, culpability, a criminal intent, and the vicious will.[27] As varied as the terms for mens rea are, when a legislature has not stated any mental state in defining a crime, courts have imposed a broad spectrum of standards that span from strict liability in public welfare offenses,[28] to a mere awareness of the facts constituting the *actus reus*, to recklessness, to knowingly.[29] A wholly different problem presents itself when the statute does name a mental state but does not define that mental state.[30] Examples include willfully, wantonly, purposefully, knowingly, recklessly, and negligently.[31] Finally, a major point of contention between prosecution and defense counsel is how far down the statute to read the mental state. If the beginning of the statute says purposefully, then a prosecutor is free to argue, in the absence of controlling precedent, that act elements which are separated from this mental state by grammar and language can be criminalized by lower mental states like recklessness.[32]

1029 (7th Cir. 1996); *and* United States v. Leo, 941 F.2d 181, 200 (3d Cir. 1991). *Cf.* United States v. Natale, 719 F.3d 719, 740–41 (7th Cir. 2013) (recognizing circuit split on the requirement of specific intent to convict for false statements). *But see* United States v. London, 66 F.3d 1227, 1241–42 (1st Cir. 1995) ("[A] false statement is made knowingly if defendant demonstrated a reckless disregard of the truth, with a conscious purpose to avoid learning the truth."). For the legislative history of 18 U.S.C § 1001, see False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459, 3459 (codified as 18 U.S.C. § 1001) (stating that false statements must be made with the *mens rea* of knowingly and willfully).

[25] Gardner, *supra* note 20, at 672. *See generally* Dannye Holley, *Mens Rea Evaluations by the United States Supreme Court: It Does Not Have the Tools and Only Occasionally Displays the Talent—A Sixty-Year Report Card—1950–2009*, 35 OKLA. CITY U. L. REV. 401 (2010) (describing the Supreme Court's failures when attempting to divine statutory mens rea requirements).

[26] Sayre, *supra* note 22, at 974.

[27] *See* Gerhard O.W. Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1051–52 (1958) (citing United States v. Gris, 247 F.2d 860, 864 (2d Cir. 1957) ("He intended to do what he did, and that is sufficient.")).

[28] Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENVTL. L. 1165, 1222 (1995).

[29] Holley, *supra* note 25, at 415; Brooks Kern, *The Reckless Misapplication of* Voisine *to the Armed Career Criminal Act*, 24 LEWIS & CLARK L. REV. ONLINE 1, 8 (2019).

[30] Holley, *supra* note 25, at 418–22.

[31] 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 112–13, 118, 122–23 (London, MacMillan & Co. 1883); Gardner, *supra* note 20, at 672 n.193.

[32] Gardner, *supra* note 20, at 689–90 (describing the effect of disjoining motive from an act element of the crime); Robinson & Dubber, *supra* note 21, at 335.

To cut these, among other, Gordian knots, the American Law Institute promulgated the Model Penal Code in 1962.[33] The MPC was intended to function as a Restatement of criminal law and thereby iron out differences between jurisdictions and provide rules for legislatures to follow in replacing their common law crimes with statutory language.[34] Among its key provisions was Section 2.02 which simplified the mens rea analysis to five defined forms of culpability ranging from purposely to strict liability, and selected recklessness as the gap-filling mental state where a legislature is silent.[35] The MPC gained popularity with state legislatures during the 1970s—Idaho even experimented briefly with adopting it wholesale—but today only about two-thirds of the states have adopted portions of the MPC.[36] One key jurisdiction that has not adopted the MPC is the federal government.[37]

Nevertheless, the Supreme Court frequently turns to the MPC as a yardstick against which it compares federal statutes.[38] Justice Samuel Alito has even suggested that the "gap-filling" mental state of recklessness is the maximum requisite intent for a federal crime that lacks an enumerated mental state.[39] This approach would elevate the MPC's gap-filling section to a background presumption of federal criminal law. It would also align with the general intent theory of mens rea.[40] However, Congress is presumed to legislate against a common law background, and, as this Note demonstrates, the MPC approach to mental state would be a deviation from the common law.[41] Alito's position would therefore depart from the common law and circumvent Congressional authority. Moreover, another common law rule—the rule of lenity—counter-indicates his solution.

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[33] Kern, *supra* note 29, at 7; Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 694–95 (1983) (discussing the distinctions between the various levels of culpability).

[34] STUNTZ, *supra* note 19, at 266–67.

[35] MODEL PENAL CODE: GEN. REQUIREMENTS OF CULPABILITY § 2.02 (AM. LAW INST. 1985).

[36] STUNTZ, *supra* note 19, at 267; Robinson & Dubber, *supra* note 21, at 320, 326; Donald G. Stone & Theodore L. Hall, *The Model Penal Code in Idaho?*, 8 IDAHO L. REV. 219, 221 (1972).

[37] Although there is, supposedly, no such thing as the federal general common law, the Supreme Court constantly refers to common law backgrounds in defining modern American rights and governmental limitations. *Compare* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (Brandeis, J.), *with* Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2043 (2020) (Thomas, J., dissenting); Trump v. Vance, 140 S. Ct. 2412, 2420, 2420 n.1 (2020); Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1969 (2020).

[38] *See* Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019); Elonis v. United States, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part and dissenting in part).

[39] *Elonis*, 135 S. Ct. at 2015–16.

[40] R. v. Cunningham, 2 Q.B. 396, 412 (1957).

[41] *See* Holley, *supra* note 25, at 402.

The rule of lenity provides that wherever the construction of a statute is in doubt, it should be resolved in favor of the defendant.[42] If the MPC placed a greater burden on the prosecution by requiring a higher mental state, then Alito would be correct; but if the background common law imposed a greater burden by requiring the prosecution prove that the defendant acted with a more culpable mental state than mere recklessness, then Alito's approach must be rejected until Congress decides to either enact the MPC or codify another rule of mental state construction.[43] Until then, in the absence of Supreme Court guidance, courts remain free to imply whatever mental state they feel is necessary to separate culpable from innocent conduct, on an *ad hoc* basis.[44]

This *ad hoc* approach is no longer tenable because of the confusion it has brought to the doctrine of mens rea. The bright-line rules in the MPC offer one way to clean things up, but the MPC is not the common law canvas on which Congress paints. Comparing the MPC's defined mental states to the common law demonstrates that the knowingly standard is the best fit for historical understandings of mens rea. Therefore, to bring clarity to the doctrine, the Court should adopt knowingly as the base-line requisite mens rea.

In advancing this thesis, this Note proceeds in four sections. Section II lays out the historical foundations of the mens rea requirement in Anglo-American common law. Section III analyzes the MPC innovation of categorizing and defining mental states against this common law foundation. Section IV critiques Supreme Court jurisprudence on mens rea and suggests that a more structured approach is called for, even if it is not the MPC's approach. Section V contends that the MPC mental state of knowingly best represents the common law concept of mens rea, and advocates for the adoption of that mental state in the absence of Congressional direction. This Note concludes that, to uphold the common law and protect criminal defendants, a standardized knowingly requirement for mens rea should be adopted by the Supreme Court.

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[42] United States v. Santos, 553 U.S. 507, 514 (2008); United States v. Bass, 404 U.S. 336, 347–49 (1971); Bell v. United States, 349 U.S. 81, 83 (1955); McBoyle v. United States, 283 U.S. 25, 27 (1931); United States v. Gradwell, 243 U.S. 476, 485 (1917); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 105 (1820).

[43] *See Elonis*, 135 S. Ct. at 2013 (majority opinion) (arguing that since there is no circuit split over recklessness filling the gap in § 875(c), the Court need not reach the issue).

[44] Morissette v. United States, 342 U.S. 246, 250 (1952).

II. THE COMMON LAW APPROACH TO MENS REA

Mens rea is a tricky concept to nail down, but one avenue for bringing some clarity to the doctrine is by tracing its history.[45] Justice Holmes wrote in 1916 that he "always . . . thought that most of the difficulties as to the *mens rea* was due to having no precise understanding what the *mens rea* is."[46] This lack of precision plagued mens rea jurisprudence throughout twentieth century American criminal law.[47] However, the requirement of mens rea is "universal and persistent," and the reason why is aptly captured by one of Holmes' most famous aphorisms: "[E]ven a dog distinguishes between being stumbled over and being kicked."[48] By the same token, society should differentiate between deliberate subversions of the law on one hand, and morally blameless mistakes on the other.[49] Ethics long played an integral role in the definition of mens rea, but in the latter half of the nineteenth century the two diverged.[50]

In the late nineteenth and early twentieth centuries, utilitarians, like Holmes, endorsed the idea that criminal sanctions can attach even in the absence of moral culpability in the form of the public welfare offense—a crime created by the legislature to protect the public from amoral yet dangerous conduct.[51] From this clash, between the criminal law's requirement of mens rea and the benevolence of protective legislatures, grew the present day confusion in the doctrine of criminal mental state.[52] In modern federal jurisprudence, there is no agreed upon definition for mens

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[45] Stanislaw Frankowski, *Mens Rea and Punishment in England: In Search of Interdependence of the Two Basic Components of Criminal Liability (A Historical Perspective)*, 63 U. DET. L. REV. 393, 393–94 (1986).

[46] Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (July 14, 1916), *in* 1 HOLMES-LASKI LETTERS 4 (Mark DeWolfe Howe ed., 1953).

[47] *See* Holley, *supra* note 25, at 401, 406–08; Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 504 (2019). The same lack of precision was apparent in nineteenth century England. A.H. MANCHESTER, A MODERN LEGAL HISTORY OF ENGLAND AND WALES 1750–1950, at 198 (1980) ("Clearly there was little agreement at common law as to exactly what amounted to a guilty mind.").

[48] *Morissette*, 342 U.S. at 250, 252 n.9; O.W. HOLMES, JR., THE COMMON LAW 3 (London, MacMillan & Co. 1882).

[49] Paul J. Larkin, Jr. & GianCarlo Canaparo, *Are Criminals Bad or Mad? Premeditated Murder, Mental Illness, and* Kahler v. Kansas, 43 HARV. J.L. & PUB. POL'Y 85, 105–06 (2020); Mandiberg, *supra* note 28, at 1177–78.

[50] Mueller, *supra* note 27, at 1058 ("[A]t common law there was and is an ethico-legal concept of *mens rea*, because every prohibited act was also known to be evil. Thus, an intention to do this act amounted to an evil intention, a mens rea.").

[51] Mandiberg, *supra* note 28, at 1185–86; *see id.* at 1203–04 (discussing analytical problems with applying the public welfare offense exception to the mens rea requirement).

[52] Larkin, Jr. & Canaparo, *supra* note 49, at 104–06. *But see* Ristroph, *supra* note 15, at 1651–52 ("The structure of criminal law includes various limiting principles that constrain what

rea, and the concept stands for little more than the proposition that the government must prove not only the outward act elements, but also some accompanying mental state, sometimes.[53] The level of culpability that is required to satisfy the mens rea element varies wildly,[54] but mens rea is a basic building block of common law crimes and should not be abandoned to pandemonium simply in deference to legislative intent. Instead, the history of mens rea should be reexamined in order to determine whether there is a principled basis by which the doctrine can be clarified and consistently applied.

A. Early English Legal History

The role of intent in criminal law has a long history. Some of the earliest writings that deal with what we would now call mens rea trace all the way back to the rule of the Roman emperor Hadrian.[55] As early as the second century C.E., differing degrees of guilt could attach depending on an offender's degree of intention.[56] The degree of intent was not yet a separate element of the offense as modern jurists would recognize it, but was instead assumed from the overt acts constituting the offense in question.[57] However, a lack of intentionality could result in a lesser degree of punishment and help the offender demonstrate accident.[58]

The translation of Roman law into England is not a linear story and has much more to do with the influence of church and canon law on English jurists than it does with a change in the government of the people of England.[59] With Nordic invasions came different customs and approaches to rule that were more diffuse than

conduct can be criminalized—that which inflicts grave injuries on individuals or society—as well as the form that criminalization must take: clear offense definitions codified by legislatures.").

[53] *See infra* Section IV; *see* 2 STEPHEN, *supra* note 31, at 95.

[54] *See* Mandiberg, *supra* note 28, at 1203 n.217 (discussing how Justices Ginsburg and O'Connor interpreted the legislative intent of a firearms statute).

[55] 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 18 (London, MacMillan & Co. 1883). *But see* Frankowski, *supra* note 45, at 395 ("A historian of English law need not go further back than the fifth century" because "subsequent Nordic invasions . . . remov[ed] . . . all traces of . . . the Roman legal system.").

[56] 1 STEPHEN, *supra* note 55, at 18; *see* Elizabeth Papp Kamali, Felonia Felonice Facta*: Felony and Intentionality in Medieval England*, 9 CRIM. L. & PHIL. 397, 415 (2015) (describing state of mind requirements from the twelfth and thirteenth centuries).

[57] 1 STEPHEN, *supra* note 55, at 18.

[58] *The Twelve Tables, 451–449 B.C.*, *in* ANCIENT ROMAN STATUTES 9, 11 (Clyde Pharr ed., Allan Chester Johnson et al. trans., 1961) (discussing punishments for arson); Gardner, *supra* note 20, at 642; Kamali, *supra* note 56, at 415 (describing Bracton's theory that crime is not committed in the absence of intent to injure).

[59] *See* Frankowski, *supra* note 45, at 395–96.

Roman centralization.[60] Much of old Germanic law, considered by some to be a progenitor of English common law, was concerned with replacing old family feuds with restitution to the victim or their kin.[61] This law did not differentiate between crimes done against society as a whole and wrongs done to an individual.[62] Where one individual harming another threatened social stability, this was considered a wrong to society best remedied by assuaging the vengeance of the aggrieved party.[63]

This early criminal law involved a form of strict liability whereby the offender was handed over to the victim or the victim's family.[64] This practice often had the flavor of state-sanctioned revenge because it was up to victims to decide whether to grant leniency or pardon depending on their feelings regarding the culpability of the offender in question.[65] Where society did step in to punish the offender, it was usually in the form of withdrawing its protection from retribution by the sanction of outlawry.[66]

This old form of strict liability did not last beyond the centralizing reigns of the early Norman kings.[67] By 1118, even if mens rea was not a separate element that had to be proven before criminal liability attached, it nevertheless was a factor for mitigating the harshness of a sentence.[68] According to the *Leges Henrici Primi*, com-

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[60] *Id.* at 396; Warren Winfred Lehman, *The First English Law*, 6 J. LEGAL HIST. 1, 2, 10–12 (1985).

[61] *See, e.g.*, Sayre, *supra* note 22, at 977.

[62] Frankowski, *supra* note 45, at 397 ("[W]hile the law during this period did address harm to individuals and their property, there was no distinction between civil delicts (torts) and crimes.").

[63] *Id. But see* Lehman, *supra* note 60, at 8–9 (arguing that the old feud system was stabilizing rather than destabilizing due to its position as a decentralized instance of police power).

[64] Sayre, *supra* note 22, at 977 ("The law, which was seeking to supplant the blood feud by inducing the victim or his kin to accept money payments in place of taking violent revenge, seemed to concentrate its gaze rather upon the outraged victims or would-be avengers who must be brought under control than upon the actual blameworthiness of the accused.").

[65] ANTHONY BABINGTON, THE POWER TO SILENCE: A HISTORY OF PUNISHMENT IN BRITAIN 73 (1968); 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 449 (2d ed. 1909); Gardner, *supra* note 20, at 643 ("[T]he ancient law appears heavily compensatory in its remedial thrust. . . . it may not be technically correct to characterize this early law as 'criminal' in nature. . . . the emergence of *mens rea* as a basic principle unique to criminal law follows, and arises because of, the systematic emergence of punishment as a sanction distinct from compensatory remedies."); Sayre, *supra* note 22, at 978 (describing this system as "rough and ready justice").

[66] 2 FLETA (H.G. Richardson & G.O. Sayles eds., 1955), *in* 72 SELDEN SOCIETY 77; Frankowski, *supra* note 45, at 398.

[67] Sayre, *supra* note 22, at 977; *see also* MANCHESTER, *supra* note 47, at 198.

[68] LEGES HENRICI PRIMI 271, 283 (L.J. Downer ed. & trans., 1972) (c. 1118); Kamali, *supra* note 56, at 407 ("Misadventure or accident was defined in contrast with felony . . . The absence

piled between 1115 and 1118, punishment should be meted out for both intentional and unintentional killing, but the amount of leniency was greatly increased for "misfortune[s] which occur by accident rather than by design."[69] Moreover, the *Leges* appears to be the earliest written source for Coke's famous maxim "*actus non facit reum, nisi mens sit rea*" which, paraphrased, gives us the current common name of the mental state requirement.[70] Also included in the *Leges* is one of mens rea's most common synonyms: *scienter*.[71] It is therefore clear that, at least as a concept, if not always a requirement, by the twelfth century mens rea was a part of English criminal law.[72]

1. The History of Mens Rea Can Be Supplemented by Analogies to Early Tort Law

By 1215, proportionality of punishment was enshrined in Magna Carta.[73] Yet it remains difficult to determine what this meant exactly in practice as the eyre rolls during the time of King John "give us only the barest details" and are "often only fragmentary."[74] Much of early criminal practice was, in essence, mob justice for criminals caught in the act by the hue and cry.[75] As the crown sought to secure the

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of *scienter* makes misadventure the legal equivalent of a venial sin . . . ."); Sayre, *supra* note 22, at 978.

[69] LEGES HENRICI PRIMI, *supra* note 68, at 283; Sayre, *supra* note 22, at 978; *see* POLLOCK & MAITLAND, *supra* note 65, at 470–71.

[70] EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN 6 (London, W. Clarke & Sons 1817) (1644); *see* 2 STEPHEN, *supra* note 31, at 94 n.1.

[71] Sayre, *supra* note 22, at 978. "*Qui inscienter peccat scienter emendet*" roughly translates to one who sins unknowingly will knowingly atone, and actually stands for the opposite of denoting a "knowing" mental state in criminal and tort law. *Id.*

[72] *See* Kamali, *supra* note 56, at 397–98 (describing a 1329 case wherein jurors did not "suspect" townsmen, who had killed a thief caught in the act, "of any felony committed feloniously").

[73] MAGNA CARTA, *reprinted and translated in* 3 ENGLISH HISTORICAL DOCUMENTS: 1189–1327, at 319 (Harry Rothwell 1975) (1215) ("A free man shall not be amerced for a trivial offence except in accordance with the degree of the offence, and for a grave offence he shall be amerced in accordance with its gravity . . . ."); *see also* Furman v. Georgia, 408 U.S. 238, 243 (1972) (Douglas, J., concurring).

[74] *See* WILLIAM CRADDOCK BOLLAND, THE GENERAL EYRE: LECTURES DELIVERED AT THE UNIVERSITY OF LONDON AT THE REQUEST OF THE FACULTY OF LAWS 22 (1922); *see also* J.H. BAKER, THE COMMON LAW TRADITION: LAWYERS, BOOKS AND THE LAW 134–36 (2000) (explaining that plea rolls "were concerned to record the outcome of proceedings rather than the discussions and reasons which explain how the result was arrived at" and that the practice of reporting began in the 1250s or 1260s); J.B. Post, *Local Jurisdictions and Judgment of Death in Later Medieval England*, 4 CRIM. JUST. HIST. 1, 9 (1983) (hypothesizing on reasons for the dearth of records for felony proceedings). One of the functions of the eyre courts was to deal with serious crime. David Crook, *The Later Eyres*, 97 ENG. HIST. REV. 241, 246 (1982).

[75] POLLOCK & MAITLAND, *supra* note 65, at 578 (noting that it was an amerceable offense to fail to raise the hue).

jurisdiction of its justices against encroachment, and secure its revenues collected from criminal forfeitures, even caught-in-the-act felons were shifted from summary proceedings to trial.[76] Nevertheless, trying to nail down mens rea still remained difficult in the early modern period because of how closely mens rea was tied to legal liability itself.[77] Mens rea was considered a question of fact for a jury to decide, and "evidence adduced by the parties," "submissions of counsel," and "judges' reasons and the guiding authorities" in trials by jury were not included in legal records at the time.[78]

However, due to the proximity of tort and criminal liability at the time, analogies between the two can shed some light on how English judges and jurists were thinking about culpability.[79] In tort, a lack of culpability was a common defense plea, which put the entire plaintiff's case in issue.[80] This proves, at the very least, that punishment and recovery were predicated on blameworthiness because "it is not reasonable to punish someone in whom there is no fault."[81] Cases stretching back to 1520 demonstrate the prevalence of this principle, including one where the serjeant argued that "the intent is the only distinction between trespass and felony."[82] This important distinction meant that at common law the same *actus reus* could result in two very different legal outcomes: civil liability if negligence, criminal liability if some form of vicious will.[83]

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[76] 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 608 (5th ed. 1942); Post, *supra* note 74, at 10–11; *see also* BOLLAND, *supra* note 74, at 19; 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 149 (First American ed. 1847) (1736).

[77] 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 23 (George E. Woodbine ed., Samuel E. Thorne trans., William S. Hein & Co. 1997) (n.d.) ("It is your intent that differentiates your acts, nor is a crime committed unless an intention to injure exists . . . .").

[78] J.H. BAKER, *supra* note 74 at 134–35 ("As soon as a material fact was asserted by one party and denied by the other, there was a triable 'issue' (*exitus*) and the pleadings were closed. The record of the trial, if there was one, gave only the bare essentials . . . ."); *see also* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 564–65 (5th ed. 2019).

[79] JOHN BAKER, 6 THE OXFORD HISTORY OF THE LAWS OF ENGLAND 1483–1558, at 754 (2003) [hereinafter BAKER, OXFORD HISTORY]. *But see id.* at 754–55 ("[L]iability in tort had already diverged from that in criminal law, since *mens rea* was not relevant in an action for damages."); J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 402, 402 n.9, 523 (4th ed. 2007) [hereinafter BAKER, AN INTRODUCTION].

[80] BAKER, OXFORD HISTORY, *supra* note 79, at 754.

[81] *Id.*

[82] Fyloll v. Assheleygh, YB 12 Hen. 8, fol. 3, Trin., pl. 3 (1520), *per* Roo sjt., *reprinted in* 119 SELDEN SOCIETY 14, 15 (2002); BAKER, OXFORD HISTORY, *supra* note 79, at 754.

[83] 2 THE REPORTS OF SIR JOHN SPELMAN (J.H. Baker ed. 1978), *in* 94 SELDEN SOCIETY 222–24 (discussing Ustwayt v. Alyngton (CP 1534)); *see* BAKER, AN INTRODUCTION, *supra* note 79, at 403.

Trespass *vi et armis* was the classic tort that triggered the king's jurisdiction.[84] The restriction of trespasses to those that broke the king's peace was relaxed when the legal fiction sustaining the form became obsolete thanks to the trespass on the case form.[85] In *vi et armis*, "the defendant's state of mind was irrelevant to civil liability."[86] All a defendant could do was enter the general plea of *non est culpabilis* and attempt to explain the circumstance of the accident to the jury.[87] Thus, there was nothing for the defendant to traverse with a question of fact, and therefore *mentes reae* defenses created little legal history in the context of trespass and negligence.[88] What legal history these cases did generate tends to show that absence of mental state had to be pled affirmatively and could only be shown by proving inevitability, demonstrating lack of fault.[89]

A notable case from this lineage is *The Case of Thorns*, which was decided in 1466.[90] There, the defendant pleaded that he had not meant for his hedge clippings to fall onto his neighbor's property, but Justice Richard Choke declared that the defendant needed to show what he did to prevent the thorns falling in order to make out a plea that would be successful.[91] Nevertheless, the Justice noted, the case would have been different had it sounded in criminal law.[92] In criminal law, a vicious will is required because of the ancient maxim "*actus non facit reum nisi mens sit rea*."[93] *The Case of Thorns* thus reaffirms the importance of mens rea to criminal liability by illustrating a key difference between tort and crime: the requisite culpability of the defendant.[94]

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[84] BAKER, AN INTRODUCTION, *supra* note 79, at 60–61.

[85] *Id.* at 61 ("[I]n the 1350s . . . the Chancery clerks began regularly to issue writs of trespass in which the phrase was omitted.").

[86] *Id.* at 402.

[87] *Id.* at 403.

[88] *Id.*

[89] *See, e.g.*, Gibbons v. Pepper (1695) 91 Eng. Rep. 922 (KB); Weaver v. Ward (1616) 80 Eng. Rep. 284 (KB); Ustwayt v. Alyngton (CP 1534), *reprinted in* JOHN BAKER, BAKER AND MILSOM: SOURCES OF ENGLISH LEGAL HISTORY, PRIVATE LAW TO 1750, at 373 (2d ed. 2010).

[90] Hulle v. Orynge, YB Mich. 6 Edw. 4, fol. 7, pl. 18 (1466), *reprinted in* BAKER, *supra* note 89, at 369.

[91] *Id.* at 373.

[92] *Id.* at 370–71.

[93] Bessey v. Olliot (1683) 83 Eng. Rep. 244, 244 (KB) (discussing *Hulle*, YB Mich. 6 Edw. 4, fol. 7, pl. 18); *see* Binavince, *supra* note 4, at 20 ("Criminal wrong is being gradually isolated from civil wrong, and 'intention' was the criterion adopted."); *see also* Stephen G. Gilles, *Inevitable Accident in Classical English Tort Law*, 43 EMORY L.J. 575, 582–83 (1994).

[94] *See* Kamali, *supra* note 56, at 418 ([F]elony connoted wickedness and intentionality, such that an outlaw might admit homicide and theft but relieve himself of responsibility by arguing that he did not commit the acts willfully or maliciously.").

In defamation, on the other hand, the culpability requirement grew into a qualified privilege where the plaintiff was alleged to have provoked the defendant.[95] "[M]alice implied a certain deliberation . . . that sudden anger for a good reason showed its absence."[96] This defense did not exonerate the defamation defendant, but it did mitigate the penance imposed.[97] Here, the influence of canon law, with its cognizance of the morality of intent, can be felt through the shifting of fault to both parties and requiring them both to do penance.[98] Intent therefore mattered, and could be negated, or at least mitigated, by provocation into passion.

Mens rea could cut against plaintiffs as well. For example, in *Chune v. Piott*, the Court of King's Bench was faced with a false imprisonment case.[99] A sheriff had arrested a plaintiff who hindered the sheriff's apprehension of an escaping prisoner in 1615.[100] The court determined that the plaintiff had verbally abused the sheriff, and on that provocation the sheriff had been justified to take the plaintiff into custody.[101] Chief Justice Edward Coke reasoned that, by his words, the plaintiff had demonstrated an intent to inhibit the sheriff's pursuit of the former prisoner, and was therefore appropriately arrested.[102] Since "[a]ctus non facit reum ni si mens sit rea," the plaintiff intended the logical consequence of his actions, which was the escape of the prisoner.[103] Such a bad intent justified the plaintiff's imprisonment, and his appeal therefore failed.

Coke's influence on the development of English law cannot be overstated.[104] Yet he was a divisive figure,[105] and cases in his Court of Star Chamber demonstrate

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[95] R.H. HELMHOLZ, 1 THE OXFORD HISTORY OF THE LAWS OF ENGLAND: THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 597 TO THE 1640S, at 580 (2004).

[96] *Id.*

[97] *Id.* (citing three examples of defendants raising provocation as a defense to defamation).

[98] *Id.* at 581.

[99] Chune v. Piott (1615) 80 Eng. Rep. 1161 (KB).

[100] *Id.*

[101] *Id.* at 1162.

[102] *Id.* at 1163.

[103] *Id.*

[104] CHRISTOPHER HILL, THE CENTURY OF REVOLUTION: 1603–1714, at 67 (1961) [hereinafter HILL, CENTURY OF REVOLUTION] ("[Coke] it is, more than any other lawyer, to whom legal historians attribute the adaptation of the medieval law to the needs of a commercial society."); *see* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 280–84 (5th ed. 1956).

[105] *See* John P. Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, 36 ILL. L. REV. 127, 140–43, 145 (1942) (discussing the fight over *habeas corpus* between the two jurists that ultimately resulted in Coke's removal from King's Bench).

that a bad intent was defined by the morals of the judge in the seventeenth century.[106] Common law mens rea depended on the culture of early modern England for its definitions, and that culture was by no means monolithic.[107] Leaving the implication of mens rea to a potentially biased judge, in conjunction with many other legitimacy issues, was problematic for a society that was unsure of its economic and moral direction.[108]

2. Judicial Discretion, Moral Differences, and a Poorly Defined Mens Rea

Arbitrary governance enforced by an arbitrary judiciary was a grievance that informed America's Founders' decision to codify protections for criminal defendants in the Bill of Rights.[109] A century earlier, this same grievance in part led to the English Civil War. During the seventeenth century, the content of one's viciousness was left to a religiously minded judiciary that could be sharply divided as to its beliefs about culpability.[110] The variable application of the king's justice led to widespread suspicion of the legal profession and a common understanding that the law did not equally apply to everyone.[111]

The English Civil War was in part a revolution against the unequal application of the law.[112] The 1688 Declaration of Rights, sometimes called the English Bill of Rights, codified many of the demands voiced by the common people during the

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[106] *See* R. v. Lilburne (1649) 4 St. Tr. 1270, 1382 (1649) (commenting that Judge Keble, at the trial of John Lilburne and before Lilburne's defense, told the jury it was their duty to find Lilburne guilty).

[107] *See* CHRISTOPHER HILL, THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION 14 (Penguin ed. 1991) [hereinafter HILL, WORLD TURNED UPSIDE DOWN]. Similar issues in culture in part inform our current criminal justice issues. *See* Frank LoMonte & Anne Marie Tamburro, *From After-School Detention to the Detention Center: How Unconstitutional School-Disruption Laws Place Children at Risk of Prosecution for "Speech Crimes,"* 25 LEWIS & CLARK L. REV. 1, 24–30 (2021).

[108] *See* HILL, WORLD TURNED UPSIDE DOWN, *supra* note 107, at 69–70.

[109] *See* Reid, *supra* note 5, at 194–95 (contending that even if the American colonies "were not looking back to the ancient constitution," they were at least "looking back to the constitution . . . that had triumphed over Charles I").

[110] *See, e.g.*, BAKER, AN INTRODUCTION, *supra* note 79, at 523 ("One matter left to the common law [as opposed to Parliament], was the extent to which moral wickedness was a necessary constituent element of criminal offences."); 1 STEPHEN, *supra* note 55, at 342–45 (discussing John Lilburne's case and the freedom of conscience defense it employed).

[111] HILL, CENTURY OF REVOLUTION, *supra* note 104, at 68–69. This feeling has at least one modern counterpart in the Black Lives Matter movement. *See* Patrisse Cullors, *'Black Lives Matter' Is About More than the Police*, ACLU (June 23, 2020), https://www.aclu.org/news/criminal-law-reform/black-lives-matter-is-about-more-than-the-police/ (discussing the many ways, including incarceration rates, health care, housing, education, and economics, in which the law does not work for Black communities).

[112] HILL, WORLD TURNED UPSIDE DOWN, *supra* note 107, at 14–15.

English Civil War.[113] The Declaration of Rights was the model for the American Bill of Rights.[114] American cornerstones like freedom of the press, freedom of religion, the warrant requirement, and the writ of habeas corpus are the fruits of the demands of the Levellers and other commoners who fought in the English Civil War.[115]

One dramatic, and directly attributable example, of this lineage is the Fifth Amendment freedom from self-incrimination.[116] John Lilburne, a Leveller leader and sometime disciple of Coke, defiantly refused to swear against himself, and that refusal is the basis of the modern Fifth Amendment right against self-incrimination.[117] Today, we understand that this right is closely tied to the protections of due process.[118] At its root, due process takes its content from what we as a society believe are fair procedures that must occur before deprivation of liberty can be justly imposed.[119]

In the seventeenth century, a similar protection included the prohibition against "[t]he defendant [being] found guilty unless he or she had the guilty mind,

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[113] STEVE PINCUS, 1688: THE FIRST MODERN REVOLUTION 292–93 (2009).

[114] *See* Culombe v. Connecticut, 367 U.S. 568, 581 (1961) (discussing the injustices of Star Chamber); Boyd v. United States, 116 U.S. 616, 629 (1886) (same); *see also* Frank Riebli, *The Spectre of Star Chamber: The Role of an Ancient English Tribunal in the Supreme Court's Self-Incrimination Jurisprudence*, 29 HASTINGS CONST. L.Q. 807, 809 (2002) (noting that the Supreme Court frequently cites "Star Chamber Procedure" as a foil to American due process).

[115] *Compare* THE HUMBLE PETITION (1648), *reprinted in* THE LEVELLER TRACTS 1647–1653, at 147, 151–54 (William Haller & Godfrey Davies eds., 1964), *with* U.S. CONST. amend. I–X, *and* THE DECLARATION OF RIGHTS (1689), *reprinted in* SELECT STATUTES, CASES, AND DOCUMENTS TO ILLUSTRATE ENGLISH CONSTITUTIONAL HISTORY, 1660–1832, at 129, 130–38 (C. Grant Robertson ed., 5th ed. 1928). *See also* Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1700 (1994). This fascinating time period is covered in detail in Christopher Hill's book *The World Turned Upside Down*. *See generally* HILL, WORLD TURNED UPSIDE DOWN, *supra* note 107.

[116] U.S. CONST. amend. V.

[117] Miranda v. Arizona, 384 U.S. 436, 459 (1966) (discussing how Lilburne's trial led to the abolition of Star Chamber and impacted the American Bill of Rights); *see also* HILL, WORLD TURNED UPSIDE DOWN, *supra* note 107, at 36–37.

[118] *See* Chavez v. Martinez, 538 U.S. 760, 781–82 (2003) (Scalia, J., concurring in part) (discussing a substantive-due-process right to be free from coercive questioning); William T. Pizzi & Morris B. Hoffman, *Taking* Miranda*'s Pulse*, 58 VAND. L. REV. 813, 841 (2005) (critiquing the conflation of self-incrimination reliability concerns and due process individual liberty concerns).

[119] DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) (describing the purpose of the due process clause as preventing arbitrary exercise of government power); Bell v. Wolfish, 441 U.S. 520, 535–37 (1979) (guaranteeing only a process for depriving the accused of liberty).

or mens rea, which the law prescribed for the criminal offence in question."[120] The problem of definition persisted, however, because common law "due process" did not require the mental element to be defined in any certain or definite way.[121] Intent was merely proven by the fact that a defendant had intended the logical consequences of their actions, and was therefore tightly tied to the *actus reus*.[122] Moreover, intent could be transferred from one unlawful act to another through the doctrine of constructive malice.[123]

The history is somewhat tangled at this point, but the concept of mens rea as a protection for defendants emerges as a fundamental right that shares its roots with other foundational American rights.[124] Despite steps forward during the seventeenth century, the moral differences of varying judges allowed discriminatory enforcement of the law to continue in regard to determinations of culpability. One attempt to nail down a definition of mens rea and eliminate vicissitude was to describe it as a vicious will of the defendant. This attempt began with Coke's *Institutes*

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[120] MANCHESTER, *supra* note 47, at 198; *see also* David McCord, *The English and American History of Voluntary Intoxication to Negate* Mens Rea, 11 J. LEGAL HIST. 372, 375 (1990) (discussing disagreements among English judges over whether drunkenness was an excuse or an aggravating factor).

[121] MANCHESTER, *supra* note 47, at 199; 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 75 (London, MacMillan & Co. 1883).

[122] MANCHESTER, *supra* note 47, at 199 ("[N]o matter how marked the lack in practice of general principle or how imprecise the mental element which was required for particular offences, the fact remained that at common law it was essential for the prosecution to prove that the defendant had a guilty mind."); *cf.* J.A. SHARPE, CRIME IN EARLY MODERN ENGLAND 1550–1750, at 80 (2d ed. 1999) (table displaying number of felony indictments in nine English counties from 1550 to 1749).

[123] MANCHESTER, *supra* note 47, at 199 ("[B]y the doctrine of constructive or implied malice a person might be guilty of murder who had no intention to kill or to injure the deceased or any other person, but only to commit some other felony . . . ."); *cf.* People v. Scott, 927 P.2d 288, 291 (Cal. 1996) ("The common law doctrine of transferred intent was applied in England as early as the 16th century."); United States v. Stavroulakis, 952 F.2d 686, 690, 692 (2d Cir. 1992) (in money laundering context, § 1956(a)(3) means that intent to launder gambling money can be transferred to co-conspirators' intent to launder drug money). *See generally* Anthony M. Dillof, *Transferred Intent: An Inquiry into the Nature of Criminal Culpability*, 1 BUFF. CRIM. L. REV. 501 (1998); Nancy Ehrenreich, *Attempt, Merger, and Transferred Intent*, 82 BROOK. L. REV. 49 (2016); Douglas N. Husak, *Transferred Intent*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 65 (1996).

[124] James J. Hippard, Sr., *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039, 1041–43 (1973) (arguing for the constitutional significance of mens rea); Aliza B. Kaplan & Venetia Mayhew, *The Governor's Clemency Power: An Underused Tool to Mitigate the Impact of Measure 11 in Oregon*, 23 LEWIS & CLARK L. REV. 1285, 1292 (2020) (arguing that mens rea protects fundamental rights); *see* HILL, CENTURY OF REVOLUTION, *supra* note 104, at 226.

and continued after the conclusion of the English Civil War through the *Commentaries* of Blackstone.[125]

B. The Origins of the Vicious Will

The phrase mens rea ultimately arrived in American jurisprudence by way of Coke's discussion of the Statute of Treasons in his *Third Institute* which was published posthumously in 1644.[126] There, Coke states that treason cannot lie where the defendant lacked the requisite intent because "*actus non facit reum, nisi mens sit rea*."[127] This maxim was also the basis of his decision in *Chune*, discussed above.[128] Following Coke's maxim, William Blackstone, in his widely circulated *Commentaries*, declared that "to make a complete crime, cognizable by human laws, there must be both a will and an act."[129] It is from Blackstone's passage that American law derives the principle that the mental state and act element must be concurrent, but a number of late seventeenth and eighteenth century cases make it clear that Coke's maxim became commonplace in contemporary English legal theory long before the founding.[130]

Three post-Restoration cases use Coke's *mens sit rea* maxim.[131] In 1680, the Common Pleas heard *Lambert v. Bessey*, another false imprisonment case.[132] This time, the jury found against the defendant, and the court upheld the verdict, summarizing *The Case of Thorns* for the distinction between civil and criminal law: "*actus non facit reum nisi mens sit rea*."[133] To hammer this distinction home, one need only turn to *R. v. Oculean*, decided the very next term in 1680 by King's Bench.[134] There, a Jesuit priest's ship had been forced by weather to harbor at Minehead in Somersetshire, a violation of an Elizabethan penal statute.[135] However, the court refused to

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[125] 4 WILLIAM BLACKSTONE, COMMENTARIES *21.

[126] COKE, *supra* note 70, at 6.

[127] *Id.*; Frankowski, *supra* note 45, at 421 ("A man's act does not make him guilty unless his mind is also guilty."); *see also* Mueller, *supra* note 27, at 1070.

[128] *See supra* notes 99–102 and accompanying text.

[129] BLACKSTONE, *supra* note 125, at *21; *see also* John A. Humbach, *Do Criminal Minds Cause Crime? Neuroscience and the Physicalism Dilemma*, 12 WASH. U. JURIS. REV. 1, 3, 8 (2019).

[130] *See* Morissette v. United States, 342 U.S. 246, 251–52 (1952); State v. Rose, 311 A.2d 281, 285 (R.I. 1973); Matthew T. Fricker & Kelly Gilchrist, Case Comment, United States v. Nofziger *and the Revision of 18 U.S.C. § 207: The Need for a New Approach to the* Mens Rea *Requirements of Federal Criminal Law*, 65 NOTRE DAME L. REV. 803, 812–13 (1990).

[131] The Restoration refers to the return of Charles II to the throne. *See* HILL, CENTURY OF REVOLUTION, *supra* note 104, at 348.

[132] Lambert v. Bessey (1680) 83 Eng. Rep. 220, 220 (KB).

[133] *Id.* at 221. *But see* Bessey v. Olliot (1683) 83 Eng. Rep. 244, 244 (KB) (reversing original holding and applying the mens rea principle to civil actions).

[134] R. v. Ocullean (1680) 83 Eng. Rep. 197, 197 (KB).

[135] *Id.*

uphold the indictment because the priest had not arrived on English soil voluntarily, and therefore "*actus non facit reum, nisi mens sit rea*."[136] The priest could not have committed a crime, because he did not intend to commit the acts or intend to cause the result constituting the crime.

Similar holdings appear in Chancery as well. In 1717, that court was asked to interpret a bank fraud statute passed during the reign of James I in *R. v. Bigg*.[137] Chancery refused to extend the statute to cover the defendant's conduct for two reasons. First, it would violate the canon of strict construction to "enlarge a penal law."[138] Second, the facts in the case did not demonstrate a concurrence of the defendant's intent to deceive or defraud with the defendant's actions.[139] The rule of mens rea controlled the decision, and therefore the prisoner was not guilty of a felony.[140]

Coke's maxim continued to appear in English cases through the early nineteenth century,[141] but it was Blackstone's *Commentaries* that ultimately gave American criminal law the gloss of "vicious will" for mens rea.[142] Under this definition, "[p]roof of criminal intent meant proof of moral fault, not just the intent to carry out one's physical actions."[143] Vicious will, however, carries with it the subjective judgments of the jurist or juror defining it, and has been largely abandoned as an unhelpful, though colorful, turn of phrase.[144]

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[136] *Id.*

[137] R. v. Bigg (1717) 24 Eng. Rep. 1127, 1127 (Ch).

[138] *Id.* at 1131.

[139] *Id.* at 1132.

[140] *Id.*

[141] *See, e.g.*, *Ex parte* Jones (1806) 33 Eng. Rep. 283, 284 (Ch) (contrasting criminal with civil libel); Fowler v. Padget (1798) 101 Eng. Rep. 1103, 1103–04 (KB) (declining to extend bankruptcy to include acts performed without a mens rea). *Compare* R. v. Shipley (1784) 99 Eng. Rep. 774, 790 (KB) (holding no criminal sedition without concurrent intent), *with* R. v. Almon (1765) 97 Eng. Rep. 94, 102 (KB) ("It is the intention which, in all cases, constitutes the offence. 'Actus non facit reum, nisi mens sit rea.'").

[142] BLACKSTONE, *supra* note 125, at *21 ("[A]n unwarrantable act without a vitious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will."); *cf.* Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 747–48 (1976) (describing the influence of Blackstone on Revolutionary-era thinkers such as Thomas Jefferson, James Monroe, John Quincy Adams, and Daniel Webster).

[143] STUNTZ, *supra* note 19, at 140.

[144] United States v. U.S. Gypsum Co., 438 U.S. 422, 436–37 (1978) (rejecting Blackstone's phrase "vicious will" in favor of MPC § 2.02). *But see, e.g.*, United States v. Erne, 576 F.2d 212, 214–16 (9th Cir. 1978); United States v. Ayo-Gonzalez, 536 F.2d 652, 657–58 (5th Cir. 1976); United States v. Barker, 514 F.2d 208, 228–29 (D.C. Cir. 1975) (Bazelon, C.J., concurring); United States v. Cordoba-Hincapie, 825 F. Supp. 485, 492, 501, 505 (E.D.N.Y. 1993).

Social definitions of morality remain open to the views and opinions of the judge deciding the case.[145] Moreover, vicious will leaves open the question of just how vicious the will must be before a crime has occurred. If left broadly undefined by the enacting legislature, a criminal statute could punish an offender who had the intention to steal money from a gas meter but was merely reckless regarding the possibility of that gas escaping and asphyxiating a neighbor.[146] This approach, termed the culpability approach, has been widely rejected in favor of the elemental approach to mens rea, which instead requires that the "culpable frame of mind" applies to the social harm elements of the substantive crime.[147] Again the problem arises of what to do when there is no mens rea element laid out in the crime.[148]

C. An Increasingly Modern Approach

Customary usage of the mens rea formula solidified the doctrine's importance as a mitigating factor in English criminal law in the eighteenth and nineteenth centuries.[149] Nevertheless, English criminal law was a rather blunt instrument.[150] The proliferation of capital offenses during this time made mens rea an important mitigating doctrine, especially in light of available downward departures like benefit of clergy and transportation.[151]

The final status of mens rea at the time of the American revolution involved two mental states.[152] First, murder had to be done with "malice aforethought."[153] Second, all other felonies had to be committed "feloniously."[154] In practice, definitions for both could only arise on the evidence, and successful defenses tended to require proof that the defendant lacked the capacity to form a malicious intent based

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[145] *U.S. Gypsum Co.*, 438 U.S. at 440–41 (discussing the "gray zone" between socially acceptable business practices and anti-competitive conduct).

[146] R. v. Cunningham, 2 Q.B. 396, 412 (1957) (rejecting trial judge's definition of the requisite mens rea as wickedness alone, where the jury had not found the requisite foresight of harm to the victim).

[147] JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES & MATERIALS 158 (8th ed. 2019); Kern, *supra* note 29, at 7.

[148] *See* Liparota v. United States, 471 U.S. 419, 424–25, 427, 433–34 (1985).

[149] E.P. THOMPSON, *Custom, Law and Common Right*, *in* CUSTOMS IN COMMON 97, 128–29 (Penguin ed. 1993) (discussing the importance of custom as a source of law-making precedent after Coke defined custom as a law unwritten).

[150] John H. Langbein, Albion*'s Fatal Flaws*, 98 PAST & PRESENT 96, 117–18 (1983).

[151] *Id.*; Transportation Act of 1717, 4 Geo. c. 11 (Eng.); *see* James J. Willis, *Transportation Versus Imprisonment in Eighteenth- and Nineteenth-Century Britain: Penal Power, Liberty, and the State*, 39 L. & SOC'Y REV. 171, 173–76 (2005); *see also* E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975).

[152] BAKER, AN INTRODUCTION, *supra* note 79, at 523.

[153] *Id.*

[154] *Id.*

on infancy or insanity.[155] These definitions of mens rea are not particularly helpful or clear, as they also require definitions.[156]

In 1883, James Fitzjames Stephen published a multi-volume tome on the history of criminal law.[157] In defining the mental state requirements of criminal liability, Stephen noted that "[t]hey are vague general terms introduced into the law without much perception of their vagueness."[158] Stephen was discussing terms such as "malice," "fraud," and "negligence."[159] Stephen attempted to be more precise, but could do no better than to say that "in order that an act may by the law of England be criminal, the following conditions must be fulfilled" when restating the law of criminal responsibility:

> 1. The act must be done by a person of competent age.
>
> 2. The act must be voluntary, and the person who does it must also be free from certain forms of compulsion.
>
> 3. The act must be intentional.
>
> 4. Knowledge in various degrees according to the nature of different offences must accompany it.
>
> 5. In many cases either malice, fraud, or negligence enters into the definition of offences.
>
> 6. Each of these general conditions (except the condition as to age) may be affected by the insanity of the offender.[160]

Here, intent, voluntariness, and mens rea are separated out into three distinct categories, with a "heightened" mental state language occupying a fourth.[161]

Prior to Stephen's attempt at systemization, English common law had passed on to America crimes that lacked a mental state with any definition more concrete than "malice aforethought" for murder and some degree of felonious intent for all other crimes.[162] This fluidity was problematic in that it allowed judges and enforcers of the law much leeway in deciding who had acted reprehensibly, and who had not. However, the existence of a mens rea requirement was widely recognized, and sometimes resulted in mitigation and acquittal.[163]

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[155] *Id* at 523–24; 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 19 (London, T. Payne 1800) (1736).

[156] *See* Kamali, *supra* note 56, at 398–99.

[157] 1 STEPHEN, *supra* note 55; 2 STEPHEN, *supra* note 31; 3 STEPHEN, *supra* note 121.

[158] 2 STEPHEN, *supra* note 31, at 118.

[159] *Id.*

[160] *Id.* at 97.

[161] *Id.*; *see* Mueller, *supra* note 27, at 1052.

[162] STUNTZ, *supra* note 19, at 266–67 (arguing that the move to precise definitions of mental state actually led to "both broader and more specific criminal liability rules").

[163] *See infra* notes 171, 177 and accompanying text.

D. A History of American Lucidity with Regard to Mens Rea

The actual phrase mens rea does not appear to have entered the American judicial lexicon until the mid-nineteenth century.[164] However, both state courts and the United States Supreme Court were well versed in the concept, and frequently grappled with implying a mental state in the absence of positive proof.[165] Terms such as *scienter*, malice, deliberate intention, feloniously, and knowledge were variously used as stand-ins for mens rea, and the courts recognized that without this mental prerequisite there could be no crime.[166] None of these terms describe mere recklessness because they imply knowledge beyond simple disregard for the rules of society.

1. State Examples of Divining Mens Rea

One of the earliest cases dealing with mental state was a Pennsylvania case from 1795.[167] In *Respublica v. Mulatto Bob*, the Supreme Court of Pennsylvania was confronted with a statute that had altered the common law definition of murder to include a premeditation element.[168] A fight had broken out in which the defendant armed himself with an axe prior to landing the killing blow on the victim, but raised the defense that the killing had not been premeditated because it was reactionary.[169] The court reasoned that if premeditation was an element of the offense of first degree murder, then it had to be proven along with willfulness for criminal liability to attach.[170] However, despite the enhanced mental state required by the statute, "intention remains, as much as ever, the true criterion of crimes, in law, as well as in ethics" and the court determined that there was sufficient evidence for a reasonable jury to infer the premeditation required to support a guilty verdict.[171] Even though the defendant here was unsuccessful in his appeal—likely due to racial biases—intent was nevertheless the crux of criminal law in early Pennsylvania.

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[164] *See* Pond v. People, 8 Mich. 150, 174 (1860) ("A criminal intent is a necessary ingredient of every crime. . . . '[T]he rule of law, founded on justice and reason, is that *actus non facit reum nisi mens sit rea* . . . .'") (quoting R. v. Thurborn (1849) 175 Eng. Rep. 349, 350 (KB)).

[165] Am. Commc'ns Ass'n, C.I.O., v. Douds, 339 U.S. 382, 411 (1950) ("[C]ourts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred.").

[166] *See, e.g.*, Davis v. United States, 160 U.S. 469, 484 (1895); Evans v. Eaton, 20 U.S. (7 Wheat.) 356, 376 (1822); The Hiram, 14 U.S. (1 Wheat.) 440, 442 (1816); People v. Croswell, 3 Johns. 337, 364 (N.Y. 1804); State v. Anderson, 2 Tenn. (2 Overt.) 6, 7 (1804); Respublica v. Mulatto Bob, 4 Dall. 145, 146 (Pa. 1795).

[167] Mulatto Bob, 4. Dall.

[168] *Id.* at 146.

[169] *Id.*

[170] *Id.*

[171] *Id.* (emphasis omitted).

New York was another jurisdiction that grappled with criminal intent in the early years of the Republic, and the first to explicitly adopt Coke's *actus non facit reum, nisi mens sit rea* maxim.[172] In 1804, a criminal libel case reached the Supreme Court of New York on the question of whether the truth of an alleged libel could negative criminal intent.[173] The court determined that the jury had been given incorrect instructions because the very essence of the crime was intent.[174] Criminality turned on malicious intention, and if the jury could not find such intention, there had been no crime.[175] This decision was based in part on the English common law, but it was also strongly informed by an American abhorrence of the Sedition Act.[176] Since "[t]here can be no crime without an evil mind," the judgment was overturned and remanded for a new trial.[177]

Chief Justice James Kent, regarded as a key founder of American equity jurisprudence, authored *Croswell*, but his commitment to a strict requirement of criminal intent was not always steadfast.[178] In *Sturges v. Maitland*, his three-sentence opinion allowed that a jury could infer criminal intent from negligence.[179] On the other hand, in *Genet v. Mitchell*, Kent felt compelled to author a concurring opinion in which he stated that "[t]he criminality or innocence of the act will . . . depend altogether upon the intent with which it was done."[180] This was another libel case, in which the defendant attempted to raise the defense that the plaintiff had published papers which made the defendant's accusations of treachery true.[181]

Kent's concurring opinion sought to show that because the plaintiff's publication was not done with treacherous intent, the defense must fail because without the requisite intent, the defendant's words would not have been true.[182] *Croswell* and *Genet* may be distinguishable on the grounds that publishers received special treatment due to the importance of freedom of the press to early Americans.[183]

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[172] People v. Croswell, 3 Johns. 337, 364 (N.Y. 1804).

[173] *Id.*

[174] *Id.* at 393 ("[T]he intent and tendency of the publication is, in every instance, to be the substantial inquiry in the trial, and that the truth is admissible in evidence, to explain that intent . . . .").

[175] *Id.* at 364.

[176] *See id.* at 369, 392.

[177] *Id.* at 364, 393.

[178] *See* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 583 (1993) ("Chancery was a one-judge court, Kent had the stage to himself.").

[179] Sturges v Maitland, 1 Ant. N.P. Cas. 208, 211–13 (N.Y. 1813) ("A neglect may be so gross as to amount to a criminal intent.").

[180] Genet v. Mitchell, 7 Johns. 120, 131 (N.Y. 1810).

[181] *Id.* at 126–27.

[182] *Id.* at 130.

[183] *See* People v. Croswell, 3 Johns. 337 (N.Y. 1804).

However, both cases still recognized that in the normal case, a defendant was not a criminal if they did not possess the requisite intent.

Connecticut faced a similar issue in a very different context in *Myers v. State*.[184] The defendant had been convicted of allowing a passenger to hire a hackney coach on a Sunday, to which he pleaded the defense of good-faith belief in the passenger's necessity.[185] The passenger had claimed that his wife was ill, but the defendant was nonetheless convicted because the judge instructed the jury that the facts had to actually have been as the defendant believed in order to sustain the defense.[186] The Supreme Court of Errors reversed, stating that "a reasonable ground to believe" the passenger's story was all that was required.[187] Charity was not a crime within the ambit of the statute at issue, and

> [u]nless this construction be adopted, a man may be convicted of a crime, when he had no intent to violate the law, and when his object was to perform a deed of charity conformable to law. This would oppugn the maxim that a criminal intent is essential to constitute a crime.[188]

Justice Gould concurred to emphasize that this was a fundamental principle of criminal law and natural justice.[189] He cited Blackstone for the proposition that "to render any act criminal, the *intention* with which it is done, must be so; or, in other words, the *will* must concur with the act."[190] Gould also quoted Coke's maxim to support the proposition that accidents cannot lead to criminality, only mere civil liability.[191]

2. The United States Supreme Court Has Not Always Been at Sea When It Comes to Mens Rea

A curious aspect of American mens rea jurisprudence is that Coke's maxim from which mens rea is derived has never been quoted in a United States Supreme Court opinion. Nevertheless, the Court has not been a stranger to the requirement of mens rea even though early nineteenth century cases dealt with the concept under the moniker of *scienter*.[192] *Scienter*, along with specific intent, long peppered the

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[184] Myers v. State, 1 Conn. 502 (1816).

[185] *Id.* at 503–04.

[186] *Id.* at 503.

[187] *Id.* at 504–05.

[188] *Id.* at 504.

[189] *Id.* at 505 (Gould, J., concurring).

[190] *Id.*; *see* BLACKSTONE, *supra* note 125, at *20–24.

[191] *Myers*, 1 Conn. at 506 (Gould, J., concurring) ("For, *actus non facit reum, nisi mens sit rea*.").

[192] The Hiram, 14 U.S. (1 Wheat.) 440, 442 (1816).

Court's opinions in discussing what is today conceptualized as the mens rea requirement.[193]

The earliest case to deal with *scienter* was a case that arose in the context of prize money from the War of 1812.[194] In 1814, a cargo of flour was seized in Massachusetts and condemned along with *The Hiram*, the ship that carried it.[195] The reason for its condemnation was that the ship was alleged to have been engaged with trade with the British, America's enemy at the time.[196] The owner of the flour wanted to recover his property on the theory that he had not known the ship was sailing with a British license, and therefore his property was not properly subject to condemnation because he had not had the intent to trade with the enemy.[197]

Chief Justice Marshall admitted that ignorance of the British license would have saved the claimants from forfeiture but found the owner had constructive knowledge of the license through the theory of *respondeat superior*.[198] Although *The Hiram* can be interpreted to have watered down the requirement of knowledge by allowing it to be inferred,[199] the Supreme Court required the mens rea of knowledge before finding that a breach of allegiance had occurred.[200] Throughout the nineteenth century, the Supreme Court continued to require *scienter* to find a defendant guilty of the alleged crime, though the exact contours of *scienter* itself remained elusive.[201]

3. State Supreme Courts Consistently Required Mens Rea

The doctrine of mens rea continued to bloom and crystalize in the state courts during the middle of the nineteenth century. The Supreme Court of Indiana, in 1856, wrestled with the concept when it was asked to overturn a jury verdict on the grounds that the defendant lacked the requisite intent to kill.[202] In *Walker v. State*, an argument over whose shoes were whose erupted into violence when the defendant shot into a crowd hoping to hit the accused thief.[203] The defendant tried to argue

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193 *See* Mueller, *supra* note 27, at 1044.

194 *The Hiram*, 14 U.S. at 440–41.

195 *Id.* at 440.

196 *See id.* at 444.

197 *Id.*

198 *Id.* at 446–47.

199 *Id.* at 446.

200 *Id.* at 447.

201 *See, e.g.*, Schuchardt v. Allens, 68 U.S. (1 Wall.) 359 (1863) (holding that in the tort of assumpsit, *scienter* need not be averred, but in any event the facts demonstrated the requisite intent); Lord v. Goddard, 54 U.S. (13 How.) 198 (1851) (turning to English and New York precedents in holding that "[f]raud means an intention to deceive"); United States v. Randenbush, 33 U.S. (8 Pet.) 288 (1834) (noting that intent is required for bank fraud).

202 Walker v. State, 8 Ind. 290, 292 (1856).

203 *Id.* at 291–92.

to the court that he had not intended death to the victim, and therefore could not be guilty of the felony assault for which he was convicted.[204] The court rejected that argument, and stated that although felonious intent was required, that intent could be inferred from the fact that the defendant had fired a gun into a crowd and "every man is supposed to intend the necessary consequences of his own acts."[205] Therefore, the jury was entitled to infer intent and the conviction was upheld.[206]

A similar problem faced the Supreme Court of California the following year in *People v. McMakin*.[207] Like in *Walker*, the defendant was convicted of assault.[208] Unlike in *Walker*, the statute at issue in *McMakin* did not define the requisite mental state for assault.[209] The defendant testified that he had only meant to frighten the victim, which is why he aimed his Colt at the ground when he drew it.[210] The court agreed that if it could have been proven, this mental state would have made out a valid defense.[211] Intent, despite its absence in the statute, was required to separate innocent from guilty conduct.[212] However, the court upheld the conviction because, from the act of drawing the Colt, the jury was free to infer intent.[213] Intent had to be proven by evidence, but once that evidence was introduced it was the role of the jury, not the court, to draw the correct inferences.[214] By the 1850s, a pattern emerged in the caselaw: the absence of mens rea is a defense against criminal liability, but in reported appellate level cases it does not meet with much success outside of New York.[215]

The Supreme Court of Michigan broke from this pattern in their 1860 decision in *Pond v. People*.[216] Following New York, Michigan adopted Coke's mens rea maxim.[217] In *Pond*, the court dealt with the question of whether an honest belief that one's life was in danger could reduce murder to excusable or justifiable homicide.[218] The defendant had fired his shotgun towards a gang that had been harassing

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[204] *Id.* at 292.

[205] *Id.* at 292–93.

[206] *Id.* at 293.

[207] People v. McMakin, 8 Cal. 547 (1857).

[208] *Id.* at 547.

[209] *Id.* at 548.

[210] *Id.* at 547.

[211] *Id.* at 549 ("If the prisoner did not intend to use the pistol at all, except for the sole purpose of intimidation, then, it is apprehended, the offense would not have been complete.").

[212] *Id.* at 548.

[213] *Id.* at 549.

[214] *Id.* at 548.

[215] *See supra* Section II.D.1.

[216] Pond v. People, 8 Mich. 150 (1860).

[217] *Id.* at 174 ("[T]he rule of law, founded on justice and reason, is that *actus non facit reum nisi mens sit rea* . . . .") (quotation omitted).

[218] *Id.* at 172.

him, his wife, and his servant at night and had not been run off by verbal warnings.[219] The court reversed the defendant's conviction for manslaughter and remanded for a new trial on the grounds that a reasonable fear could negate the required mental state.[220] Since the law privileges self-defense, the intent to stop the trespassing and imminent violence—even if with a shotgun—could not replace the intent to murder the deceased.[221] "A criminal intent is a necessary ingredient in every crime," the court stated.[222] Although killing is always reprehensible, without a criminal intent it is not criminal.[223]

Two years later, the Supreme Court of Michigan reaffirmed this principle in *Maher v. People*.[224] At issue in that case was whether or not the defendant's hearing a rumor about adultery could serve as adequate provocation in the heat of passion to negative the required mental state of malice aforethought.[225] "Homicide . . . does not, of itself, constitute murder; it may be . . . entirely innocent," the court said.[226] The state of mind made all the difference, and the case was remanded for a new trial on the evidence of whether the defendant could negative malice aforethought.[227]

The key pieces of the story of mens rea in America so far are (1) some form of intent was required for criminal liability to attach, (2) that intent varied with the crime, and (3) that intent could be readily proven by inferences drawn from the act element.[228] However, principled uses of defined mental states were rare, and the evolving common law often clashed with statutory crimes.[229] That clash resounded across American law when a Reconstruction-era Supreme Court, in upholding the importance of the mens rea principle, conceptually undermined what clarity was finally beginning to emerge in the doctrine.

4. Conceptual Instability Collides with the Modern Regulatory State

Distinguishing between judicial morality and the mens rea element of criminal law by establishing mens rea as an independent requirement of the common law was

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[219] *Id.* at 179–80 (describing a pattern of the gang's verbal abuse of the defendant's wife and, on the night when the death occurred, a physical assault against one of the defendant's servants).

[220] *Id.* at 175, 182.

[221] *See id.* at 180–81.

[222] *Id.* at 174.

[223] *Id.* at 175–76.

[224] Maher v. People, 10 Mich. 212 (1862).

[225] *Id.* at 218–19.

[226] *Id.* at 217 ("*[A]ctus non facit reum nisi mens sit rea*.") (quoting *Pond*, 8 Mich. at 174).

[227] *Id.* at 226–27.

[228] Sayre, *supra* note 22, at 1026 ("*[M]ens rea* can never be analyzed into any single constituent element or group of elements because no single state of mind common to all crimes exists."); *see also, e.g.*, Blanton v. State, 24 P. 439, 440 (Wash. 1890) (deliberate intent required to support a murder conviction); Killer v. Commonwealth, 16 A. 495, 495 (Pa. 1889) (same).

[229] *See* Brown v. State, 74 A. 836, 838 (Del. 1909) (discussing the history of statutory rape).

a hard-won, if tenuous, achievement of state courts in the nineteenth century. By muddling motive and intent together, the Supreme Court's 1876 decision in *United States v. Reese* undid that progress.[230]

In *Reese*, the defendants denied Black would-be voters the right to register to vote.[231] William Garner sought to register to vote in Kentucky but was denied by municipal election inspectors.[232] The United States indicted both election inspectors under the Enforcement Act, a statute that criminalized violations of the Fifteenth Amendment.[233] Although not suspect on its face, the Enforcement Act did not require proof of racial motivation. Therefore Chief Justice Waite deemed that the statute was beyond the scope of the Fifteenth Amendment, and thus unconstitutional.[234] To arrive at this holding, Waite had to intermix motive, criminal intent, and moral guilt into a single mens rea analysis which set the stage for a drag-out fight between legislatures and the courts as to what exactly the mens rea principle actually requires.[235] This jumbled holding is the source of much of America's confusion over mens rea to this day because *Reese* confuses racially-based motive for criminal intent, and rejects the defendant's moral guilt for a speculative thought-experiment on Congressional decision-making.[236]

At the federal level, courts continued to grapple with specific intent after *Reese*.[237] As more and more statutory offenses omitted a mental state requirement, it became steadily less clear that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[238] Part of this difficulty may have been that it took the Supreme Court until 1945 to finally adopt the phrase mens rea in *Screws v. United States*.[239] In that case Hall, a Black man, was beaten to death with a blackjack for allegedly stealing a tire.[240] The

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[230] United States v. Reese, 92 U.S. 214, 216–18 (1875); STUNTZ, *supra* note 19, at 114.

[231] *Reese*, 92 U.S. at 215.

[232] *Id.*

[233] *Id.* at 215–16; STUNTZ, *supra* note 19, at 114.

[234] *Reese*, 92 U.S. at 215, 221.

[235] *See* STUNTZ, *supra* note 19, at 114; *see also* United States v. Balint, 258 U.S. 250, 254 (1922) (Taft, C.J.) (deciding that Congress had "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").

[236] *See Reese*, 92 U.S. at 218–19.

[237] Debs v. United States, 249 U.S. 211, 216 (1919); Brown v. State, 74 A. 836, 837–38 (Del. 1909).

[238] Dennis v. United States, 341 U.S. 494, 500 (1951).

[239] Screws v. United States, 325 U.S. 91, 127 (1945) (Rutledge, J., concurring); *see id.* at 156 (Roberts, J., dissenting) ("[T]here must be a *mens rea* for every offense.").

[240] *Id.* at 92–93 (majority opinion).

Court was faced with a vagueness challenge to the statute that penalized willful deprivation of rights, privileges, or immunities under color of state law.[241] Over a vehement dissent, the Court upheld the statute, so long as specific intent to deprive an individual of their rights was read into it, but rejected the idea that the defendant had to have the intent to violate the victim's civil rights.[242]

At the state level, legislatures experimented with strict liability, and left the courts at times grasping at historical straws.[243] The state courts fought back and frequently insisted that an element of intent was required in a penal statute.[244] The courts now found themselves in a dilemma that was the reverse of the one that faced the Pennsylvania Supreme Court in 1795 when it ratcheted criminal intent in a less lenient direction.[245] Courts and jurists continued to view mens rea as a necessary element of common law offenses, but became less clear as to what that element actually meant.[246] These lines of case law variously involving police offenses, strict liability, and the supposed Anglo-American rule of mental state entangled mens rea in a morass from which the doctrine only partially recovered with the advent of the Model Penal Code in 1962.[247]

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[241] *Id.* at 135 (Murphy J., dissenting).

[242] *Id.* at 101–06.

[243] *E.g.*, Brown v. State, 74 A. 836, 837 (Del. 1909); *see* Smith v. California, 361 U.S. 147, 150 (1959) (recognizing that although "it is doubtless competent for the States to create strict criminal liabilities by defining criminal offenses without any element of scienter," that power has limitations).

[244] *See, e.g.*, Huggins v. State, 142 So. 2d 915, 917 (Ala. Ct. App. 1962) ("The *mens rea* must be that needed to commit the would be crime."); State v. White, 374 P.2d 942, 965 (Wash. 1962) (en banc) (citing State v. Strasburg, 110 P. 1020, 1028 (Wash. 1910)) ("[I]nsanity is a defense to crimes in Washington [because] the minimum requirements of *mens rea* have been held by this court to compel it."); State v. Jackson, 356 P.2d 495, 498–99 (Or. 1960) (holding that an obscenity statute could only survive constitutional scrutiny if a "knowingly" mental state were read into it) *rejected on other grounds by* State v. Henry, 732 P.2d 9, 16 (Or. 1987); *Ex parte* Marley, 175 P.2d 832, 836–37 (Cal. 1946) (Carter, J., dissenting).

[245] *See* Respublica v. Mulatto Bob, 4 Dall. 145 (Pa. 1795).

[246] Gary V. Dubin, Mens Rea *Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 325 (1966) (noting that despite the "absence" of unifying concepts, courts have long held on to the requirement of mens rea); *see also* Miguel Angel Méndez, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS L. REV. 407, 412–14 (1995) (discussing the evolution of California's approach to mens rea).

[247] Marcia Baron, *Negligence,* Mens Rea*, and What We Want the Element of* Mens Rea *to Provide*, 14 CRIM. L. & PHIL. 69, 70, 74–76 (2020) (discussing the gradient of *mentes reae* provided by the Model Penal Code); Mandiberg, *supra* note 28, at 1178 (describing police offenses).

III. THE MODEL PENAL CODE INNOVATION

In 1962, the American Law Institute (ALI) attempted to finally resolve the mens rea difficulty.[248] The ALI had begun in the 1920s with an attempt to "produc[e] code like formulations of the main common law fields."[249] Among the ALI's key supporters was Benjamin Cardozo, then of the New York Court of Appeals.[250] The Restatements that resulted became extremely influential persuasive authority.[251] Building off of that eminent reputation, a longtime Columbia law professor named Herbert Wechsler sought to rationalize criminal law and replace vague common law standards with more precise legislative rules by creating a Model Penal Code in the image of the Restatements.[252]

In the twentieth century, general intent mens rea had taken on its current meaning: "the defendant intended the physical act in question, and that the physical act itself violated the conduct requirements of a criminal statute."[253] Yet, the degree of that intention towards that physical act often relied on the nature of the conduct, and its associated morality.[254] Moreover, specific intent crimes—like theft—often involved knowledge of attendant circumstances beyond the defendant's personal physical actions.[255] In response to this scattered definition, Wechsler drafted Section 2.02 of the Model Penal Code which finally both structured and defined mens rea.

Under Section 2.02, mens rea is renamed culpability, and includes five degrees: purposefully, knowingly, recklessly, negligently, and strict liability.[256] This simplification carried with it the innovation that each material element of the offense in question had to be accompanied by the defined mental state.[257] Where a legislature

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[248] *See* STUNTZ, *supra* note 19, at 266.

[249] JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 851–52 (2009).

[250] N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 L. & HIST. REV. 55, 72 (1990).

[251] *See, e.g.*, June v. Union Carbide Corp., 577 F.3d 1234, 1239–40 (10th Cir. 2009); *cf.* John G. Fleming, *The Restatements and Codification*, 2 JEWISH L. ANN. 108, 111, 120–23 (1979); G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 L. & HIST. REV. 1, 15 (1997) (explaining that it was "crucial to the founders of the ALI that esteemed scholars would be the reporters of the Restatement volumes and that eminent judges and practitioners would oversee their work").

[252] STUNTZ, *supra* note 19, at 266–67.

[253] Kamali, *supra* note 56, at 398–99 (citing STUNTZ, *supra* note 19, at 262).

[254] *See* DRESSLER & GARVEY, *supra* note 147, at 169.

[255] *Id.* at 164.

[256] MODEL PENAL CODE § 2.02; *see* Michael Vitiello, *Defining the Reasonable Person in the Criminal Law: Fighting the Lernaean Hydra*, 14 LEWIS & CLARK L. REV. 1435, 1439 (2010) (MPC drafters premised criminal liability on culpable mental state).

[257] MODEL PENAL CODE § 2.02(4) ("Prescribed Culpability Requirement Applies to All Material Elements" stating that "[w]hen the law defining an offense prescribes the kind of

does not specify a mental state, the MPC supplies recklessness as the gap-filler.[258] Both negligence and strict liability must be specifically enumerated if a legislature wishes a negligent mental state or no mental state to suffice for the commission of a crime.[259]

The MPC approach obviously varied greatly from the common law background.[260] Mens rea and even intent are both scrubbed from criminal law's lexicon under the MPC approach.[261] However, despite this radical departure, Section 2.02 has proven to be the most popular and influential of the MPC's provisions.[262] This is largely because, from dozens of potential common law mental states, the MPC selected a single backdrop of recklessness and defined it with relative precision.[263]

Nevertheless, in selecting recklessly, the MPC was not true to the history of common law mens rea.[264] Based on the common law history decribed above, the best candidate for replacing mens rea is knowingly. MPC Section 2.02(2)(b) defines knowingly as:

> A person acts knowingly with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
>
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.[265]

This definition lines up well with Stephen's requirements of mens rea, and with the common law backdrop of liability attaching to conduct that is performed with criminal intent.[266] If one is presumed to know the law and the facts, when one acts with

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culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears."); Robinson & Dubber, *supra* note 21, at 334; Robinson & Grall, *supra* note 33, at 714–15.

[258] Robinson & Dubber, *supra* note 21, at 336.

[259] Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 633 n.10, 635 (1963).

[260] *See* Holley, *supra* note 25, at 402.

[261] Robinson & Dubber, *supra* note 21, at 335 ("Talk of 'malice aforethought' and even 'premeditation' were replaced by presumably testable phenomena such as 'conscious object' or 'knowledge.'").

[262] STUNTZ, *supra* note 19, at 267.

[263] Robinson & Dubber, *supra* note 21, at 335–36.

[264] *See* STUNTZ, *supra* note 19, at 266–67.

[265] MODEL PENAL CODE § 2.02(2).

[266] 2 STEPHEN, *supra* note 31, at 94–95.

knowledge of unlawful conduct or unlawful result, then criminal liability attaches.[267]

Recklessness, on the other hand, looks much more akin to the approach taken by medieval *tort* law towards logical consequences.[268] MPC Section 2.02(2)(c) defines recklessly as:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[269]

Awareness of risk involves a post-hoc jury analysis that is fact specific.[270] According to the commentary to Section 2.02, the jury must do two things to find a reckless state of mind: (1) analyze the risk factors and the justifications for the defendant's conduct; and (2) determine whether the defendant's conscious disregard of the risk justifies condemnation.[271]

In contrast to recklessness, knowingly requires a defendant's affirmative awareness of the facts which constitute the elements of the offense.[272] According to the Commentaries to Section 2.02, this distinction is intended to serve as proof that the defendant purposively, not necessarily purposefully, acted towards the commission of a crime.[273] Even where intent was allowed to be transferred at common law, the underlying act still had to be purposive.[274] Risk creation, even if conscious and substantial, is not the same as felonious intentionality.[275]

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[267] *Id.* at 114.

[268] *See* BAKER, AN INTRODUCTION, *supra* note 79, at 403; *supra* Section II.A.1.

[269] MODEL PENAL CODE § 2.02(2).

[270] Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, 581–83 (1988); Kenneth W. Simons, *Should the Model Penal Code's* Mens Rea *Provisions be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 189–92 (2003).

[271] MODEL PENAL CODE § 2.02(3) cmt.

[272] MODEL PENAL CODE § 2.02(2).

[273] MODEL PENAL CODE § 2.02(2) cmt. ("[A]ction is not purposive with respect to the nature or result of the actor's conduct unless it was his conscious object to perform an action of that nature or to cause such a result."); *see* Gardner, *supra* note 20, at 725 (arguing that one cannot understand motive without examining recklessness).

[274] *See* MANCHESTER, *supra* note 47, at 199.

[275] *See supra* note 154 and accompanying text.

Mapping common law mens rea presumptions onto the MPC reveals that in selecting recklessly, the gap-filler culpable mental state, Wechsler and the ALI departed from the common law.[276] Knowingly captures the awareness and goal-orientation that the common law of mens rea requires before the machinery of state could act to punish an individual. Without this protection in place, discretionary enforcement and definition is left to potentially biased police, prosecutors, and judicial officers. Anything below the knowingly threshold should not be adopted by the Supreme Court.

IV. THE SUPREME COURT'S MODERN LACK OF CLARITY

Congress never adopted the MPC's approach to mens rea.[277] The federal penal code contains nothing like Section 2.02 definitions for the words Congress selects to denote mental states, and there are over 100 types of mens rea in the code.[278] Against this backdrop, courts are left to divine the meanings of these mental states according to the statutory contexts in which they are employed.[279] Although defining the mental state chosen by Congress presents serious difficulties in the absence of clear definitions, the task becomes even harder where there is no mens rea indicated at all.[280]

From the foregoing discussion, it appears that some mental states must be read into the statutes in question, and this was the approach that the Supreme Court took in *Morissette*, the seminal mens rea case.[281] In *Morissette*, the defendant collected and recycled spent bomb casings which were located on government property in Michigan.[282] The defendant was convicted of stealing government property, despite his insistence that he thought the bomb casings were abandoned scrap metal.[283] The Supreme Court reversed in an opinion written by Justice Jackson that traced the importance of mens rea in Anglo-American jurisprudence back to Blackstone's

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[276] STUNTZ, *supra* note 19, at 266–67, 303; *supra* Sections II, III.

[277] *E.g.*, United States v. Weitzenhoff, 35 F.3d 1275, 1283–84 (9th Cir. 1993); *see also* STUNTZ, *supra* note 19, at 267.

[278] JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES & MATERIALS 57 (7th ed. 2019); William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049, 1063–65 (1992).

[279] Ratzlaf v. United States, 510 U.S. 135, 141 (1994) (recognizing that "willful" is a word that shifts meaning depending on context).

[280] O'SULLIVAN, *supra* note 278, at 57; *see also, e.g.*, 18 U.S.C. § 641 (2018) ("knowingly" only appears halfway down the offense); 33 U.S.C. § 1319(c) (2000) (unclear whether the mental state applies to the material elements, or knowledge of the violation of the Clean Water Act); 26 U.S.C. § 5802 (2018) (imposing strict registration requirements for automatic weapons classified as firearms).

[281] Morissette v. United States, 342 U.S. 246 (1952).

[282] *Id.* at 247.

[283] *Id.* at 248.

Commentaries.[284] The Court held that the requirement of intent was so inherent in criminal law, legislatures could be forgiven for forgetting to include a mens rea element because it was obvious that courts would imply one.[285]

Justice Jackson did recognize the growing trend of strict liability crimes and duties that, according to him, had begun with the industrial revolution.[286] However, those crimes were sharply distinguished as "police regulations" that carried with them only the penalty of a fine, were not "infamous," and did not result in imprisonment.[287] Since the defendant stood to be convicted of theft, an infamous offense that could result in two months imprisonment, the Court reversed and remanded the case for proper jury instructions on the requisite intent.[288]

Justice Jackson's reference to police regulations attended by strict liability occupies a subsection of mens rea jurisprudence that has come to be known as the public welfare offense doctrine.[289] "Such offenses involve health and welfare regulations arising out of the industrial revolution and attach heightened duties to those in control of particular industries and trades."[290] The federal criminal system is increasingly confronted with crimes of the public welfare variety as conduct is increasingly criminalized not just by statute but also under the regulatory regime.[291] Where the subject matter regulated is not dangerous to the public welfare, the absence of a mens rea could raise due process concerns, but the Supreme Court has held that so long as the product or activity is dangerous, an individual is presumed to be aware of the regulation; therefore, the government need not prove a knowing violation, only knowledge of the underlying facts.[292]

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[284] *Id*. at 250–52, 276.

[285] *Id.* at 252 ("As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law.").

[286] *Id.* at 253–57.

[287] *Id.* (quotations omitted).

[288] *Id.* at 262, 276 ("Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law . . . .").

[289] Leonid (Lenny) Traps, *"Knowingly" Ignorant: Mens Rea Distribution in Federal Criminal Law After* Flores-Figueroa, 112 COLUM. L. REV. 628, 630–33 (2012).

[290] *Id.* at 631.

[291] *See* Mandiberg, *supra* note 28, at 1204.

[292] United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 564–65 (1971).

In *Staples v. United States*, the lack of mental state in the National Firearms Act resulted in an opinion that demonstrates just how much a defendant's criminal liability can hinge on the personal feelings of a judge.[293] Congress does not require intent regarding the facts that make a defendant's conduct illegal, so the Court chose a knowingly standard.[294] Justice Thomas, writing for the majority, roundly rejected the idea that the defendant should have been on notice that his AR-15 was a machinegun—and thus required to be registered in the National Firearms Registration and Transfer Record—simply because it was a dangerous weapon.[295] Justice Thomas noted that despite precedent attaching strict liability to statutes that omit a mens rea, regulatory offenses can only apply to illicit or blameworthy conduct.[296] Moreover, strict liability regulatory offenses are only appropriate where "only light penalties such as fines or short jail sentences" are threatened.[297]

Stevens' dissent in *Staples* argued that where Congress has attempted to control dangerous drugs, substances, or similar articles of commerce, the Court should defer to the choice to make an activity a strict liability public welfare offense.[298] The problem with Stevens' position is that Congress has not made that choice clear.[299] Where Congress does not affirmatively enact a strict liability offense, especially if a defendant would only have knowledge of "traditionally lawful conduct,"[300] *Staples* establishes the Court's unwillingness to let Congressional silence impose strict liability on defendants.[301] However, *Staples* did not establish a systematic method for which mens rea should be implied where a statute is silent or ambiguous.[302]

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[293] *See* DRESSLER & GARVEY, *supra* note 147, at 189, 196.

[294] Staples v. United States, 511 U.S. 600, 619 (1994); *see* Traps, *supra* note 289, at 633–34; John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1049 (1999).

[295] *Staples*, 511 U.S. at 609–11.

[296] *Id.* at 605–06 (citing United States v. Balint, 258 U.S. 250, 254 (1922)).

[297] *Id.* at 616–17 (citing Blackstone's "vicious will" definition as the required mens rea for general criminal liability).

[298] *Id.* at 627–28 (Stevens, J., dissenting).

[299] *Id.* at 622 (Ginsburg, J., concurring).

[300] *Id.* at 618 (majority opinion).

[301] *Id.* ("[A]bsent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*.").

[302] *Compare* Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009) (when a statute "introduces the elements of a crime with . . . 'knowingly' . . . [courts] appl[y] that word to each element"), *with* United States v. Jones, 471 F.3d 535, 539 (4th Cir. 2006) (interpreting knowing as only applying to the verb "transports" in 18 U.S.C. § 2423(a)).

This lack of systematic treatment means that this issue perennially pops up in the circuits.[303] It also means that the Supreme Court has to deal with the question repeatedly, as it did recently in *Elonis v. United States*.[304] In 2015, Chief Justice Roberts, writing for the majority, did not expressly endorse the MPC definition of either knowingly or recklessly as a gap-filler, and instead chose the "otherwise innocent conduct" standard: "When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from "otherwise innocent conduct."'"[305] The case was reversed and remanded for jury instructions that properly required a mens rea at least higher than negligence.[306] However, under the majority's noncommittal approach, mens rea remains mired in fact- and statute-specific analyses.[307]

In response to this mire, an exasperated Samuel Alito filed a concurrence in part in which he suggested that the Supreme Court should stop waiting for Congress and just adopt the MPC approach to mens rea whole cloth.[308] "[W]hen Congress does not specify a *mens rea* in a criminal statute, we have no justification for inferring anything more than recklessness is needed."[309] Since recklessness regarding a risk is wrongful, Justice Alito reasoned, nothing more blameworthy is required.[310] However, Alito missed the fact that this adoption would be supposedly impermissible

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[303] *See, e.g.*, United States v. Alvarez, 809 F. App'x 562, 567 (11th Cir. 2020); United States v. DeCoster, 828 F.3d 626, 633 (8th Cir. 2016); United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993); United States v. Bakhtiari, 913 F.2d 1053 (2d Cir. 1990).

[304] Elonis v. United States, 135 S. Ct. 2001 (2015); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 107 (1962) ("*Mens rea* is an important requirement, but it is not a constitutional requirement, except sometimes."); Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 859, 943 (1999) (same). *Compare* Dean v. United States, 556 U.S. 568, 572 (2009), *with* Arthur Andersen LLP v. United States, 544 U.S. 696, 706 (2005), Hanousek v. United States, 528 U.S. 1102, 1102–03 (2000) (Thomas, J., dissenting), *denying cert. to* 176 F.3d 1116 (9th Cir. 1999), Bryan v. United States, 524 U.S. 184, 193 (1998) ("Thus, unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense."), *and* Liparota v. United States, 471 U.S. 419, 424 (1985) ("Congress certainly intended by use of the word 'knowingly' to require *some* mental state with respect to *some* element of the crime . . . .").

[305] *Elonis*, 135 S. Ct. at 2010 (citing Carter v. United States, 530 U.S. 255, 269 (2000)).

[306] *Id.* at 2013.

[307] *Id.* at 2025 (Thomas, J., dissenting) (citing Blackstone and a 1754 English threat statute that required only general intent for the proposition that a reasonable interpretation of a threat's meaning is all that should be required to convict the defendant). *Contra* United States v. Bailey, 444 U.S. 394, 403 (1980) (noting the difficulty involved in general intent inquiries).

[308] *Elonis*, 135 S. Ct. at 2015 (Alito, J., concurring and dissenting).

[309] *Id.*

[310] *Id.*

legislating from the bench, because the common law background requires more than mere recklessness.[311]

Perhaps an unstated acknowledgment of this reality is that Justice Alito's approach did not garner any support from his fellow justices.[312] No justice concurred in his solution, and only Justice Thomas dissented from the majority's holding.[313] Yet, Alito was right about the need for clarity in the law of mens rea; he simply chose a standard that is mismatched from the common law requirement which mirrors the MPC's definition of knowingly.

Indeed, the Court has, despite its reliance on MPC definitions, refused to adopt the MPC's approach to implying mens rea.[314] However, it has intermittently held that "knowingly" is the level of mens rea required to separate wrongful from innocent conduct.[315] Indeed, on remand, Elonis was convicted using such a standard.[316] Had the Supreme Court simply adopted this standard when they had the chance, they would have created both uniformity and protected less-culpable defendants while also upholding the requirements of the common law.

V. THE COURT SHOULD ADOPT 'KNOWINGLY' AS THE DEFAULT MENS REA

Without Congressional action, the MPC's approach to mens rea does not represent legislative intent.[317] However, the law of mens rea is riddled with exceptions and qualifications, and some clarity is badly needed.[318] The Supreme Court continues to confront the doctrine, and it is apparent that a bright line rule is needed to

[311] Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 192–93 (2007) (describing politicians' declarations that judicial law-making is impermissible). For opinions authored or joined by Alito decrying the approach, *see* Obergefell v. Hodges, 135 S. Ct. 2584, 2642 (2015) (Alito, J., dissenting); King v. Burwell, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting); United States v. Windsor, 570 U.S. 744, 808–09 (2013) (Alito, J., dissenting); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 706 (2012) (Scalia, J., dissenting). *But see* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 393–94 (2010) (Stevens, J., concurring in part) (also decrying the rewriting of laws).

[312] *Elonis*, 135 S. Ct. at 2013.

[313] *Id.* at 2018 (Thomas, J., dissenting).

[314] *See* Holley, *supra* note 25, at 441.

[315] *See, e.g.*, Rehaif v. United States, 139 S. Ct. 2191 (2019); Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754 (2011).

[316] United States v. Elonis, 841 F.3d 589, 598 (3d Cir. 2016).

[317] Holley, *supra* note 25, at 442 (noting that Congress has been frustratingly unaware of the MPC reforms to mens rea law).

[318] *Id.*

bring coherence to the doctrine of criminal intent and provide guidance to the federal judiciary.[319] The public welfare exception, for example, has caused more harm than good if deterrence is seriously a fundamental goal of the criminal justice system.[320] In the context of environmental crimes, conduct that is perhaps ecologically reprehensible often falls into the *Staples* category of conduct that historically would raise no eyebrows.[321] Such a crime therefore has no deterrent effect.[322]

It would behoove the Court to pressure Congress in two ways to take a firm stance on mental state, and thereby clean up the criminal code. First, the Court should state that knowingly will be implied as to every material element in every statute that does not enumerate a mental state. Second, the Court should adopt the MPC's definition section where Congress does not provide its own. Exceptions—such as strict liability crimes like assault on a federal officer—may continue to exist thanks to the force of stare decisis.[323] However, a knowingly standard best conforms to the historical meaning of mens rea, and it is this meaning that is required by due process because it is the common law background against which Congress is presumed to legislate.[324] When Congress wants to deviate from this standard, it must do so explicitly.

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[319] *See also* Kahler v. Kansas, 140 S. Ct. 1021, 1028 (2020) (balancing moral culpability and social policy in upholding Kansas' deletion of the insanity defense); *Rehaif*, 139 S. Ct. at 2204 (Alito, J., dissenting) (arguing against a bright line of knowingly); Torres v. Lynch, 136 S. Ct. 1619, 1630 (2016) (stating the common law background requires a criminal *mens rea*).

[320] *Compare*, Paul H. Robinson, *Strict Liability's Criminogenic Effect*, 12 CRIM. L. & PHIL. 411, 416, 425–26 (2018) (arguing that strict liability crimes undermine the law's reputation as being just), *with* Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 737 (1960) ("[T]he presence of strict liability offenses might have the added effect of keeping a relatively large class of persons from engaging in certain kinds of activity."). These types of low-level fine offenses disproportionately impact poor communities of color. *See* Taibbi, *supra* note 11.

[321] *See* Staples v. United States, 511 U.S. 600 (1994); United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1195 (2d Cir. 1989) ("[E]ven in a conspiracy case, in which specific intent must be proven, use of a conscious-avoidance instruction may be appropriate with respect to the defendant's knowledge of the objectives of the conspiracy. . . . The same is true of mail fraud cases.") (citations omitted).

[322] *See* Mandiberg, *supra* note 28, at 1201–02 (arguing that lenity actually fulfills retributive goals in this context because heightened mens rea results in targeting only those who are aware of moral wrongdoing with felony prosecutions).

[323] United States v. Feola, 420 U.S. 671 (1975); *see* Fricker & Gilchrist, *supra* note 130, at 813.

[324] *See* Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009); Ratzlaf v. United States, 510 U.S. 135, 149 (1994); United States v. U.S. Gypsum Co., 438 U.S. 422, 444 (1978).

Federal courts routinely apply the knowingly standard to separate criminal from innocent conduct and are thus comfortable drawing this line.[325] Where individuals are factually aware that their conduct or the results of their conduct contradict social mores, blameworthiness and attendant criminal liability attach more comfortably than when a defendant engages in risk-creating behavior.[326]

The United States Attorney's Manual has already adopted a definition of knowingly that fits with the MPC insofar as it requires awareness of material elements of the crime, and cannot be predicated on accident.[327] This definition could be used in lieu of the MPC's, but in any event it is time for Congress, defendants, and prosecutors to understand that knowingly is the level of mental state required to separate innocent from criminal activity in the absence of explicit deviation from the norm of mens rea. The adoption of knowingly would not only provide an academically satisfying and clear approach to mens rea, it also would serve to save judicial resources from being wasted arguing over what the requirement of a criminal mental state means.[328]

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[325] United States v. Yermian, 468 U.S. 63, 64 (1984) ("[T]he Government must prove beyond a reasonable doubt that the statement was made with knowledge of its falsity."); Bronston v. United States, 409 U.S. 352, 359 (1973) (perjury requires a knowing intent to mislead); United States v. Svoboda, 347 F.3d 471, 477 (2d Cir. 2003) ("[W]ith *knowledge* of the criminal purpose of the scheme and with the *specific intent* to aid in the accomplishment of those unlawful ends.") (emphasis added); United States v. Whiteside, 285 F.3d 1345, 1351–52 (11th Cir. 2002) (holding that the government failed to show characterizations were knowingly and willfully false); United States v. Curran, 20 F.3d 560, 567 (3d Cir. 1994) ("[T]he government is required to show that the misrepresentation was not made innocently or inadvertently."); United States v. Martellano, 675 F.2d 940, 942 (7th Cir. 1982) ("There is no crime of false swearing before a grand jury unless the defendant's answer about a material fact was knowingly false.").

[326] *See* Baron, *supra* note 247, at 70, 74–76; Méndez, *supra* note 246, at 442 (critiquing the MPC's unresponsiveness to entrenched racism and sexism but admitting that if punishment is the goal then the MPC occupies a special place); Ray Sanchez, *Choke Hold by Cop Killed NY Man, Medical Examiner Says*, CNN (Aug. 2, 2014, 5:02 PM), https://www.cnn.com/2014/08/01/justice/new-york-choke-hold-death/index.html (discussing the death of Eric Garner, killed for selling loose untaxed cigarettes).

[327] *Criminal Justice Manual: 910. Knowingly and Willfully*, U.S. DEP'T JUSTICE (Jan. 21, 2020), https://www.justice.gov/archives/jm/criminal-resource-manual-910-knowingly-and-willfully ("[T]o commit an act 'knowingly' is to do so with knowledge or awareness of the facts or situation, and not because of mistake, accident or some other innocent reason.").

[328] *Compare* Brief for the United States in Opposition at 6, Russell v. United States, 572 U.S. 1056 (2014) (No. 13-7357), 2014 WL 1571932, at *6 (admitting error in the courts below and conceding the correct definition of willfully is acting with knowledge that conduct is unlawful), *with* United States v. Puente, 982 F.2d 156, 159 (5th Cir. 1993) (stating that "a defendant who deliberately avoids reading the form he is signing" has acted with "reckless indifference," and allowing this to satisfy a statute with a "knowingly and willfully" requirement).

Furthermore, public welfare offenses should be restricted to fines, and where they are not must also include a minimum mens rea of knowingly because recklessness is not enough to determine conduct that is dangerous enough to warrant a deprivation of liberty.[329] Requiring a mental state below knowingly should trigger due process concerns of the kind that the judicial branch was intended to safeguard.[330] Clarity is needed in mens rea, but it should not come at the expense of the innocent-yet-clumsy—though potentially liable at tort—defendant which the mens rea requirement was instituted to protect.[331] Therefore, Justice Alito's suggestion that recklessness suffices to separate innocent from criminal conduct must also be rejected.[332]

The movement during the late nineteenth and twentieth centuries away from a mens rea requirement is an arrogation of power to the government.[333] It results in greater bargaining power to prosecutors during plea deals, increases revenue to the government in terms of fineable offenses, generates political capital in the form of "tough-on-crime" propaganda, and places nonculpable people behind bars.[334] In the 1600s, even treason could not lie where the defendant lacked the requisite intent because "*actus non facit reum, nisi mens sit rea*."[335] Food stamp fraud or unwitting immigration violations are far removed from the *malum in se* offenses which the common law traditionally labelled as felonious. Federal mens rea jurisprudence should give meaning to the doctrine's guarantee against undeserved punishment by safeguarding innocent conduct from government overreach in the absence of specific Congressional language dispensing with or altering a knowing mental state.

VI. CONCLUSION

If the Supreme Court intends to adopt a portion of the MPC as representative of a common law background against which Congress is presumed to legislate, then Section 2.02 definitions are an excellent start. The MPC's definitions would bring clarity to the doctrine of mens rea by providing a badly needed common vocabulary. However, choosing recklessly as the gap-filling mental state departs from the common law's historical meaning of mens rea, and to thus relax the law of criminal intent would impermissibly cross the line from clarifying a muddled doctrine to legislating from the bench. Knowingly should instead be chosen both to reflect the

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[329] *Cf.* Frankowski, *supra* note 45, at 421; Kern, *supra* note 29, at 28.

[330] Apprendi v. New Jersey, 530 U.S. 466, 476, 483–84 (2000); Fricker & Gilchrist, *supra* note 130, at 821–22, 831; Holley, *supra* note 25, at 410.

[331] *See* BAKER, OXFORD HISTORY, *supra* note 79, at 754.

[332] *Contra* Baron, *supra* note 247, at 76.

[333] STUNTZ, *supra* note 19, at 84–85.

[334] *See id.* at 303–05.

[335] COKE, *supra* note 70, at 6; STUNTZ, *supra* note 19, at 277.

common law approach to mens rea and to reduce unwarranted criminal exposure that results from discriminatory prosecutorial practices.