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# Proportional Mens Rea

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# ESSAY

## PROPORTIONAL MENS REA

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### INTRODUCTION

Over the last generation, the Supreme Court has dramatically revitalized the mens rea requirement for federal crimes. The "guilty mind" requirement now aspires to exempt all "innocent"[1] (or morally blameless) conduct from punishment and restrict criminal statutes to conduct that is "inevitably nefarious."[2] When a literal interpretation of a federal criminal statute could encompass "innocent" behavior, courts stand ready to impose heightened mens rea requirements designed to exempt all such behavior from punishment. The goal of current federal mens rea doctrine, in other words, is nothing short of protecting moral innocence against the stigma and penalties of criminal punishment.

Although the scholarly community has been quick to embrace the goal of innocence-protection,[3] this Essay argues that federal mens rea doctrine rests on an unduly narrow conception of "innocence." To conceive of innocence-protection as merely preventing conviction for morally blameless conduct, as current doctrine does, is to miss an important dimension of moral culpability—namely, proportionality, or the idea that the punishment must be tailored to the offender's level of blameworthiness. The objection to punishing blameless acts is that the actor is not morally deserving of the blame that it is uniquely the province of the criminal law to impart. The same misalignment of blame and punishment occurs when blameworthy acts receive disproportionately severe punishment.

Consequently, if the goal really is to protect "innocence" by ruling out morally undeserved punishment, mens rea doctrine must do more than guarantee a modicum of moral blameworthiness as a precondition to punishment. It must also

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1. Liparota v. United States, 471 U.S. 419, 426 (1985); *see also, e.g.*, Carter v. United States, 530 U.S. 255, 269 (2000).

2. Ratzlaf v. United States, 510 U.S. 135, 144 (1994).

3. *See, e.g.*, Dan M. Kahan, *Ignorance of the Law* is *an Excuse–But Only for the Virtuous*, 96 MICH. L. REV. 127, 145-52 (1997); Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 882-904 (1999); John S. Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1057-1130 (1999).

ensure that the acts which lead to criminal liability will be *sufficiently blameworthy* to deserve the sanctions imposed by the substantive offense. Only then will "innocence" truly be protected against criminal liability, and the traditional role of mens rea fulfilled.

This Essay proceeds as follows. Part I outlines the Supreme Court's current approach to mens rea, which equates "innocence" with "moral blamelessness." Part II criticizes that narrow conception of "innocence." Mens rea has traditionally served to prevent disproportional punishment as well as punishment of blameless conduct, and the outcomes in recent mens rea cases are indefensible without reference to the very proportionality considerations the cases treat as irrelevant.

Part III makes the case for "proportional mens rea," a proportionality-based approach to mens rea selection. Proportional mens rea would provide proportionality safeguards that are otherwise entirely lacking in substantive criminal law and, as a practical matter, unavailable in constitutional law. Creating implied mens rea requirements, where necessary to ensure proportional punishment, is not a judicial usurpation of a legislative function. Rather, it is to take seriously the role that courts play, under both constitutional and substantive criminal law, to ensure that punishment "fits" the crime. Moreover, proportional mens rea would represent a needed counterweight to prosecutorial behavior whereas current doctrine does not. Given that federal prosecutors do not seek to charge morally blameless people, mens rea doctrine aimed only at protecting moral blamelessness from punishment will largely be redundant of prosecutorial discretion. Proportionality of punishment, however, is a concern that federal prosecutors—bound by longstanding Executive Branch mandates to seek the maximum supportable penalty in every case and oppose lenient exercises of judicial sentencing discretion—routinely ignore. Judicial mens rea selection, therefore, has a substantial contribution to make to the achievement of proportionality of punishment.

## I. INNOCENCE-PROTECTION AND MENS REA

Moral innocence was not always an important factor in federal mens rea selection. For several generations, the Supreme Court treated the historic requirement of a "guilty mind" (or a morally culpable mental state) as the exception, rather than the rule, in federal criminal law.[4] In *Morissette v. United States*,[5] the Court held that a culpable mental state is required for the small category of crimes derived from the common law but ominously stated that "quite contrary inferences" may be warranted as to "offense[s] new to general law, for whose definition the courts have no guidance except the Act."[6] The clear implication, seized upon in

4. *See, e.g.*, United States v. Freed, 401 U.S. 601, 607 (1971); United States v. Dotterweich, 320 U.S. 277, 280-81 (1943); United States v. Balint, 258 U.S. 250, 251-52 (1922).

5. 342 U.S. 246 (1956).

6. *Id.* at 262. Among these "new" offenses are regulatory crimes known as "public welfare offenses," which dispense with mens rea as to one or more elements of the actus reus in the interest of the public welfare. Simply

later cases,[7] was that a culpable mental state may not be required for regulatory or other crimes unknown to the common law.

In *Liparota v. United States*[8] and subsequent cases,[9] the Supreme Court employed an entirely different approach to mens rea. Under this approach, the goal of the mens rea requirement is to protect "innocent" conduct from punishment. This goal is accomplished by requiring a culpable mental state for all crimes, regardless of their origin or status.

*Staples v. United States*[10] exemplifies the new approach to mens rea. The case involved a prosecution for possession of an unregistered machinegun, a crime previously classified as a public welfare offense. Citing public-safety concerns, the prosecution argued that conviction should be allowed as long as the defendant knew the item he possessed was a gun of some kind. The Court disagreed, noting that such a minimal mens rea requirement would allow prosecutors to convict the "innocent" act of possessing guns that "traditionally have been widely accepted as lawful possessions."[11]

To exempt "innocent" instances of gun possession from the statute, *Staples* demanded proof of a culpable mental state. To convict, the government must prove that the defendant knew the "quasi-suspect character" of his "firearm" (in Staples's case, its automatic-firing capability) that placed it outside of the category of guns that can be lawfully possessed free of government regulation.[12] Thus, far from being limited to common law crimes, the "guilty mind" requirement now applied more broadly to regulatory crimes as well.[13]

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stated, public welfare offenses require individuals who engage in activities that create generalized risks of harm to the public at large to use special care to prevent those harms from materializing. *See id.* at 255-56.

7. *See, e.g.*, *Freed*, 401 U.S. at 607 (concluding that a culpable mental state is not required in the "expanding regulatory area involving activities affecting public health, safety, and welfare" and that common-law crimes belong to a "different category").

8. 471 U.S. 419 (1985).

9. *See, e.g.*, Staples v. United States, 511 U.S. 600, 619 (1994); Ratzlaf v. United States, 510 U.S. 135, 144 (1994).

10. 511 U.S. 600 (1994).

11. *Id.* at 612. In declaring gun possession to be "innocent" conduct, the Court relied on the "long tradition of widespread lawful gun ownership by private individuals in this country." *Id.* at 610; *see also id.* at 621 (Ginsburg, J., concurring in judgment) (faulting the government for "not tak[ing] adequate account of the 'widespread lawful gun ownership' Congress and the States have allowed to persist in this country"). Given this tradition, the mere fact that an item is a gun "cannot be said to put gun owners sufficiently on notice of the likelihood of regulation." *Id.* at 612 (majority opinion).

12. *Id.*; *see also id.* at 619 (holding that "to obtain a conviction, the Government should have been required to prove that petitioner knew of the features of his AR-15 that brought it within the scope of the Act").

13. *Id.* at 612. *Staples*, of course, did not reject the concept of strict liability, which arises when one or more elements of the actus reus require no mens rea at all. Indeed, even as construed in *Staples*, the possession offense was a strict liability crime because, under *Freed*, no mens rea is required as to the unregistered status of the firearm. *See id.* at 609. The fundamental insight of *Staples* is that strict liability, if properly limited, is not inconsistent with the goal of innocence protection: mens rea can be safely dispensed with as to elements of the crime that are not central to the blameworthiness of the prohibited act, provided that the remaining elements of the crime supply the requisite blameworthiness (and hence notice). What makes the possession of weapons classified

The innocence-protection the Court desires is achieved by strategically adjusting the mens rea in light of the nature of the prohibited act. Where the nature of the prohibited act, as defined by Congress, is sufficient to guarantee that anyone convicted of the crime will be morally blameworthy, courts treat the legislative definition of the crime as conclusive and do not impose heightened mens rea requirements.[14] If, however, the prohibited act is not "inevitably nefarious"[15] and thus could potentially reach innocent conduct, courts adopt more stringent mens rea requirements designed to exclude all innocent conduct from the crime's reach.[16]

Typically, as exemplified by *Staples*, innocence protection is achieved by requiring knowledge of all the facts that make the defendant's conduct wrongful. Although the Court perceived a threat to innocence protection in *Staples*, it did not require proof that the defendant knew the legal definition of "firearm," much less that it is illegal to possess unregistered "firearms." Instead, the Court required the government to prove that the defendant knew the pertinent facts—namely, the characteristics that brought his weapon within the statutory definition of "firearm."[17]

In many cases, full knowledge of the facts that make the defendant's conduct illegal will prevent conviction for morally blameless conduct. Sometimes, however, knowledge of the facts that constitute the offense will fail to exclude all "innocent" conduct from the reach of a criminal statute. These are situations of incompletely defined crimes—situations where the crime, as legislatively defined, fails to describe acts that citizens would expect to be considered wrongful. In these

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as statutory "firearms" blameworthy is not that they are unregistered—after all, most dangerous items, and indeed most guns, need not be registered—but rather that they are the kind of weapons that traditionally could not be lawfully possessed without strict government regulation. *See id.* at 611-12; *Freed*, 401 U.S. at 616 (Brennan, J., concurring in judgment) (noting that the crime encompasses only "major weapons" as to which "the likelihood of government regulation . . . is so great that anyone must be presumed to be aware of it"). The Court's insistence on proof of a culpable mental state as to the nature of the "firearm" thus served to exclude innocent gun possession from the crime, even though the weapon's unregistered status is a strict-liability element.

14. The relevant case here is *Bryan v. United States*, 524 U.S. 184 (1998). The issue in *Bryan* was whether persons charged with "willfully violating" a federal firearms law have to know of the exact law they violated or whether it is enough that they knew, in a generic sense, they were acting illegally. Because general knowledge of illegality would be enough to guarantee moral culpability, the Court accepted the lesser, more generic showing as sufficient. *Id.* at 194-96.

15. Ratzlaf v. United States, 510 U.S. 135, 144 (1994).

16. This is precisely what happened in *Staples*, as previously noted. *See supra* p. 4. *Staples* was not an outlier in this regard; the Supreme Court has repeatedly responded to the danger that innocent conduct might result in punishment by adopting heightened mens rea requirements. *See, e.g.*, Arthur Andersen LLP v. United States, 544 U.S. 696, 706 (2005) (holding that, to be guilty of obstruction of justice as a "corrupt persuader," consciousness of wrongdoing is required); *Ratzlaf*, 510 U.S. at 144 (ruling that defendants cannot be convicted of evading currency-transaction reporting requirements unless they knew such evasion is illegal); *Liparota*, 471 U.S. at 426 (holding that food stamp fraud requires proof that the defendant knew he violated laws concerning permissible uses of food stamps). For a comprehensive discussion of the key cases in this area, see Wiley, *supra* note 3, at 1034-53.

17. 511 U.S. at 619.

situations, the mental culpability (and innocence protection) the Court demands can only come from proof that the defendant knew his conduct was illegal.

The Court's commitment to innocence protection is most dramatically shown in its cases making ignorance of the law a defense to particular crimes. The most recent installment in this line of cases is *Arthur Andersen LLP v. United States.*[18] Arthur Andersen was charged with "corruptly persuading" its employees to destroy Enron-related documents with intent to cause those documents to be withheld from federal investigators.[19] Noting the prevalence and legitimacy of document-retention policies in the business world and the fact that lawyers often advise clients to withhold documents from investigators on privilege grounds, the Court concluded that persuading others to withhold documents from a federal investigation is "by itself innocuous" and "not inherently malign."[20] To ensure that innocent "persuasion" cannot result in punishment, the Court required proof that the "persuader" acted with "consciousness of wrongdoing."[21]

As this brief survey of current mens rea doctrine suggests, the recent mens rea cases have given rise to a dramatically different approach to mens rea in the federal system. The Supreme Court has insisted that federal crimes be defined in terms that guarantee a path to acquittal in substantive criminal law for morally blameless conduct and has increasingly looked to the mental element of crimes to provide this protection against punishment for "innocent" conduct. Thus, innocence-protection has emerged both as the overarching goal of the mental element of federal crimes and as the driving force behind federal mens rea selection.

## II. WHAT IS "INNOCENCE"?

The Supreme Court, to date, has only grappled with one part of the innocence-protection problem: avoiding punishment for innocent acts. Proportionality concerns have no place in the mens rea analysis outlined by the Court. An act is either "inevitably nefarious"[22] or not; if it is, then the act is not "innocent" and heightened implied mens rea requirements are categorically ruled out. As a recent case declares, "The presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"[23] On this narrow view of innocence protection, federal mens rea doctrine serves only to ensure that persons subject to conviction

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18. 544 U.S. 696 (2000).

19. *See id.* at 702 (describing indictment of Arthur Andersen). "Corrupt persuasion" is a form of obstruction of justice prohibited by 18 U.S.C. § 1512(b).

20. *Arthur Anderson*, 544 U.S. at 703-04.

21. *Id.* at 706. *Arthur Andersen* was hardly the first case in which the Court demanded consciousness of wrongdoing in order to exclude innocent conduct from the reach of federal crimes. *See* Ratzlaf v. United States, 510 U.S. 135, 144 (1994) ("structuring" cash transactions to avoid currency reporting requirements); Cheek v. United States, 498 U.S. 192, 203 (1991) (tax fraud); *Liparota*, 471 U.S. at 426 (misuse of food stamps).

22. *Ratzlaf*, 510 U.S. at 144.

23. Carter v. United States, 530 U.S. 255, 269 (2000) (citations omitted).

in federal court will have committed a minimally blameworthy act.

This is not the only possible understanding of the meaning of "innocence" and of the normative aspirations of mens rea doctrine. Innocence-protection might mean more than ensuring that punishment will not be imposed for morally blameless conduct. On this broader view, the goal of mens rea would be to align guilt and punishment with the moral blameworthiness of the defendant's conduct. This conception of innocence-protection would give relevance to moral blameworthiness along two axes instead of just one: blameworthiness would not only determine *who* can and cannot be punished, but also *how much* punishment can be imposed for a blameworthy act. Innocence-protection, as thus broadly construed, would also aim to ensure that blameworthy acts will be punished in proportion to their degree of blameworthiness.

This Part contends that the innocence-protection project will not be complete until the Supreme Court explicitly adopts the broader view of innocence as the basis of mens rea doctrine. The Court's limited, culpability-focused approach reflects a fundamental misunderstanding of the role that mens rea has traditionally performed in criminal law in achieving proportional punishment for blameworthy acts. Unless corrected, the restrictive approach to mens rea selection will allow the single greatest threat to innocence in the federal system—disproportionately severe penalties—to go unaddressed.

### *A. Criminal Law Tradition and "Innocence"*

The correctness of the broader conception of innocence-protection can be seen by examining the various ways in which mens rea has traditionally operated to delimit criminal liability. In some, mens rea serves to ensure that "normal" persons, operating under normal circumstances,[24] will not be convicted of a crime unless they committed a morally blameworthy act. In others, however, mens rea serves to distinguish among the "guilty" by determining the extent of punishment

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24. "Normal" persons are those who are not so gravely deficient in their ability to discern right from wrong as to make it unfair to blame them for breaking the law. The law affords defenses, such as insanity and immaturity, to excuse crimes by certain categories of "abnormal" persons, colorfully described by one commentator as "the very young, the very crazy, and the severely mentally retarded." Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1521 (1992). Even "normal" persons, however, can be confronted with abnormal situations in which they cannot fairly be blamed for committing a crime. In such situations, commission of a crime might be morally appropriate or "justified" (such as breaking into private property to save a life) or, in the case of crimes committed under duress or as a result of entrapment, are "excused" as not fairly attributable to the defendant. Abnormal situations, like abnormal persons, are addressed by special defenses (such as necessity, duress, and entrapment, respectively, in the above examples) rather than mens rea doctrine. These defenses, and mens rea doctrine itself, reflect what Professor Peter Arenella has called the "liberal paradigm for moral responsibility." *See generally id.* at 1516-26. According to the paradigm, an individual does not deserve moral blame or punishment unless he "made rational and voluntary choice to engage in behavior that he knew (or more controversially, that he should have known) would (or might) breach community norms under circumstances that gave him a fair opportunity to avoid the breach." *Id.* at 1523.

certain offenders deserve as compared to others.

In three different ways, mens rea operates to restrict guilt and punishment according to moral blameworthiness. First, the identification of a specific mens rea in the definition of the offense can remove from the ambit of a criminal statute whole categories of innocent behavior that fall within the actus reus of the crime. Contrary to Justice Jackson's colorful reference to the actus reus requirement as mandating an "evil-doing hand,"[25] the actus reus of crimes is often not "evil" at all; indeed, quite often it is entirely consistent with moral, law-abiding behavior.

Consider, for example, the crime of mail fraud. The actus reus of mail fraud is not defrauding people, but rather using the mails.[26] What makes this innocuous conduct both capable and deserving of criminalization is the illicit purpose for which the mails are used—namely, to defraud others—and so Congress sensibly defined the crime as requiring proof that the mails were used "for the purpose of executing" a "scheme or artifice to defraud."[27] Legislative specification of the "guilty" purpose or motive necessary for use of the mails to constitute a crime excises categories of blameless conduct from the scope of mail fraud.

Mail fraud is not exceptional in this regard. Rather, it exemplifies an entire category of crimes known in common-law terminology as crimes of "specific intent." Generally speaking, crimes of specific intent prohibit conduct only when engaged in for some specified bad purpose or objective.[28] Absent that illicit purpose or objective, the act often will not be blameworthy, and so the requirement of specific intent guarantees that any convicted offender will have committed an act that deserves punishment.

Second, in many crimes, the specific intent requirement promotes proportionality of punishment for blameworthy conduct. In these situations, mens rea matches up the *degree* of blameworthiness of the offense with the severity of punishment authorized by the legislature. This serves to minimize the danger that disproportionate punishment—punishment, in other words, that is either too severe or too

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25. *See Morissette*, 342 U.S. 246, 251 (1952) (describing crime as a "compound concept" involving the "concurrence of an evil-meaning mind with an evil-doing hand").

26. The actus reus of mail fraud is

> plac[ing] in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposit[ing] or caus[ing] to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or tak[ing] or receiv[ing] therefrom, any such matter or thing, or knowingly caus[ing] to be delivered by mail or such carrier . . . any such matter or thing.

18 U.S.C. § 1341 (2006).

27. *Id.*

28. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.06, at 136 (3d ed. 2001). Common examples of specific-intent crimes include larceny (which requires intent to steal), attempt (which requires intent to commit a crime), and conspiracy (which requires intent to commit a crime or to perform a lawful act through unlawful means). Specific-intent crimes are to be contrasted with "general-intent crimes," which do not require proof of any particular bad purpose or motive. For an attempt to explain the elusive distinction under common law between general and specific intent crimes, see *id.* § 10.06, at 135-37.

lenient—will be imposed for blameworthy conduct.

Homicide crimes provide a useful illustration. The actus reus of murder (the unlawful killing of a human being) is undeniably blameworthy whether or not committed with the specific intent ("malice aforethought") required by the traditional definition of murder.[29] Consequently, defining murder without reference to malice would not threaten to convict blameless persons. Nevertheless, legislatures, for good reason, have adhered to the traditional mental element for murder.[30]

The specific intent of "malice aforethought" is the means by which the law differentiates murder from the less severely punished crime of manslaughter. The presence or absence of malice has dramatic penal consequences: murder is potentially punishable by death or life imprisonment in the federal system, but the maximum penalty for manslaughter, a killing without malice aforethought, is ten years in prison.[31] Murder, therefore, represents a category of specific-intent crimes in which defining the crime in terms of a particular mental state is essential, not to exempt blameless conduct from punishment, but rather to achieve proportional punishment for blameworthy acts.

Notice that the two previously discussed ways in which specific intent serves to align guilt with blameworthiness are not mutually exclusive. In some crimes, specific intent will do double duty, exempting blameless acts from criminal liability and ensuring proportionate punishment for acts that are blameworthy. The crime of larceny provides an apt example.

To be guilty of larceny, a person must take the property of another with the intent permanently to deprive the owner of it. This so-called "intent to steal" exempts from conviction those who innocently take someone else's property. So, for example, if a defendant takes property in the mistaken belief that it belongs to him, his mistake of fact disproves the intent to steal required by larceny.[32] In addition,

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29. "Malice aforethought" has commonly been construed to require either intent to kill or inflict serious bodily injury, recklessness as to a risk of death so extreme as to manifest extreme indifference to the value of human life, or intent to commit a serious felony during which the killing occurs. *See, e.g., id.* § 31.02[B][2], at 503.

30. *See, e.g.*, 18 U.S.C. § 1111(a) (2006) (incorporating "malice aforethought" requirement in definition of murder). The Model Penal Code does not employ the term "malice aforethought," but, with the exception of the Code's much-narrower definition of felony murder, closely tracks the familiar common-law categories of murder. *See* MODEL PENAL CODE § 210.2 (2001).

31. *Compare* 18 U.S.C. § 1111(b) (punishments for murder) *with* 18 U.S.C. § 1112(b) (2006) (punishments for manslaughter). Even within the separate categories of murder and manslaughter, mens rea is used to differentiate between different grades of those offenses. For example, "willful, deliberate, . . . and premeditated" murders are classified as murder in the first degree, with "[a]ny other murder" constituting second-degree murder only. 18 U.S.C. § 1111(a). First-degree murder is punishable by a minimum of life imprisonment, and potentially the death penalty, whereas any term of years, up to a maximum of life, can be imposed for second-degree murder. *See* 18 U.S.C. § 1111(a)-(b). Similarly, an intentional killing in the heat of passion in response to legally adequate provocation is punished as voluntary manslaughter, but negligent or reckless killings are classified as involuntary manslaughter. 18 U.S.C. § 1112(a). The maximum punishment for voluntary manslaughter is ten years, as compared to the six years that may be imposed for involuntary manslaughter. *See* 18 U.S.C. § 1112(b).

32. *See* DRESSLER, *supra* note 28, § 12.03[C], at 154-55.

the intent-to-steal requirement operates, in conjunction with "joyriding" statutes, to promote proportionality of punishment for blameworthy takings of property. Taking someone else's car for a joyride is blameworthy, but less so than stealing the car. The operative difference is that joyriding only temporarily dispossesses the owner of the car, whereas theft involves a dispossession that the taker intends to be permanent.[33] The intent to steal required for larceny thus ensures that joyriders will not be punished for the more severe crime of theft, but rather of the lesser offense of joyriding.

Third, in all crimes, mens rea provides a vehicle through which defendants can show that their actions were blameless given their perception of the operative facts. If defendants were mistaken as to the facts (and possibly even the law) that made their conduct morally blameworthy, the mistake can be used to negate the required mens rea.[34] There is also a proportionality function for mistake doctrine in specific-intent crimes: a defendant who is unreasonably mistaken about a specific-intent element is guilty of negligence (for failing to use reasonable caution and prudence in appraising the pertinent facts), but is nonetheless exonerated because negligence falls below the level of culpability required for intentional crimes.[35]

As an example of how mens rea promotes both aspects of innocence-protection—namely, preventing conviction for blameless conduct and disproportionate punishment for blameworthy conduct—consider *Morissette v. United States*.[36] The

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33. As Oliver Wendell Holmes, Jr. famously said of the crime of larceny: "A momentary loss of possession is not what has been guarded against with such severe penalties. What the law means to prevent is the loss of [property taken] wholly and forever, as is shown by the fact that it is not larceny to take for a temporary use without intending to deprive the owner of his property." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 71 (1881).

34. Generally speaking, mistakes of facts are valid defenses where, had the facts been as the defendant reasonably supposed them to be, his conduct would not have been wrongful. The only exception involves mistakes as to strict-liability elements, which require no mens rea and thus admit of no mistake defenses. *See generally* DRESSLER, *supra* note 28, §§ 12.03-12.05. Apart from strict-liability elements, mistakes of fact can be a complete defense. The same is true of mistakes of non-criminal law, such as the law determining the validity of divorces where relevant to bigamy prosecutions. The common law rule is that mistakes of noncriminal law are admissible to negate specific intent, *id.* § 13.02[D][1]-[3]; under the Model Penal Code jurisdictions, such mistakes, like mistakes of fact, can be used to negate any mens rea requirement with which they are logically inconsistent. *See* MODEL PENAL CODE § 2.04(1)(a) (2001). Neither the common law nor the Code, however, is solicitous of mistakes of criminal law. Except in the rare case where the crime makes knowledge of some aspect of the criminal law an element of the offense, claims of ignorance or mistake of criminal law almost invariably meet with the reflexive retort that "ignorance of the law is no excuse." *See* MODEL PENAL CODE § 2.02(9) (2001) (mistakes of criminal law no defense); *see generally* Cheek v. United States, 498 U.S. 192, 199 (1991) (citing "numerous" applications of the doctrine in federal cases).

35. Even unreasonable mistakes are a defense to specific-intent elements. *See, e.g.*, *Cheek*, 498 U.S. at 202 (noting that individuals who misunderstood their tax obligations cannot be convicted of "willful" violations of the tax code "whether or not the claimed belief or misunderstanding is objectively reasonable"). The common law rule was different, however, for crimes of general intent. For such crimes, negligent mistakes are not a defense. *See generally* DRESSLER, *supra* note 28, § 12.05, at 136-38 (summarizing the common law's mistake-of-fact rules).

36. 342 U.S. 246 (1952).

defendant took spent bomb casings from an Air Force bombing range in the mistaken belief that they were abandoned scrap metal when, in fact, they belonged to the federal government. The taking would have been morally blameless if the bomb casings were, as he incorrectly assumed, abandoned scrap metal, free to the first taker. Given that the ownership of the casings was central to the blameworthiness of Morissette's actions, the Supreme Court ruled that he was entitled to acquittal if, in fact, he was genuinely mistaken.[37]

That ruling was essential to avoid two distinct threats to innocence-protection that would have arisen if, as the government contended, mistakes concerning the ownership of the property were no defense. First, prosecutors would have been able to brand as felons people whose actions were morally blameless because they reasonably believed the property they took was abandoned. Second, prosecutors would be able to visit upon negligent wrongdoers—people who unreasonably assumed government property was abandoned—serious criminal sanctions, ranging up to ten years in prison, that were intended only for intentional wrongdoers.[38]

As the above discussion demonstrates, innocence-protection, properly understood, is broader than exempting morally blameless conduct from punishment. It involves limiting guilt and punishment in accordance with the blameworthiness of the defendant's act. The means of doing so differs. In some cases, mens rea serves to carve morally innocent conduct out of the reach of a criminal statute whereas, in others, it ensures that morally blameworthy conduct will not be punished out of proportion with its level of blameworthiness; in still others, it does both. The goal, however, is the same: to ensure that guilt and punishment track the moral blameworthiness of the conduct that gives rise to liability.

To be faithful to the traditional understanding of innocence-protection, the Supreme Court should broaden its understanding of what it means for an act to be "innocent" for purposes of federal mens rea doctrine. Certainly, acts that are entirely free of moral taint qualify as "innocent" and should not be punished. "Innocence," however, also exists when a prohibited act, though blameworthy, is insufficiently blameworthy to deserve the penalties authorized by the statute under which the offender is prosecuted. In that instance, there is what might be called a "culpability gap"—a gap between the greater level of moral culpability contemplated by Congress and the lesser level manifested in the action of the offender. That gap, quite simply, is "innocence," no different in principle from the kind of innocence presented by morally blameless conduct. It is a gap that mens rea doctrine has traditionally aimed, and must again aim, to close.

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37. *Id.* at 276.

38. In *Morissette*, the conversion statute explicitly provides that, to be a crime, the conversion of government property has to be "knowing[]." 18 U.S.C. § 641 (2006). This was significant to the outcome of the case because, as the Court noted, it was impossible for Morissette to "have knowingly . . . converted property that he did not know could be converted, as would be the case if it was in fact abandoned or if he truly believed it to be abandoned and unwanted property." *Morrissette*, 342 U.S. at 271.

### *B. Proportionality Through the "Back Door"*

Perhaps the best evidence that the Supreme Court's understanding of "innocence" is unduly narrow comes, oddly enough, from the Court itself. As the Court has recently noted, mens rea doctrine requires "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"[39] This is what one would expect from a doctrine premised upon innocence-protection in the narrow sense: if innocence-protection simply means limiting punishment to blameworthy acts, then the mens rea would only be increased only if (and to the extent) necessary to guarantee some minimal degree of culpability. To the extent minimal blameworthiness exists, the conduct is not "innocent," and a doctrine of mens rea that does not assign independent value to proportionality of punishment would demand no greater culpability.

As is often the case, however, what the Supreme Court actually does is far more revealing than what it says. When we look beyond the Court's statements that mens rea serves only to prevent punishment for blameless conduct, we get a very different picture. What we find is that the cases support a very different rule—namely, that the current approach often requires *considerably more* than minimal culpability. Proportionality, in short, has been smuggled into the mens rea analysis (partially, at least) through the back door.

If minimally sufficient culpability were all that the new approach requires, then negligence or recklessness would be the default mens rea in federal cases. After all, those are the lowest levels of culpability that are widely accepted as justifying criminal sanctions.[40] Nevertheless, in each of its recent mens rea cases, the Court required a substantially more culpable mental state (knowledge) when it detected a risk that blameless conduct might lead to conviction. These cases show that, in federal cases, the mens rea requirement often demands high levels of culpability.

Take *Staples* first. The Court there ruled that it is not a crime to possess an unregistered machinegun unless the defendant actually knew that his gun could

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39. Carter v. United States, 530 U.S. 255, 269 (2000). Professor John Wiley gives a similar description; he says that the Court addresses risks that blameless conduct might result in conviction by "formulat[ing] an additional and *minimally sufficient* element about mental state to shield blameless conduct from criminal condemnation." Wiley, *supra* note 3, at 1023 (emphasis added). He finds implicit in the new approach a "rule against requiring superfluous culpability," pursuant to which mens rea requirements should only demand "minimally sufficient culpability." *Id.* at 1128. For reasons that will soon become clear, it is incorrect to say that mens rea doctrine requires only the minimal level of culpability necessary to avoid conviction for blameless conduct.

40. *See* MODEL PENAL CODE §§ 2.02(2)(c)-(d) (2001) (recognizing recklessness and negligence as culpable mental states). The Code defines "negligence" as involving unawareness of risks that are so obvious and so substantial and unjustifiable in the circumstances as to amount to a "gross deviation from the standard of care" that a "reasonable person" would have observed. § 2.02(2)(d). Recklessness, by contrast, involves "conscious disregard" of risks that are so substantial and unjustified as to constitute a "gross deviation from the standard of conduct" that a "law-abiding person" would have observed in such circumstances. *Id.* § 2.02(2)(c). Although negligence is thus regarded as a culpable mental state, the Code drafters chose the higher standard of recklessness as the default mens rea required for Code offenses. § 2.02(3). The Code also recognizes two higher standards of culpability; they are, in ascending order, "knowledge" and "purpose." *See* § 2.02(2)(a)-(b).

fire automatically.[41] The two other cases in the foundational trilogy, *Liparota* and *Ratzlaf*, adopted even stricter mens rea requirements. These cases did not simply require knowledge of the facts bearing on the legality of the defendant's conduct, as *Staples* did; they required proof that the defendants knew the law. Brushing aside the maxim that "ignorance of the law is no excuse," *Liparota* ruled that defendants cannot be convicted of misusing food stamps unless they knew that they were violating applicable food stamp regulations.[42] Similarly, the Court ruled in *Ratzlaf* that the crime of "structuring" requires proof that the defendant knew it is illegal to break up a cash transaction involving at least $10,000 in order to avoid federal currency transaction reporting requirements.[43]

In each case, the Supreme Court could have easily ruled, if it intended merely to guarantee some minimal level of culpability, that the defendants could be convicted only if they acted unreasonably. This would have meant that Staples would have been guilty if he should have known of his gun's automatic-firing capability and that Liparota and Ratzlaf could have been convicted if they should have known their conduct was illegal. Instead, in each case, the Court construed a statute silent as to mens rea to require the much higher standard of actual knowledge, either of the operative facts or of the law itself.

The same dynamic played out in *United States v. X-Citement Video, Inc.*[44] The case involved a prosecution for possession and distribution of child pornography. The court of appeals ruled that the pornography statute did not require knowledge that the material in question depicted minors performing sex acts, an interpretation of the statute that the Supreme Court conceded was "[t]he most natural grammatical reading."[45] Nevertheless, the Court deemed that interpretation unacceptable because it would allow prosecutors to convict blameless defendants (such as delivery workers handling packages that, unbeknownst to them, contained child pornography).[46]

*X-Citement Video* is another example of back-door proportionality at work in federal mens rea selection. The Court adopted a stringent mens rea requirement, ostensibly for the purpose of exempting blameless acts from punishment, but the requirement was significantly higher than necessary to guarantee a minimal level of blameworthiness. A minimal-culpability standard would have allowed conviction as long as the defendant should have known that the material depicted minors having sex.[47] Instead, the Court required actual knowledge—a difficult

41. Staples v. United States, 511 U.S. 600, 619 (1994).
42. Liparota v. United States, 471 U.S. 419, 433 (1985).
43. Ratzlaf v. United States, 510 U.S. 135, 149 (1994).
44. 513 U.S. 64 (1994).
45. *Id.* at 68.
46. *Id.* at 69-73.
47. Arguably, even a less demanding mens rea would have established minimal culpability. The argument would be that the knowing possession of *any* pornographic material, whether or not it involves minors, is morally culpable. Even assuming that pornography can be treated as inevitably nefarious in our prurient culture, the First

standard to meet.[48]

If the purpose of mens rea is merely to avoid punishment for "innocent" conduct, the outcome in *X-Citement Video* is inexplicable. Simply put, it is neither morally nor "constitutionally" innocent to possess material that any reasonable person would know to be child pornography. Tellingly, the Court did not premise its "innocence" analysis on the usual ground of moral blamelessness. Rather than making a moral claim, as it did in its other innocence-protection cases, the Court relied on "*legal* innocence," the idea that trafficking in non-obscene adult pornography is legal (by virtue of the First Amendment) and, in that sense only, "innocent."[49] The doctrine of "constitutional" (or "legal") innocence merely required *some* level of mens rea concerning the age of the performers; it did not require any particular mens rea, much less the stringent mens rea of actual knowledge.[50] Any mens rea option other than strict liability for the underage status of the performers would have solved the constitutional problem, leaving the Court free to require a mens rea less stringent than knowledge if it wished.

Nevertheless, the otherwise inexplicable outcome in *X-Citement Video* makes perfect sense as an effort to promote proportionality of punishment. After all, trafficking in child pornography is a very serious crime, and it is punished so severely because the creation of child pornography inflicts serious harms on the children used to produce it.[51] Not surprisingly, the penalties that Congress has authorized for trafficking in obscene adult pornography pale in comparison to the

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Amendment complicates matters. In terms of precedent, adult pornography constitutes protected speech, provided it is not so vulgar as to be considered "obscene" under *Miller v. California*, 413 U.S. 15 (1973). *See generally X-Citement Video*, 513 U.S. at 72. The First Amendment itself would seem to require mens rea for the underage status of a performer in pornographic material to avoid a "chilling effect" on the production and distribution of constitutionally protected adult pornography. Indeed, the dissenters in *X-Citement Video* voted to invalidate the child pornography statute on this basis. *See id.* at 85-86 (Scalia, J., dissenting). In light of the First Amendment, the possession and distribution of non-obscene pornography involving adults is "constitutionally innocent"—"innocent" not because it is morally licit, but rather because it is constitutionally protected—and thus cannot be treated as blameworthy by the criminal law. *See generally* Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828 (1999) (arguing that strict liability is unconstitutional when the crime, minus the strict-liability element, constitutes constitutionally protected activity). Some culpability, therefore, was necessary concerning the age of the performers.

48. *X-Citement Video*, 513 U.S. at 78. The Court ruled that actual knowledge was required "both" as to "the sexually explicit nature of the material and . . . the age of the performers." *Id.*

49. *Id.* at 73 (emphasis added).

50. As Professor Alan Michaels has explained, with particular reference to *X-Citement Video*, "[t]he principle of constitutional innocence . . . means that strict liability may not be imposed with regard to the use of minors in the production of [pornographic] materials." Michaels, *supra* note 47, at 890.

51. In *New York v. Ferber*, the Court was unequivocal as to the serious "physiological, emotional, and mental" harms that children used to produce child pornography suffer. 458 U.S. 747, 758 (1982). Not only are children sexually exploited in the very creation of child pornography, but the resulting images create a permanent record of their exploitation which can surface at any time, causing the victims great anxiety and emotional distress. *See id.* at 756-59. Because protecting children against sexual exploitation is "of surpassing importance," *id.* at 757, the Court ruled that legislatures can "dry up the market for this material by imposing severe criminal penalties [for the creation and possession of child pornography]." *Id.* at 760.

severe penalties available under federal law for child pornography offenses.[52] Limiting conviction to those who actually knew that their pornographic material featured minors thus serves to guarantee that the conduct that can lead to conviction for federal child pornography offenses will be sufficiently blameworthy to deserve the severe penalties available for those offenses.

Given the severity of penalties that were authorized in *Staples*, *Liparota*, *Ratzlaf*, and *X-Citement Video*, the Court was absolutely right to insist on more than "minimal" culpability. Each of these cases involved serious crimes, not minor infractions. All were classified as felonies, which, as the Court reminds us, "is . . . 'as bad a word as you can give to man or thing.'"[53] Moreover, the crimes were punishable by lengthy terms of imprisonment. The maximum prison term was five years in *Liparota* and *Ratzlaf*,[54] ten years in *Staples*,[55] and twenty years (with a five-year mandatory minimum) in *X-Citement Video*.[56] For crimes as serious as these, serious culpability should be required.

An analogy to public-welfare offenses is instructive here. An important ground for allowing strict liability for those offenses is that their penalties are "relatively small, and conviction does no grave damage to an offender's reputation."[57] Although strict liability for public-welfare offenses remains controversial,[58] the argument for it is strongest for minor crimes that are punishable, at most, by short periods of confinement and that typically result only in fines. After all, such

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52. For example, possession of an obscene visual depiction on federal property carries a maximum prison term of two years, see 18 U.S.C. § 1460(a) (2006), and engaging in the business of distributing obscene matter is punishable by no more than five years, see § 1466(a). By comparison, the basic penalty for possession or distribution of child pornography is five to twenty years in prison. *See* 18 U.S.C. §§ 1466A(a), 2252A(b)(1) (2006).

53. Staples v. United States, 511 U.S. 600, 618 (1994) (quoting Morissette v. United States, 342 U.S. 246 (1952)).

54. *See* 7 U.S.C. § 2024(b)(1) (2006) (*Liparota*); 31 U.S.C. § 5322(a) (2006) (*Ratzlaf*).

55. 26 U.S.C. §§ 5861(d), 5871 (2006).

56. 18 U.S.C. §§ 1466A(a), 2252A(b)(1). The penalty range for convicted sex offenders is much higher still: fifteen to forty years. *See id.* For constitutional law purposes, criminal statutes carrying far less severe punishments are treated as serious crimes. The right to jury trial and the right to counsel are examples. The right to trial by jury attaches to any crime for which more than six months incarceration is authorized; only crimes punishable by less than six months can be treated as "petty offenses" as to which there is no constitutional right to jury trial. *See* Blanton v. City of N. Las Vegas, 489 U.S. 538, 543-44 (1989) (holding that "petty crimes" are not subject to the Sixth Amendment jury trial provision). Indigents have an automatic right to appointed counsel in any felony prosecution, regardless of the penalty the defendant may receive. *See* Nichols v. United States, 511 U.S. 738, 743 n.9 (1994) (noting that the Constitution requires indigent defendants to be offered appointed counsel in felony cases). Indeed, even for misdemeanors, the possibility of being sentenced to even a day in jail makes a criminal case important enough to entitle indigent defendants to appointed counsel. *See, e.g.*, Alabama v. Shelton, 535 U.S. 654, 662 (2002) (arguing that an uncounseled conviction, once a prison sentence is triggered, is violative of the Sixth Amendment); Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (holding that if a misdemeanor ends with a deprivation of liberty, the accused should have "the guiding hand of counsel").

57. *Morissette*, 342 U.S. at 255. Consistent with this reasoning, the *Staples* Court adopted an interpretive presumption against treating felonies as public-welfare offenses. *See* Staples v. United States, 511 U.S. 600, 618-19 (1994).

58. *See generally* Michaels, *supra* note 47, at 831 (noting that "[s]trict liability has endured decades of unremitting academic condemnation").

offenses are more like civil infractions than crimes in terms of their impact on the defendant.[59]

By the same logic, severe penalties and high stigma should be available only where the defendant is seriously at fault. Otherwise, there will be a culpability gap in which blameworthy conduct may result in disproportionately severe penalties. Mens rea doctrine should strive to close these culpability gaps by ensuring that persons subject to conviction for federal crimes will be sufficiently blameworthy to warrant the penalties to which they would be exposed upon conviction.[60] That is precisely what the Court has been doing in recent mens rea cases under the guise of exempting blameless conduct from punishment.

To summarize, in cases like *Liparota*, *Staples*, and *Ratzlaf*, the Supreme Court is saying one thing, but doing something quite different. On the one hand, the Court says that whether or not heightened mens rea requirements should be adopted for federal crimes depends on whether, absent such requirements, the crimes could potentially reach morally blameless conduct. This reflects the view that innocence-protection, the stated goal of federal mens rea doctrine, is concerned solely with avoiding punishment for conduct that is entirely blameless.

On the other hand, when the Court perceives a risk that a statute would reach blameless conduct, it does not simply ratchet up mens rea requirements to a level sufficient to ensure some minimal level of culpability. That is precisely what the Court should do if, as it says, its sole concern is exempting blameless conduct from punishment. What the Court does instead is raise the required mens rea to a level that is sufficient to ensure that the acts that give rise to criminal liability will be *sufficiently culpable* to deserve the available penalties. Thus, although the Court never says so explicitly, its most recent mens rea cases reflect an effort to guarantee not only culpability, but also proportionality of punishment, for individuals subject to federal criminal prosecution.

## III. MENS REA AND PROPORTIONALITY

The Court's instincts in this regard are correct: mens rea doctrine should aim at closing culpability gaps in federal criminal law. To the extent a statute would expose a defendant to punishment that he does not deserve—either because the act

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59. *Cf.* United States v. Dotterweich, 320 U.S. 277, 280-81 (1943) (noting that public-welfare offenses differ from traditional crimes in that their "penalties serve as [an] effective means of regulation").

60. This is not to suggest that there is no conceptual upper limit on the level of mental culpability that courts can require as a precondition to punishment. Innocence-protection, as we have seen, is fundamentally about two things: avoiding punishment for blameworthy acts and limiting punishment for blameworthy acts in proportion to their moral culpability. So understood, there is no warrant for courts to require culpability greater than necessary to ensure blameworthiness and proportionality of punishment. *See, e.g.*, Bryan v. United States, 524 U.S. 184 (1998) (adopting a less stringent interpretation of "willful violation" because the more stringent interpretation favored by the defendant would have hampered law enforcement without any innocence-protection payoff). Thus, once culpability and proportionality have been guaranteed, the proper demands of innocence-protection are at an end.

is entirely blameless or because it is insufficiently blameworthy to warrant the penalties authorized for it—the defendant is, in that sense, "innocent" and should not be convicted. Therefore, if protecting "innocence" truly is to be the aim of mens rea doctrine, the doctrine should treat disproportionate punishment as a proper concern in its own right, quite apart from punishment for blameless conduct.

### *A. The Limits of "Back-Door" Proportionality*

One might wonder why it matters whether proportionality comes into the mens rea analysis through the back door or the front door. Either way, one might argue, the key point is that proportionality concerns are taken into account despite the Court's insistence that mens rea serves only to exempt blameless conduct from punishment. In actuality, however, it matters a great deal whether proportionality comes in through the front door (as it should) or the back door (as it currently does).

Under the current approach, proportionality concerns are beyond the purview of mens rea doctrine. This is because the premise of the doctrine is innocence-protection in the narrow sense of preventing punishment for blameless conduct. If no blameless conduct would fall within the statute, courts never reach the second, critically important mens rea selection stage.

This is significant because it is only at the second stage that proportionality considerations come in through the back door. If courts get to the mens rea selection stage, then (and only then) can heightened mens rea requirements be imposed, and, as in *Liparota, Ratzlaf, Staples*, and *X-Citement Video*, courts will require proof of mens rea sufficient to guarantee both culpability and, coincidentally, proportionality. If, however, there are no potential applications of a statute to morally blameless conduct, heightened mens rea requirements are categorically ruled out under the current approach. As a result, the opportunity to use mens rea to achieve proportionality of punishment is lost.

*Evans v. United States*[61] is a case in point. The case involved a county commissioner who accepted payments from an undercover federal agent knowing that they were given for an official act.[62] Because the federal bribery statute[63] and other anti-bribery statutes did not apply, the government charged the commissioner with extortion under color of official right under the Hobbs Act.[64] Although inapplicable, the federal bribery statute was instructive because it uses mens rea to determine when the receipt of illegal compensation by public officials is merely a "gratuity" or a "bribe."[65] The distinction has enormous penal consequences: a gratuity offense is subject to a two-year maximum punishment, as compared to the

61. 504 U.S. 255 (1992).
62. *Id.* at 257.
63. *See* 18 U.S.C. § 201 (2006).
64. *Evans*, 504 U.S. at 257; *see* 18 U.S.C. § 1951 (2006).
65. The Supreme Court has explained:

fifteen-year maximum for bribery.[66]

In *Evans*, however, the Court obliterated the careful distinction between bribery and gratuities. The Court did so by adopting an astonishingly low mens-rea requirement for extortion under color of right. In order to convict for extortion under color of official right—a crime punishable by up to twenty years in prison—the government "need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."[67] With this holding, the Court exposed gratuity offenses *qua* extortion under color of right to punishment well in excess of the two-year maximum prescribed for such offenses under the bribery statute.

This perverse result reflects the limits of back-door proportionality in mens rea selection. The minimal mens rea standard adopted in *Evans* guarantees blameworthiness because public officials will face conviction only if they abused the public trust to some degree by deriving private gain from public office.[68] Under these circumstances, the judicial hands are tied, and courts cannot impose more stringent mens rea requirements necessary to guarantee proportionality for blameworthy acts. That limitation leads directly to *Evans*: the critically important distinction between gratuities and bribes is erased under the Hobbs Act, with the gratuities that Congress deemed to be minor crimes being exposed to serious penalties the bribery statute deems disproportionately severe for mere gratuities as distinct from outright bribes.

In short, current doctrine is structured in such a way that courts can use mens rea to solve proportionality problems only if there happens to be an independent problem of punishing blameless behavior. Even then, proportionality problems are addressed under the pretense of solving blamelessness problems, without treating proportionality as a proper consideration in its own right. A myopic focus on "innocence," narrowly defined, will thus lead courts to miss the danger that crimes that reach only blameworthy conduct will nonetheless expose persons who engage in that conduct to disproportionate punishment.

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> The distinguishing feature of each crime is its intent element. Bribery requires "intent to influence" or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may have already determined to take),or for a past act that he has already taken.

United States v. Sun-Diamond Growers, 526 U.S. 398, 404-05 (1999) (quoting 18 U.S.C. § 201).

66. *Compare* 18 U.S.C. § 201(b) (bribery) *with* 18 U.S.C. § 201(c) (gratuity).

67. *Evans*, 504 U.S. at 268.

68. Perhaps only barely so. As *Sun-Diamond Growers* noted, the mens rea requirement for gratuities offenses does not prevent prosecution for acceptance of tokens of appreciation that are so trivial as to carry no possibility of corruption. *See* 526 U.S. at 411-12.

### *B. Proportionality Alternatives*

The stakes for mens rea doctrine are high because, as a practical matter, there are few other safeguards against disproportionate severity in federal punishments. As presently interpreted, the Constitution offers very little protection in this regard. Although the Eighth Amendment forbids "grossly disproportionate" penalties,[69] the constitutional proportionality principle for noncapital sanctions has largely proved to be an empty promise. The governing test for proportionality challenges to sanctions other than death is so stringent that terms of imprisonment other than life without parole are virtually immune from invalidation on Eighth Amendment grounds.[70]

Moreover, sentencing discretion, once a tried-and-true path for federal judges to show leniency, is quite narrow. Of course, the Federal Sentencing Guidelines, which have long been criticized for undue rigidity and severity,[71] are no longer legally binding after *United States v. Booker*.[72] Nevertheless, statutory mandatory minimums—which account for "many of the[] 'horror stories' [in federal sentencing]"[73]—remain in place and are commonly invoked by prosecutors to force district judges to impose severe sentences.[74]

Even when there is no applicable statutory mandatory minimum, the "advisory" guidelines powerfully constrain sentencing discretion. That is because the "advisory" guidelines system created by *Booker* exerts significant pressure on district judges not to impose sentences below the range recommended by the guidelines.[75]

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69. Ewing v. California, 538 U.S. 11, 23 (2003).

70. *See generally* Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 892-93 (2005).

71. *See generally, e.g.*, KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991).

72. 543 U.S. 220 (2005). *Booker* invalidated the binding federal sentencing guidelines as violative of the Sixth Amendment right to jury trial. The guidelines were invalid because they allowed judicial factfinding to increase sentences above the guidelines range authorized by jury verdicts of guilty. The Court cured the Sixth Amendment infirmity by declaring the guidelines "effectively advisory" only. *Id.* at 245. This meant that, as before the advent of the guidelines, guilty verdicts expose defendants to any punishment up to the statutory maximum and district judges are entitled to engage in the factfinding necessary to select appropriate sentences.

73. Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1045 (2004).

74. There are more than one hundred statutes in the federal code that impose mandatory minimum sentences, and those statutes applied in "nearly 60,000 cases" decided between 1984 and 1991. *See* UNITED STATES SENTENCING COMM'N, REPORT ON MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 11-12 (1991).

75. Professor Kate Stith explains:

> There are still powerful forces arrayed against the exercise of sentencing discretion by district judges responsive to local concerns, the particular facts of the case at hand, and the advocacy of the parties. As a formal matter, courts of appeals may still second-guess judges whose sentences are found to be an "unreasonable" application of the broad statutory sentencing criteria that are the lodestar of sentencing law after *Booker* . . . . Most importantly, the Guidelines remain the starting point for all sentences, with an anchoring effect made all the more powerful by [the Supreme Court's] go-ahead to the courts of appeals to treat Guidelines sentences as presumptively

Not surprisingly, even after the guidelines were declared to be "advisory," a mere 12.1% of defendants succeeded in getting below-guidelines sentences over the prosecution's objection.[76] In a sentencing regime in which judges are so reluctant to grant unilateral exercises of leniency, the interpretation of federal crimes is, as a practical matter, the only sure avenue left open to the courts to promote proportionality of punishment.

Under these circumstances, mens rea selection can make a meaningful contribution to the achievement of sentencing proportionality. Narrowly construing the actus reus of federal crimes could be an effective way of reducing risks of disproportionate punishment in the federal system.[77] The problem is that courts repeatedly—and almost reflexively—succumb to the temptation to expand the reach of federal crimes when culpable conduct is at stake, even when doing so significantly drives up the maximum punishment for a criminal act.[78] As long as courts continue to do so, mens rea requirements will be the best hope for redressing the potential for disproportionate criminal penalties in the federal system.

### *C. The Need for "Front-Door" Proportionality*

It is time to bring proportionality considerations in through the front door by explicitly incorporating them into federal mens rea analysis. There are both theoretical and pragmatic reasons for doing so. These reasons are developed, in turn, below.

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reasonable. The Guidelines are now the frame, in both law and practice, in which sentences are viewed.

Kate Stith, *The Arc of the Penduluum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1496 (2008) (footnotes omitted).

76. U.S. SENTENCING COMM'N, PRELIMINARY QUARTERLY DATA REPORT, 3RD QUARTER RELEASE tbl. 1(2007), *available at* http://www.ussc.gov/sc_cases/Quarter_Report_3rd_07.pdf. Overall, almost two-thirds (61.2%) of defendants sentenced after *Booker* received sentences within the guidelines range, and most of the sentences below the guidelines range were sought by the prosecution as a reward for assistance by the defendant in pursuing other offenders. *Id.*

77. A familiar historical example involves the Mann Act, otherwise known as the "White Slave Traffic Act," Pub. L. No. 61-277, § 2, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421 (2006)). The Act made it a crime to transport a female in interstate commerce for purposes of "prostitution or debauchery, or for any other immoral purpose." *Id.* The catch-all phrase ("any other immoral purpose") could be read narrowly (as, say, limited to commercialized vice) or broadly (as reaching sex outside of marriage and any other sex deemed immoral). This interpretive choice, which was presented in *Caminetti v. United States*, 242 U.S. 470 (1917), had dramatic implications for the punishment available for extramarital sex in federal court. The Mann Act's five-year maximum was harsher than the punishments available in most states at the time for adultery and fornication and, oddly enough, under the congressional statutes that specifically prohibited adultery and fornication on federal lands. *See generally* Smith, *supra* note 70, at 897-903 (discussing the proportionality implications of *Caminetti*). A narrow interpretation of the catch-all phrase that excluded extramarital sex from the Mann Act would thus have prevented disproportionate punishment for that conduct.

78. *See generally* Smith, *supra* note 70, at 893-930. *Caminetti* is a prime example. The Court construed a statute aimed at "white slavery" broadly as encompassing the transportation of willing females across state lines for extramarital sex. 242 U.S. at 484-86. The Court's desire to allow prosecutors to reach culpable conduct evidently blinded it to the fact that its interpretation significantly increased the penalty for adultery and fornication.

*1. Theoretical Considerations*

As a matter of theory, disproportionately severe punishment offends notions of justice and sound criminal justice policy just as punishment of morally blameless conduct does. In both contexts, punishment is being imposed that the offender does not deserve.[79] Even if punishment for a blameless act is viewed as a greater injustice than excessive punishment for a blameworthy act, the distinction is one of degree, not of kind; both circumstances involve the same type of injustice—namely, punishment that is not morally deserved. For that reason, Anglo-American legislatures and courts have historically used mens rea to ensure that, in the event of conviction, the available punishment will "fit" the crime.[80] This is exactly how it should be in a legal system, such as ours, that aspires to limit criminal punishment in accordance with moral blameworthiness.

It is important to note that the linkage between punishment and blameworthiness is no mere artifact from a bygone retributivist age. Although utilitarians reject the retributivist notion that moral blameworthiness is the justification for punishment,[81] they agree that blameworthiness must be accounted for in a utilitarian criminal justice system. For example, although Herbert Packer, the noted criminal law scholar, dismissed the retributivist justification for punishment as having "Pollyanna-ish overtones,"[82] he endorsed moral blameworthiness as an "important limiting principle" for criminal punishment.[83] The fundamental insight here, recognized by Packer and most modern utilitarians, is that there is considerable "utility" in moral "desert"—that a criminal law which distributes punishment according to moral blameworthiness will more effectively achieve its crime-prevention goals than one which punishes without regard to community moral

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79. Indeed, it is possible to think of avoiding punishment for blameless acts as simply an application of the broader principle that punishment must be proportional to the blameworthiness of the offense committed. Where the defendant's conduct is blameless, the only proportional punishment is zero.

80. *See supra* Part II.A.

81. *Compare, e.g.*, MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 91 (1997) ("Retributivism is a very straightforward theory of punishment: We are justified in punishing because and only because offenders deserve it. Moral responsibility ('desert') in such a view is not only necessary for justified punishment, it is also sufficient.") *with* 1 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in THE WORKS OF JEREMY BENTHAM 83 (John Bowring ed., 1962) ("All punishment being in itself evil, upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."). H.L.A. Hart stated the utilitarian credo with characteristic pithiness: the law "punish[es] men not as wicked but as nuisances." H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 181 (1968).

82. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 66-67 (1968).

83. *Id.* Packer was far from alone in this regard. As no less an authority than Oliver Wendell Holmes, Jr. declared, "a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." HOLMES, *supra* note 33, at 50. Similarly, Hart agreed that the law should heed "principles of justice" calling for reduced punishment in particular situations. HART, *supra* note 81, at 24. Hart also contended that the "guiding principle," both for legislatures in defining crimes and judges in sentencing defendants, should be "proportion," meaning "very broad judgments both of the relative moral iniquity and harmfulness of different types of offence." *Id.* at 25.

sentiments.[84]

In a system that thus employs moral blameworthiness as a limit on punishment, the only plausible ground for excluding proportionality considerations from mens rea analysis would be that proportionality represents an unmanageable standard of judicial decisionmaking. The argument would be that it is too difficult for courts to make principled determinations of when punishment does, and does not, "fit" the crime.[85] Even in a system that would otherwise embrace proportionality as a limiting principle, the absence of judicially manageable standards could be a valid reason for excluding proportionality concerns from the mens rea analysis.

The short answer to this argument is that the law does *not* regard proportionality as an unmanageable standard. Even though proportionality unquestionably defies precise definition, it has long determined the proper amount of punishment to impose for a criminal act. Proportionality is a standard routinely applied by courts no less than legislatures. Even after legislators grade offenses and prescribe the range of punishments that a crime could warrant, it is left for judges to select, from the range of legislatively authorized punishments, the sentence that "fits" on the facts of particular cases. That, obviously, is a proportionality inquiry.[86] Moreover, courts use proportionality as the standard determining the constitutionality both of legislatively authorized penalties and, in the civil context, of punitive damages

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84. Professors Paul Robinson and John Darley nicely explain the utility of limiting punishment in accordance with moral blameworthiness. *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997). In their view, "every deviation from a desert distribution can incrementally undercut the criminal law's moral credibility, which in turn can undercut its ability to help in the creation and internalization of [social] norms and its power to gain compliance by its moral authority." *Id* at 478; *see generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 178 (1990) (reporting results of study finding that people "obey[] the law if it is legitimate and moral"). Robinson and Darley conclude that, to have moral credibility in the eyes of the public, the criminal law "ought to adopt rules that distribute liability and punishment according to desert, even if a non-desert distribution appears in the short run to offer the possibility of reducing crime." Robinson & Darley, *supra*, at 477-78.

85. Justice Antonin Scalia leveled this sort of objection against constitutional proportionality analysis in *Harmelin v. Michigan*:

> The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that it is not. For that real-world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.

501 U.S. 957, 986 (1991) (plurality opinion).

86. As a leading account of sentencing reform notes, apart from the era of binding sentencing guidelines, "[i]n exercising the wide sentencing discretion assigned by Congress, a federal judge's task has been to allocate punishment fairly for each crime and each criminal who comes before the court"—a determination made according to the "idea of proportionality in sentencing." STITH & CABRANES, *supra* note 73, at 14. Even during the nation's now-ended experiment with binding federal sentencing guidelines, proportionate sentencing was still the goal; what changed was the means by which the goal was to be achieved. The binding guidelines replaced wide judicial discretion with precise guidelines telling judges precisely what factors are relevant to sentencing and the precise weight to give to those factors. *See generally id.* at 78-103 (contrasting pre- and post-guidelines sentencing).

awards.[87] Given that proportionality is regarded as a judicially manageable standard (and, indeed, manageable enough to serve as a *constitutional* limit on legislative power), the use of proportionality merely as a factor influencing the interpretation of mens rea requirements in federal criminal statutes—which Congress is free to revisit if it so chooses[88]—seems entirely unproblematic.

A potential counterargument concerns the proper judicial role. In its most defensible form, the argument would be that, with the exception of constitutionally mandated judicial proportionality review, it is the sole province of legislatures to determine whether or not a sanction is proportional to a criminal act. The argument proceeds from a sound premise—the centrality of proportionality to the criminal law—but reaches an incorrect conclusion about the judicial role.

Properly understood, the judicial role is broad enough to encompass adjusting mens rea requirements in order to promote proportionality of punishment. The definition of the mens rea requirements for federal crimes is an exercise of statutory construction, a core function of the judicial branch.[89] Building on the emphasis in *Morissette v. United States*[90] on using mens rea to limit punishment according to moral blameworthiness, modern mens rea cases, beginning with *Liparota v. United States*,[91] have essentially required judges to apply an "unwritten moral code" in determining whether or not conduct that falls within the literal scope of a criminal statute is blameworthy.[92] If it is proper for courts to adjust mens rea requirements based on judicial judgments about of whether or not an act

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87. *See* Smith, *supra* note 70, at 891. In making proportionality determinations for these constitutional purposes, courts are properly guided by objective indicia of how the authorized punishment compares with the crime of conviction. Two of the most pertinent indicia in this regard are the penalties authorized for other crimes in the same jurisdiction and for the same crime in other jurisdictions. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 292 (1984) (describing criteria that should guide a court's proportionality analysis).

88. Congress quickly exercised its prerogative in this regard in the wake of *Ratzlaf v. United States*, 510 U.S. 135 (1994). At the urging of the Justice Department, Congress enacted a new crime punishing "structuring" cash transactions worth $10,000 or more into smaller transactions in order to avoid federal currency transaction reporting requirements. The new law omitted the original crime's "willfulness" requirement, which *Ratzlaf* had interpreted as making ignorance of the law a defense. *See* Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160 (codified at 31 U.S.C. § 5324(d) (2006)). As the rapid demise of *Ratzlaf* shows, Congress is willing and able to override heightened mens rea requirements when it thinks the courts have undermined an important law-enforcement tool.

89. *See generally* Staples v. United States, 511 U.S. 600, 605 (1994) (stating that "we have long recognized that determining the mental state required for commission of a federal crime requires 'construction of the statute'" (quoting United States v. Balint, 258 U.S. 250, 253 (1922))).

90. 342 U.S. 246 (1956).

91. 471 U.S. 419 (1985).

92. Wiley, *supra* note 3, at 1046. Although they have disagreed over the application of mens rea doctrine in particular cases, the Justices agree that heightened mens rea requirements can and should be used to avoid the possibility of conviction for morally blameless conduct. This approach to mens rea selection has commanded support from such polar opposites as Justices Stevens and Ginsburg and Chief Justice Rehnquist and Justice Thomas, all of whom have authored major opinions adjusting mens rea requirements in light of culpability concerns. *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 706 (2005) (Rehnquist, C.J.); Bryan v. United States, 524 U.S. 184 (1998) (Stevens, J.); *Ratzlaf*, 510 U.S. at 144 (Ginsburg, J.); *Staples*, 511 U.S. at 605 (Thomas, J.).

is morally blameworthy (and scholars and Justices agree that it is),[93] courts can also take into account proportionality concerns in deciding mens rea questions. After all, it is artificial (if not illogical) to sever culpability and proportionality concerns from one another; they are interrelated aspects of the *same* normative imperative that punishment should be distributed in accordance with moral desert.

Pragmatically speaking, it should not be too difficult for courts to determine whether a sanction is disproportionate and thus improper absent heightened mens rea requirements. As with constitutional proportionality challenges to criminal sanctions, judges can consult other federal and state criminal statutes as objective, democratically legitimate benchmarks against which to determine whether a criminal sanction is proportional or not; thus proportionality analysis need not be entirely subjective and ad hoc. Indeed, proportionality may well be *more*—not less—manageable than culpability as a standard to guide the interpretation of mens rea requirements. At least there are objective benchmarks to guide the proportionality inquiry; under the culpability approach to mens rea selection, however, such benchmarks are lacking, and courts decide for themselves, without any legislative guidance, whether acts that fall within the literal reach of a federal criminal statute are morally blameworthy or not.[94] Be that as it may, unless one is prepared to jettison the culpability approach to mens and require courts to treat legislative silence as to mens rea as signaling strict liability—which, to say the least, would produce draconian results—there is no good reason to allow courts to consider culpability, but not proportionality, as a factor influencing mens rea selection.

### 2. *Pragmatic Considerations*

The case for explicitly factoring proportionality considerations into mens rea selection is not theoretical only. As a practical matter, federal mens rea doctrine will be more consequential, and federal criminal law as a whole will operate better, if the mens rea requirement is allowed to serve its traditional, salutary role of ensuring that serious criminal penalties will only be available in federal court for seriously culpable conduct.

The Supreme Court's current methodology will have little impact as long as it remains focused solely on preventing punishment for morally blameless conduct. That is because of prosecutorial discretion. Even if a crime has definitely been committed, prosecutors are under no obligation to file criminal charges.

Although exercises of prosecutorial discretion depend on a broad array of

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93. *See* sources cited *supra* note 3. For an extensive argument that the culpability-based approach to mens rea accords with the proper judicial role, see Wiley, *supra* note 3, at 1068-78.

94. As one supporter has explained, the culpability approach to mens rea selection necessarily rests on courts' "internal moral intuitions": "The question of whether conduct is 'apparently innocent' usually cannot be answered by direct reference to congressional sources because the meaning of the legislative authority—the statute and its history—is the very issue for decision." Wiley, *supra* note 3, at 1071.

factors whose weight varies from case to case,[95] one constant is that prosecutors acting in good faith have strong incentives not to prosecute blameless individuals. Apart from cases of actual innocence, there would be no more sympathetic a defendant than an individual who is prosecuted for acts that any well-intentioned, law-abiding citizen would have performed in similar circumstances. As any prosecutor knows, charging sympathetic defendants with serious crimes carries unacceptable risks that the jury will be unable to reach a verdict or, in extreme cases, will nullify the charges outright.[96] Consequently, barring some sort of impermissible motivation (which, of course, is subject to constitutional regulation in its own right),[97] prosecutors have no incentive to charge defendants who truly are blameless.[98]

Thinking about the current approach to mens rea in light of prosecutorial discretion reveals what is really at stake in cases like *Liparota*, *Staples*, and *Ratzlaf*. In imposing heightened mens rea requirements, the Supreme Court repeatedly speaks of the need to counteract the possibility that morally blameless, or "innocent," conduct might lead to a criminal conviction, as if to suggest that the Department of Justice would knowingly prosecute morally blameless people.[99] These statements, however, cannot be taken literally given how prosecutors behave.

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95. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607-08 (1985) (listing factors that prosecutors consider when determining whether to prosecute).

96. *See, e.g.*, Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249, 1276 (2003) (reporting results of study finding that "juror concerns about legal fairness and outcome fairness are present to a measurable extent in hung and acquittal juries").

97. The main constitutional limits on bad-faith charging decisions are the Equal Protection and Due Process Clauses. Equal protection forbids "selective prosecution," which occurs when prosecutors charge suspects based on race or other suspect classifications. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996) (clarifying the elements required to establish selective prosecution based on race). Due process prohibits prosecutors from making arbitrary or vindictive charging decisions, the latter being charging decisions intended to punish suspects for exercising constitutional or statutory rights. *See, e.g.*, Wayte, 470 U.S. at 608 (rejecting vindictiveness claim by vocal pacifist who refused to register for the Selective Service).

98. The recent mens rea cases illustrate the point. Although the Supreme Court feared that innocent defendants could be convicted absent heightened mens rea requirements, those fears were not based on real-world prosecutions. Rather, the Court resorted to imaginative hypotheticals to demonstrate that blameless defendants could be convicted. *See generally* Wiley, *supra* note 3, at 1044-46 (explaining that the examples of "innocence" cited in the mens rea cases were "all about outermost applications and not about usual or actual cases"). The exclusive reliance on hypothetical cases of innocence suggests that, in each of the real-world prosecutions that faced the Court, the prosecution had successfully identified morally blameworthy suspects.

99. In one commentator's view, the mens rea cases suggest that the Supreme Court views prosecutors "as threats to, rather than bulwarks of, justice." Wiley, *supra* note 3, at 1043. This view, however, is mistaken. Even though the Supreme Court has insisted that federal crimes be defined when possible in terms that prevent conviction for morally blameless conduct, current mens rea doctrine in no way questions the professionalism and integrity of federal prosecutors. The point of the recent mens rea cases is not that prosecutors cannot be trusted to be fair (or, worse still, that prosecutors can be trusted to be *un*fair). It is, rather, that judicially enforceable safeguards against conviction for morally blameless conduct have an important role to play, along with prosecutorial discretion, in ensuring the just disposition of criminal cases.

In exercising their charging discretion, prosecutors are looking, first and foremost, for blameworthiness. They are trying to identify offenders who deserve to be publicly branded as criminals and punished. Prosecutors gain nothing and risk much if they invest scarce resources in the prosecution of morally blameless individuals, the kind of defendants likely to evoke sympathy from jurors, judges, and the public at large. Thus, if the purpose of *Liparota* and its progeny is merely to prevent prosecutors from using federal criminal law, in effect, to persecute morally blameless people, it is unnecessary.

In fact, cases like *Liparota* serve a more fundamental purpose. The operative concern is not that prosecutors will make bad-faith charging decisions, but rather that prosecutors, acting entirely in good faith, may make mistakes in determining blameworthiness. The potential for error flows from the substantively unbounded and procedurally informal nature of prosecutorial charging decisions.

Charging decisions are substantively unbounded in the sense that they need not be (and often are not) made solely on the basis of the conduct that constitutes the charged offense. Other information about the suspect, including character information and suspicion of other criminal activity, often weighs heavily in the charging decision, whether or not such information would be admissible at trial.[100] Moreover, once the prosecutor's office identifies and assembles the information deemed relevant, the case is processed, and the charging decision reached, through a highly informal, and largely ex parte, adjudicative procedure that lacks the safeguards of accuracy and reliability that characterize criminal trials.[101] These features of the charging decision, in combination, create risks that the prosecutor's determination of blameworthiness may be erroneous. The prosecutor, for example, may overlook relevant evidence that explains or justifies conduct that seems, on its face, to be "guilty" (such as motive or state-of-mind evidence that can only come from the defendant), give undue weight to input from law-enforcement agents, or, as in the paradigmatic case of pretextual prosecution, act on the basis of suspicions of other criminal activity that cannot be proven.

In two ways, reading heightened mens rea requirements into crimes when

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100. As former U.S. Attorney Harry Litman has written:

> Many decisions to prosecute federally are based not on the facts of the charged offense but rather on other conduct or characteristics of the defendant. Call it the "Al Capone approach to federal prosecution" after its most celebrated instance, the 1932 prosecution on federal tax evasion charges of the colorful Chicago mobster who had long evaded prison for his notorious crimes.

Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1135 (2004). For an interesting argument that pretextual prosecutions are particularly prevalent at the federal level, see Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 599-618 (2005).

101. The classic exposition of these points is Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998). These missing procedural safeguards include adversarial presentation of evidence and cross-examination, evidentiary rules barring the use of unreliable or unfairly prejudicial evidence, and the requirement that all reasonable doubts be resolved in the suspect's favor. *Id.* at 2127-28.

necessary to exclude morally innocent behavior helps ensure that there will be an accurate and reliable determination of blameworthiness in every litigated case. First, it narrows the information prosecutors can use to prove blameworthiness. Second, it brings the accuracy-enhancing safeguards of the judicial process to bear on the determination of blameworthiness.

In a regime of incomplete crime definition such as ours—where crimes, as legislatively defined, are not necessarily "inevitably nefarious"[102] and thus could be committed by law-abiding persons—trials will not necessarily establish that the defendant deserves blame. To the extent mens rea doctrine succeeds in its objective of incorporating all elements essential to the blameworthiness of a crime into the definition of the offense, proof of legal guilt will entail proof, beyond any reasonable doubt, of moral blameworthiness. Unlike the prosecutor's charging decision, the determination of moral blameworthiness at trial will be made by a neutral decisionmaker (the factfinder) after full-blown judicial process, with opportunity for proof and counterproof from the defendant. Furthermore, the factfinder's determination will be reached on the sole basis of evidence deemed reliable enough to be admissible in court, and the evidence will normally bear solely on the charged crime (as opposed to unproven allegations of other criminal activity),[103] with any and all reasonable doubts resolved in the defendant's favor. In these ways, mens rea doctrine serves to counteract the danger that the informal and unbounded nature of prosecutorial deliberations will lead prosecutors acting in good faith to charge morally blameless individuals.

Accordingly, there is value in the current approach to mens rea even if, as is surely the case, few prosecutors would knowingly prosecute morally blameless people. The *impact* of the current approach, however, will be open to question as long as mens rea doctrine remains limited to ensuring blameworthiness of the part of federal convicts. Because prosecutors acting in good faith will not be oblivious to moral innocence, current doctrine will either serve as a minimal check against bad-faith charging decisions by rogue prosecutors or as a more robust safeguard against good-faith but mistaken prosecutorial determinations of blameworthiness. The impact of current doctrine thus depends on how frequently prosecutors ignore, or simply miss, moral innocence.

Nevertheless, the impact of mens rea doctrine will be undeniable and real if pressed into service for proportionality of punishment. Of the wide array of critiques that have been leveled against federal criminal law in recent decades, one of the most consistent is that it frequently produces disproportionately severe sentences. Especially in the frequently prosecuted area of drug and firearms offenses (which account for roughly half of all federal prosecutions), federal mandatory

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102. Ratzlaf v. United States, 510 U.S. 135, 144 (1994).

103. With "enterprise" crimes, such as RICO, proof of other crimes by the defendant and his associates is essential in order to establish liability. *See* 18 U.S.C. § 1962 (2006) (making the commission of a "pattern of racketeering activity" a necessary element of a RICO charge).

minimum sentences sometime equal or exceed the *maximum* punishment that would be available in some states for parallel offenses.[104] The phenomenon of higher federal sentences is not limited to drug-related offenses, however. The now-"advisory" federal sentencing guidelines, which apply to all federal crimes, routinely generate sentences that are severe "as compared to state sentences for similar conduct, pre-guidelines federal sentences, and sentences in most other countries for similar crimes."[105]

Once it is understood that a major problem for federal criminal law is disproportionate penal severity, the case for incorporating proportionality considerations into federal mens rea analysis becomes even more compelling. Whereas federal prosecutors specifically look for blameworthiness in deciding whether or not to file charges, they are *required* by Department of Justice policy to ignore proportionality considerations in cases in which charges are filed. For decades, under Democratic and Republican administrations alike, it has been departmental policy that, in the event of federal prosecution, prosecutors will charge and seek conviction on the offense that will generate the highest sentence.[106] To the extent they follow this unyielding mandate from Washington (which seems likely),[107] line prosecutors will not charge only lesser offenses or charge all applicable offenses and then dismiss or bargain away offenses that are disproportionally severe. Instead, prosecutors will continue to act as sentence-maximizers at the charging stage.

The sentence-maximizing posture mandated by Washington at the pretrial stage

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104. *See generally* Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 674 (1997) (describing aspects of federal sentencing that make federal prosecution less favorable to defendants than state prosecution). According to another commentator, federal drug offenses often result in sentences that are "ten or even twenty times higher" than the sentences that would be imposed in state court for the same conduct. Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 998-99 (1995). Even advocates of tough criminal sentences have criticized mandatory minimum sentences. *See, e.g.*, Cassell, *supra* note 73.

105. Stith, *supra* note 75, at 1449.

106. *See* Memorandum from Att'y Gen. John Ashcroft to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing 2 (Sept. 22, 2003) [hereinafter Aschcroft Memorandum], *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm. This Memorandum declares it to be "the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case." *Id.* The "most serious offense or offenses," the Memorandum continues, "are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence." *Id.* The mandate that federal prosecutors actively pursue the highest available sentence is not just the policy of the George W. Bush administration; it was a "central requirement" of the two preceding administrations as well. *See* Stith, *supra* note 75, at 1469 (citing earlier departmental memoranda).

107. Efforts have long been underway in the Justice Department to centralize control over enforcement decisions made by prosecutors in the field, with the Bush administration's firing of several U.S. Attorneys being but the latest (and most controversial) example. *See generally* Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn't*, 117 YALE L.J. 1374, 1378-85 (2008) (discussing efforts of recent administrations to exert greater control over field-level enforcement decisions). To be fair, Professor Richman doubts the long-term efficacy, as well as the wisdom, of such efforts to reverse the decentralization of federal enforcement decisionmaking. *See id.* at 1403-11.

might be acceptable if federal prosecutors retained latitude to grant or allow leniency at the sentencing stage. Unfortunately, longstanding Justice Department policy also requires prosecutors to seek the maximum supportable penalty under the guidelines. For example, prosecutors "must disclose" to the judge's attention at sentencing all factors that would result in increased punishment under the federal sentencing guidelines and cannot do anything that would "result[] in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing."[108]

Even though the guidelines are no longer legally binding after *Booker*, federal prosecutors are required to act, in effect, as if they still are law. Prosecutors have been instructed to continue the pre-*Booker* practice of opposing, both in the district courts and on appeal, unilateral efforts by judges to impose sentences below the applicable guidelines range.[109] As Professor Kate Stith has explained, current Justice Department policies "put[] the prosecutor in the position not of upholding the law, but of opposing in all circumstances the exercise of *lawful* discretionary decisions of the sentencing judge[,]" and to do so "even when Guidelines sentences would clearly disserve the statutory purposes invoked by *Booker*."[110] Thus, federal prosecutors are categorically barred from taking proportionality into account in pending cases and must, from start to finish, pursue the highest supportable sentence under the guidelines given the law and facts of particular cases.

These Department of Justice policies requiring prosecutors always to seek the maximum supportable penalty under the guidelines, regardless of the equities of particular cases, suggest that mens rea doctrine has matters precisely backwards. The current method of judicial mens rea selection is designed to solve a culpability problem (punishment without blameworthiness) that rarely, if ever, materializes and will usually be addressed by sound exercises of prosecutorial discretion. It ignores, however, a related culpability problem (punishment in excess of blameworthiness) that not only is endemic to federal criminal practice, but is also routinely exploited by federal prosecutors to generate sentences that are, by any realistic

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108. Ashcroft Memorandum, *supra* note 106, at 3.

109. Under the "Comey Memorandum," prosecutors "must actively seek sentences within the range established by the Sentencing Commission in all but extraordinary cases . . . involving circumstances that were not contemplated by the Sentencing Commission." Memorandum from Deputy Att'y Gen. James B. Comey to All Federal Prosecutors 2 (Jan. 28, 2005) [hereinafter Comey Memorandum], *available at* http://www.usdoj.gov/usao/iln/osc/documents/ag_memo_august_12_2005.pdf. The Memorandum further instructs that

> in any case in which the sentence imposed is below what the United States believes is the appropriate Sentencing Guidelines range (except uncontested departures pursuant to the Guidelines, with supervisory approval), federal prosecutors must oppose the sentence and ensure the record is sufficiently developed to place the United States in the best position possible on appeal.

*Id.*

110. Stith, *supra* note 75, at 1484 (emphasis added). The statutory purposes referred to in the text can be summarized as retribution, deterrence, incapacitation, and rehabilitation. *See* 18 U.S.C. § 3553(a)(2) (2006).

measure, severe. The only way to bring rationality to this area, and to help restore a greater sense of moral legitimacy to federal criminal law, is to recognize excessive punishment as a proper concern of federal mens rea doctrine.

## CONCLUSION

After two decades of mens rea jurisprudence designed to achieve innocence-protection, the Supreme Court, ironically enough, still does not fully appreciate what "innocence" is. What the Court fails to realize, and must realize if the goals of mens rea doctrine are to be fully achieved, is that "innocence" also incorporates considerations of proportionality. Commission of a blameworthy act is merely the first of two culpability-related inquiries; it is also necessary to ask whether the defendant's act was *sufficiently blameworthy* to warrant the penalties afforded by the statute in question. If the conduct was only minimally blameworthy, severe penalties would constitute disproportionate punishment. "Innocence" will never be fully protected until courts recognize that mens rea must, to the maximum extent possible, guarantee both culpability *and* proportionality for every potential federal defendant—until, in other words, disproportional mens rea finally becomes proportional mens rea.