2018

"Innocence" and the Guilty Mind

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For decades, the "guilty mind" requirement in federal criminal law has been understood as precluding punishment for "morally blameless" (or "innocent") conduct, thereby ensuring that only offenders with adequate notice of the wrongfulness of their conduct face conviction. The Supreme Court's recent decision in Elonis v. United States *portends a significant, and novel, shift in mens rea doctrine by treating the potential for disproportionately severe punishment as an independent justification for heightened mens rea requirements. This long-overdue doctrinal move makes perfect sense because punishment without culpability and excessive punishment involve the same objectionable feature: the imposition of morally undeserved punishment.*

This Article uses Elonis *as a vehicle for reexamining the effectiveness of current mens rea doctrine. Even after* Elonis, *mens rea doctrine remains hobbled by several methodological flaws which prevent it from making moral culpability a necessary precondition for punishment. These flaws, I argue, are traceable to the doctrine's simultaneous embrace of two irreconcilable views of the separation of powers in criminal law. The project of reading implied mens rea requirements into statutes and fleshing out incomplete legislative crime definitions necessarily assumes that courts have a lawmaking role on par with Congress. The mens rea selection methodology, however, reflects standard faithful-agent textualism. This turns out to be the doctrine's Achilles heel because the risk of morally undeserved punishment stems primarily from poor legislative crime definition.*

To be truly effective, mens rea doctrine must operate outside *the statutory definition of the offense. All mens rea options not clearly foreclosed by Congress—even knowledge of criminality—must be available wherever needed to prevent morally undeserved punishment. Until this occurs, mens rea doctrine will continue to default on its promise of preventing conviction for morally blameless conduct, not to mention the broader promise, suggested both by* Elonis *and criminal law tradition and theory, of precluding disproportionately severe punishment.*

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* Professor of Law, University of Notre Dame. For insightful comments on early drafts, I am grateful to Richard Bonnie, Kim Forde-Mazrui, John C. Jeffries, Jr., Peter Low, and Daniel Richman. My thinking on these issues also benefitted from conversations with faculty workshop participants at the College of William & Mary, Notre Dame, Pepperdine, and University of San Diego law schools. Any errors herein are mine alone.

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INTRODUCTION

Under what circumstances can the expression of an idea in terms others might deem threatening result in criminal punishment? The Supreme Court took up the question in *Elonis v. United States*.[1] The case involved a self-styled "rap" artist convicted under the federal threats statute[2] for certain passages posted on his Facebook page. These passages, said to be lyrics, arguably contained threats of bodily harm against his former wife and others. The defense challenged the conviction on the ground that threatening communications, no less than the

1. 135 S. Ct. 2001 (2015).

2. 18 U.S.C. § 875(c) (2012) (prohibiting the transmission of "any communication containing any threat . . . to injure the person of another . . . .").

burning of crosses by white supremacists in *Virginia v. Black*,[3] are protected speech unless made for the purpose of inspiring fear of bodily injury.

The First Amendment issue naturally took center stage in *Elonis*, but it was not the only, or even the principal, argument for reversal. Quite apart from constitutional concerns, the defendant argued that the threats statute requires proof that the accused acted with the specific intent to place listeners in fear. The government, however, contended that no intent is required for conviction. In the government's view, it is sufficient that the defendant acted negligently, using words that a reasonable person might view as menacing.

The Court resolved the case in the defendant's favor, but did so on narrow grounds. Declining to reach the First Amendment issue, the Court ruled that the threats statute demands proof of a mental state more culpable than negligence. This includes not just purpose to cause fear, but also knowledge that listeners would be fearful of bodily harm. The sufficiency of recklessness to convict, and the proper definition of "true threats" constitutionally immune from proscription,[4] would have to await another day.

Some commentators have dismissed *Elonis* as a missed opportunity to provide needed guidance on an important free speech issue.[5] Though understandable, this view is mistaken. The constitutional question is, without a doubt, important, but the decision's significance lies in the fact that the Court did *not* decide the case on constitutional grounds.

By resolving the case through statutory interpretation, the *Elonis* Court provided groundbreaking new guidance on federal doctrine concerning mens rea—the vital but admittedly murky requirement that criminal liability requires moral blameworthiness.[6] Until *Elonis*, the historic requirement of mens rea was described in unduly narrow terms

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3. 538 U.S. 343, 365 (2003) (ruling that the burning of crosses as a symbol of racial hatred is protected speech unless done with purpose to intimidate others).

4. The Court explained:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Id. at 359–60.

5. *See, e.g.*, Joseph Russomanno, *Facebook Threats: The Missed Opportunities of* Elonis v. United States, 21 COMM. L. & POL'Y 1, 3 (2016) (accusing the *Elonis* Court of "neglect of duty").

6. As a leading treatise explains: "For several centuries (at least since 1600) the different common law crimes have been so defined as to require, for guilt, that the defendant's acts or omissions be accompanied by one or more of the various types of fault (intention, knowledge, recklessness or—more rarely—negligence)." 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.5, at 381 (2d ed. 2003).

as merely precluding punishment for "morally blameless" (or "innocent") conduct.[7] If mens rea doctrine merely required the minimally sufficient mental state necessary to guarantee moral blameworthiness, however, then the government would have prevailed in *Elonis*. After all, as the concurrence noted, negligence *is* regarded as a blameworthy mental state under both common law and the Model Penal Code.[8] Nevertheless, eight Justices agreed that negligence is insufficiently culpable to warrant punishment under the threats statute.

This Article uses *Elonis* as a point of departure to assess the current state of federal mens rea doctrine. Prior commentators have addressed a number of the larger normative issues. These issues include whether mens rea should be required at all[9] and, if so, whether mens rea doctrine should prevent punishment for morally blameless conduct only,[10] or guarantee both culpability and proportionality of punishment.[11] Precious little attention, however, has been given to whether or not the prevailing federal approach to mens rea selection actually works. To put the question slightly differently, can we be confident that mens rea doctrine accomplishes its stated objective of preventing punishment for morally blameless conduct?

Until now, such workability questions have largely gone unaddressed, with scholars often simply assuming the effectiveness of contemporary mens rea doctrine.[12] These questions concerning the

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7. *See, e.g.*, Carter v. United States, 530 U.S. 255, 269 (2000) ("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.'"). As conventionally understood, "innocence" and "blamelessness" encompass conduct that is both consistent with community standards of morality and societal expectations about the kinds of activities that are likely to be illegal. Conduct is said to be "blameworthy," "culpable," or "guilty" if engaged in despite notice that it is considered morally or legally wrongful.

8. *See* Elonis v. United States, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part and dissenting in part) (recognizing that negligence lies within "the hierarchy of mental states that may be required as a condition for criminal liability . . . .").

9. *See, e.g.*, Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 WAKE FOREST L. REV. 769 (2012).

10. *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).

11. *See generally* Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127 (2009) (arguing that proportionality concerns should explicitly factor into federal mens rea selection).

12. *See, e.g.*, Wiley, *supra* note 10, at 1023 (asserting that federal mens rea doctrine "operates to ensure that only the culpable can be criminals"). One scholar has come to the opposite conclusion based on a survey of lower court decisions, which he views as proof that mens rea doctrine is wholly ineffective in preventing punishment without culpability. *See* Jeffrey A. Meyer, *Authentically Innocent: Juries and Federal Regulatory Crimes*, 59 HASTINGS L.J. 137 (2007) (arguing that juries should be allowed to determine for themselves whether, and under what circumstances, defendants are blameworthy and thus deserving of punishment). In this Article, I attempt to navigate a middle

effectiveness of mens rea doctrine have far-reaching significance. If the doctrine satisfactorily achieves its goal, then it makes sense that the Supreme Court has failed to heed repeated calls to treat moral blameworthiness as a constitutional prerequisite for punishment.[13] *Lambert v. California*,[14] a case involving an ex-convict punished for failing to register with the police upon taking up residence in Los Angeles, took a modest first step in that direction decades ago. The *Lambert* Court set aside the conviction on fair warning grounds, ruling that a failure to register cannot be punished as blameworthy without proof the accused actually knew of the legal duty to register. Although it seemed to invalidate punishment without moral culpability, today *Lambert* remains, as dissenting Justice Felix Frankfurter predicted, "an isolated deviation from the strong current of precedents—a derelict on the waters of the law."[15]

For a Supreme Court that has been so insistent as of late on using mens rea doctrine to exempt morally blameless conduct from punishment, the demise of *Lambert* is easily explained. To the extent mens rea doctrine successfully limits criminal liability to morally blameworthy conduct, there is no need in the federal system for a constitutional rule invalidating morally undeserved punishment. Of course, such a rule would still retain vitality for *state* criminal law, but such punishment may be much less prevalent in the state system. As Professor William Stuntz has explained, powerful resource and political constraints concentrate state enforcement efforts on violent and other serious mala in se crimes, as opposed to technical offenses involving less blameworthy offenders.[16] Under these circumstances, it is hardly surprising that *Lambert* remains an unfulfilled promise.

On the other hand, if mens rea doctrine fails to make moral blameworthiness a prerequisite for criminal punishment, then the doctrine must be viewed as a work-in-progress. At a minimum, the Court would have to consider whether existing doctrine can be improved to

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course between these positions by identifying and proposing solutions to the defects that undermine the effectiveness of current mens rea doctrine.

13. *See, e.g.*, John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 655–59 (2012); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 588–91 (2002); Singer & Husak, *supra* note 10, at 943; John Calvin Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 211–12 (1985).

14. 355 U.S. 225 (1957).

15. *Id.* at 232 (Frankfurter, J., dissenting). As Professor William Stuntz noted, "*Lambert*'s notice principle has never taken off. Few decisions rest on it, and the principle itself remains an unenforced norm, not a genuine constitutional rule." Stuntz, *supra* note 13, at 589. Even so, the decision continues to capture the imagination of legal scholars. *See, e.g.*, Peter W. Low & Benjamin Charles Wood, Lambert *Revisited*, 100 VA. L. REV. 1603, 1659–62 (2014) (endorsing *Lambert* as an application of the void-for-vagueness doctrine rather than a freestanding constitutional blameworthiness principle).

16. *See generally* Stuntz, *supra* note 13, at 542–46.

deliver the desired protection against punishment without culpability. The Court might also need to look beyond mens rea doctrine, perhaps to a *Lambert*-like rule of constitutional law or revitalized Eighth Amendment sentencing proportionality standards, for additional safeguards against morally undeserved punishment. In order to know whether or not additional safeguards are required, however, the effectiveness of current mens rea doctrine must be subjected to critical examination.

This Article proposes to do just that. Part I sets the stage by explaining the traditional conception of the role of mens rea (and of moral "innocence") in criminal law, as well as the contours of current mens rea doctrine. As presently framed, mens rea doctrine seeks to insulate morally blameless conduct from the reach of federal criminal statutes by ensuring that offenders will not face conviction unless they had adequate notice that their conduct was legally or morally wrongful. If they violate a criminal law despite such notice, their actions are morally blameworthy—"guilty"—and they are appropriate candidates for punishment. There is, of course, the further question of how *much* punishment may be imposed. Traditional federal mens rea doctrine, however, lays that question to one side, as if the commission of a blameworthy act justifies the imposition of unlimited punishment rather than the level of punishment that "fits" the crime.

Part II uses the *Elonis* decision as a window into federal mens rea selection. The decision blazed new trails in mens rea doctrine by treating the potential for disproportionately severe punishment as an independent basis for imposing heightened state-of-mind requirements. In so ruling, the Court essentially broadened the recognized purpose of federal mens rea doctrine. No longer does the doctrine merely aim to prevent punishment for morally blameless conduct; it also seeks to preclude punishment in excess of blameworthiness. This long-overdue doctrinal move makes perfect sense because punishment without culpability and excessive punishment both involve the *same* objectionable feature: the imposition of punishment which is not morally deserved.

Unfortunately, as potentially path-breaking as the *Elonis* decision was in this respect, it otherwise conformed to the Court's familiar, self-defeating approach to the interpretation of criminal statutes. Ironically, the Court itself created the very problem of morally undeserved punishment that it attempted to solve through heightened mens rea requirements. The potential for conviction based on mere carelessness in expression only existed because the Court brushed aside narrower interpretations in favor of the broad view that the term "threat" includes any statement, no matter how fanciful in context, which might portend

bodily harm. In this sense, *Elonis* exemplifies a fundamental contradiction in the Court's approach to federal criminal interpretation: the Court, with good reason, frets at the mens rea stage about exempting "innocent" conduct from punishment, yet it routinely interprets the actus reus of federal crimes in ways that expose more conduct—"guilty" and "innocent" alike—to prosecution.

As if that were not bad enough, the *Elonis* Court failed to go far enough in its treatment of the mens rea required under the threats statute to achieve full proportionality for punishment. As the Court correctly recognized, felony sanctions are disproportionately severe for people who carelessly use words that might inspire fear of bodily injury. This line of reasoning suggests that the threats statute should be reserved for people who *intended* (or at least *knew*) that their statements would cause others to be afraid. Nevertheless, the Court left open the possibility that reckless disregard of the potential for causing fear may result in conviction, in violation not just of proportionality concerns but also potentially the First Amendment itself.

Part III, the centerpiece of this Article, examines the effectiveness of the current approach to mens rea selection. Is it sufficient to accomplish the goal of precluding punishment for morally blameless acts? Unfortunately, the doctrine is not nearly as efficacious as courts and commentators suppose. The doctrine is a considerable improvement over the *ad hoc* approach it replaced, but it nonetheless fails to ensure that federal criminal liability will track moral blameworthiness.

Even aside from the glaring absence of proportionality considerations as a recognized factor in mens rea selection prior to *Elonis*, the Court's current method for determining mens rea issues is hobbled by several methodological flaws. Even at its most aggressive, federal mens rea doctrine operates *within* the legislative definition of the crime. No matter how essential it may be in particular contexts to exempt blameless conduct from punishment, courts cannot require proof that offenders knew their conduct was illegal absent statutory text making knowledge of the law relevant to the definition of the offense. Even more conventional mens rea requirements (such as purpose or knowledge) cannot be imposed where courts deem them impliedly precluded by the wording or structure of the statute of conviction or related statutes. The doctrine thus hinges the availability of implied mens rea requirements on the presence of textual cues from Congress rather than the overriding need to prevent morally undeserved punishment.

This feature of existing doctrine turns out to be its Achilles heel. That is so because the effectiveness of mens rea requirements in limiting conviction to morally blameworthy conduct depends on the fortuity of how particular crimes are worded and structured. Given that risks of

morally undeserved punishment stem primarily from poor legislative crime definition, mens rea doctrine can be effective only if it operates *outside* the statutory definition of the offense. That is to say, the controlling consideration in prescribing mens rea requirements should be whether heightened mens rea requirements are needed to prevent morally undeserved punishment. Whenever such punishment is possible, *all* mens rea options should be on the table, even knowledge of the law, unless clearly foreclosed by Congress. Unless and until the Supreme Court endorses this approach, mens rea selection will continue to default on its central promise of guaranteeing a path to acquittal for morally blameless conduct.

I trace the self-defeating limitations of existing mens rea doctrine to the Supreme Court's simultaneous embrace of two conflicting theories of the separation of powers in criminal cases. The entire project of reading judicially created standards of mental culpability into statutes silent, in whole or in part, as to mens rea necessarily assumes that the Court *shares* crime-definition power with Congress: Congress takes the lead in defining the prohibited act, relegating courts to the familiar posture of interpretation, but expects courts to take an active role in fleshing out incompletely specified mens rea requirements in order to keep federal criminal liability within appropriate bounds. This "cooperative" or "partnership" model would give the Court wide latitude to impose whatever standards of mental culpability it deems warranted in particular settings, provided only that they are not textually foreclosed.

The prevailing mens rea selection methodology, however, rests on a considerably narrower view of separation of powers: the familiar model of "faithful-agent textualism." Under this model, the Court must take its cues from Congress on the mens rea required to convict and thus cannot impose implied mens rea requirements absent reason to think Congress would have wanted those requirements. The Court can no longer vacillate between these inconsistent models of the separation of powers in its mens rea decisions but must choose among them—and the right choice, I argue, is the "cooperative" or "partnership" model.

Part IV proposes two sets of reforms that would make mens rea doctrine truly effective in accomplishing its stated purpose. *First*, the Supreme Court should broaden its understanding of "innocence" so that mens rea doctrine will no longer treat moral blameworthiness as an "on/off" switch. The doctrine should clearly embrace the widely accepted principle that punishment must be proportional to blameworthiness. Heightened mens rea requirements should thus be available to fend off the possibility of disproportionately severe punishment for blameworthy acts, no less than punishment for blameless acts. *Second*, the Court should expand the remedial options available to courts in responding to

the potential for morally undeserved punishment. In particular, judges should be very reluctant to infer that essential mens rea requirements are precluded based on the wording or structure of criminal statutes. Conversely, judges should not hesitate to require knowledge of the law or other heightened mens rea standards if failure to do so would permit punishment that is not morally deserved.

The reforms proposed in this Article would provide the more robust protection against morally undeserved punishment that current mens rea doctrine sorely lacks. Ultimately, of course, only robust constitutional rules can ensure that federal prosecutors will never be able to impose morally undeserved punishment. Nevertheless, there is much the Supreme Court can do, through a careful and considered approach to the interpretation of criminal statutes, to ensure that criminal liability and punishment will track moral blameworthiness.

I. "INNOCENCE" AND TRADITIONAL MENS REA DOCTRINE

This Part sets the stage for a critical reassessment of federal mens rea doctrine. The analysis begins with an exploration of the stated purpose of mens rea requirements and of the prevailing method of mens rea selection in federal cases. The next issue, deferred until Part II, is the impact of the recent decision in *Elonis v. United States*[17] on current doctrine.

A. "INNOCENCE" AND FEDERAL MENS REA REQUIREMENTS

For more than half a century, it has been hornbook law in the federal system that the goal of mens rea is "innocence"-protection, narrowly understood as preventing punishment for morally blameless conduct. As Justice Robert Jackson wrote in *Morissette v. United States*, the notion that "an injury can amount to a crime only when inflicted by intention . . . is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[18] The requirement of a "guilty mind," or mens rea, thus serves "to protect those who were not blameworthy in mind from conviction" by predicating criminal liability on the "concurrence of an evil-meaning mind with an evil-doing hand."[19]

Although *Morissette* left no doubt that mens rea requirements are designed to make moral culpability a prerequisite for punishment, it did not explain *why* blameworthiness should be regarded as essential. The

17. 135 S. Ct. 2001 (2015).
18. 342 U.S. 246, 250 (1952).
19. *Id.* at 251–52.

answer, of course, would be obvious to retributivists. For them, the very purpose of criminal law is to visit the moral stigma of criminal conviction and the pains of punishment upon those who have transgressed community standards of morality.[20] On this view, mens rea is important because it separates the morally "guilty" (those who chose "evil" over "good" and thus deserve punishment) from the morally "innocent" (those who, in *Morissette* terms, were not "blameworthy in mind").

These answers would fall flat for utilitarians. In their view, the purpose of the criminal law is *not* to enforce community standards of morality. Rather, it is to avert the social losses of crime through the familiar mechanisms of deterrence, incapacitation, and rehabilitation.[21] Once the harms the law seeks to prevent have occurred, it is not obvious why a utilitarian would care whether the offenders made blameworthy choices. After all, by their unlawful conduct, offenders have revealed themselves to be dangerous to the interests the law seeks to protect, and utilitarian theory holds that dangerous persons must be punished to prevent them and others similarly situated from breaking the law in the future.

In fact, however, utilitarians do care, perhaps as deeply as retributivists, about moral blameworthiness. Even though the purpose of utilitarian punishment is crime prevention, the legitimacy of the criminal law depends critically on assigning punishment in accordance with moral desert. As the noted utilitarian Justice Oliver Wendell Holmes, Jr. famously remarked, to deny that criminal liability is "founded on blameworthiness . . . would shock the moral sense of any civilized community."[22] Precisely because, as Holmes put it, "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,"[23] utilitarians widely accept moral blameworthiness as an "important limiting principle" on punishment.[24] As Professors Paul Robinson and John Darley have explained:

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20. *See, 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 . . . offenders deserve it."); H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 9 (1968) (defining retribution "as the application of the pains of punishment to an offender who is morally guilty . . . .").

21. *See, e.g.*, Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, *in* 1 THE WORKS OF JEREMY BENTHAM 83 (John Bowring ed., 1962) ("[A]ll punishment in itself is 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.").

22. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 50 (1881).

23. *Id.*

24. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 66–67 (1968); *see also* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 15–19 (2003). *See generally* Paul H. Robinson &

> [T]he criminal law's moral credibility is essential to effective crime control, and is enhanced if the distribution of criminal liability is perceived as "doing justice," that is, if it assigns liability and punishment in ways that the community perceives as consistent with the community's principles of appropriate liability and punishment. Conversely, the system's moral credibility, and therefore its crime control effectiveness, is undermined by a distribution of liability that deviates from community perceptions of just desert.[25]

The view that punishment should track moral blameworthiness has important implications for the definition of the "innocence" that mens rea doctrine aims to protect against punishment. Commission of a blameworthy act is merely the first of two essential culpability-related inquiries; it is also necessary to ask whether the offender's act was *sufficiently blameworthy* to warrant the penalties authorized by Congress. If the conduct was only minimally blameworthy, to impose severe penalties would be to visit upon the defendant more punishment than his or her unlawful act deserves. Simply put, the admittedly hard-to-quantify differential between the offender's level of blameworthiness and any higher level of blameworthiness contemplated in the charged offense *is* a form of "innocence," no different in principle from a complete absence of blameworthiness.

Stated differently, the objection to punishment in the absence of blameworthiness is that such punishment is morally underserved. The same objection holds true in the case of disproportionately severe punishment. When a blameworthy act is punished in excess of its blameworthiness, morally undeserved punishment is imposed even though some lesser quantum of punishment may have been entirely just. Thus, if, as *Morissette* holds, punishment for blameless acts should be precluded by federal mens rea requirements, the same should be true of punishment in excess of blameworthiness.

Had the *Morissette* Court not been so single-mindedly focused on the complete absence of moral blamelessness, it would have seen that, in many contexts, mens rea requirements serve to rule out disproportionately severe punishment for blameworthy conduct. Ironically enough, *Morissette* was just such a case. If, as seems likely, Morrisette was at least negligent in assuming that the spent bomb casings

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John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315 (1984).

25. Robinson & Darley, *supra* note 24, at 457–58; *see also, e.g.*, Darryl K. Brown, *Criminal Law Theory and Criminal Justice Practice*, 49 AM. CRIM. L. REV. 73, 87 (2012) ("There is now widespread agreement among [utilitarian] scholars that culpability is necessary to justify punishment and should serve to limit sentences in accord with desert."); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 74–75 (2005) (noting that research indicates that people are more likely to obey the law if they perceive it as "fair").

he carted off from an Air Force bombing range had been abandoned—after all, they were stored on government property, fenced in from the outside world with "No Trespassing" signs along the perimeter, and he made no effort to seek permission before taking them—then he *was* morally blameworthy. Nevertheless, the high mens rea required by the Court entitled him to acquittal, despite his blameworthiness, if he truly believed the casings were abandoned.[26]

This result, inexplicable in terms of preventing punishment without culpability, makes perfect sense on proportionality grounds. The charges against Morissette carried serious sanctions, ranging up to ten years in prison.[27] Such heavy penalties suggest they were intended for intentional wrongdoers who know they are misappropriating government property.[28] To visit such harsh sanctions upon persons who honestly believed they were entitled to take government property would constitute morally undeserved punishment.

Regrettably, the Supreme Court later seized upon *Morissette*'s emphasis on preventing punishment for morally blameless conduct to suggest that implied mens rea requirements cannot validly demand anything more than minimal culpability. The clearest example is *Carter v. United States*, in which the Court declared: "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.'"[29] Taken literally, that declaration, which is difficult to reconcile with the holdings of prior cases,[30] leaves no room for

26. Morissette v. United States, 342 U.S. 246, 276 (1952). To be fair, the *Morissette* Court's emphasis on punishment without culpability flowed from the all-or-nothing nature of the defense before it. The defendant claimed he thought the spent bomb casings he took had been abandoned. Given that it is not blameworthy to take property that belongs to no one, the Court quite correctly made knowledge that the property taken belonged to another a necessary element of the crimes of stealing and knowingly converting government property.

27. 18 U.S.C. § 641 (2012).

28. The conversion statute explicitly provides that, to be a crime, the conversion of government property has to be "knowing[]." 18 U.S.C. § 641 (2012). This was significant to the outcome in *Morissette*. 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." *Morissette*, 342 U.S. at 271.

29. 530 U.S. 255, 269 (2000) (quoting United States v. X–Citement Video, Inc., 513 U.S. 64, 72 (1994)).

30. As I have demonstrated in prior work, the Supreme Court often requires more than the minimal mental culpability necessary to ensure a modicum of moral blameworthiness, but does so under the guise of excluding morally blameless conduct from the ambit of a criminal statute:

> 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.

proportionality concerns in mens rea selection even though disproportionately severe punishment constitutes morally undeserved punishment.

B. CONTEMPORARY MENS REA DOCTRINE

Contemporary mens rea doctrine emerged from three cases involving mala prohibita regulatory crimes. These cases are *Liparota v. United States*,[31] *Staples v. United States*,[32] and *Ratzlaf v. United States*.[33] In each case, the Court saw a potential for punishment without culpability and, unwilling to rely on prosecutorial discretion as an adequate safeguard, responded with heightened mens rea requirements. The analytical method employed in these watershed cases now represents the governing approach to mens rea selection in the federal system.

1. The Foundational Cases: Liparota, Staples, *and* Ratzlaf

The first case was *Liparota*. It involved an alleged scheme by the owner of a store, not authorized to accept food stamps, to purchase food stamps for less than face value. The owner was prosecuted under a statute providing criminal penalties for anyone who "uses, transfers, acquires, alters, or possesses" food stamps "in any manner not authorized by [the relevant statute] or the [implementing] regulations."[34] The issue was whether the government could convict absent knowledge that the defendant's use of food stamps was prohibited. Seven Justices agreed that it could not.

Unless mistake or ignorance of pertinent administrative regulations were recognized as a defense, the Court feared, a "broad range of apparently innocent conduct" could be prosecuted as misuse of food stamps.[35] Certain uses of food stamps, though unlawful, would strike many people as innocuous. As an example, the Court cited a food-stamp recipient who purchases food from a vendor who, unbeknownst to the purchaser, charges excessive prices.[36] It is illegal to use food stamps on otherwise permissible purchases at inflated prices, yet the shopper was merely using food stamps to buy groceries—the very purpose for which the government supplied food stamps to program recipients. The only

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Smith, *supra* note 11, at 137–38 (discussing *Staples* and *X-Citement Video, Inc.*). The issue of "back door proportionality" is discussed further at *infra* Part I.B.2.

31. 471 U.S. 419 (1985).
32. 511 U.S. 600 (1994).
33. 510 U.S. 135 (1994).
34. 7 U.S.C. § 2024(b) (2012).
35. *Liparota*, 471 U.S. at 426.
36. *Id.*

way to prevent conviction in circumstances such as these (and to ensure that persons convicted of misusing food stamps will be morally blameworthy) was to require proof that the defendant knowingly violated the rules governing the use of food stamps.

The next case in the trilogy was *Ratzlaf*. There, the defendant was prosecuted for "willfully violating" the "anti-structuring" law. The law prohibited breaking up into smaller transactions a single cash transaction worth at least $10,000 in order to evade a financial institution's obligation to report to the government large cash transactions.[37] The government claimed that the requisite "willfulness" was shown by the defendant's purpose to evade the currency transaction reporting requirement; the defendant countered that willfulness also demanded proof the defendant knew that "structuring" is illegal. Again, the Court ruled against the government, making ignorance of the law a defense.

The Court reasoned that structuring a cash transaction to avoid triggering currency transaction reporting obligations is not "inevitably nefarious" in our culture.[38] In our society, there is nothing wrong with people choosing to conduct cash transactions in ways designed to avoid taxes or other unwanted government mandates, or simply to protect their financial privacy from the prying eyes of government or others. Accordingly, a conviction for "structuring" required proof the defendant knew it was illegal to attempt to evade currency transaction reporting requirements.

The last case, *Staples*, was a prosecution under the National Firearms Act for possession of an unregistered "firearm." Among other major weapons, the term "firearm" includes automatic weapons (guns capable of firing repeatedly with a single pull of the trigger) but not semiautomatic weapons. The defendant possessed a semiautomatic rifle not otherwise subject to federal registration requirements, but the weapon had somehow acquired the ability to fire automatically, rendering it a "firearm" that had to be registered.

A prior decision, *United States v. Freed*,[39] had classified the statute at issue in *Staples* as a "public welfare offense." This was significant because *Morissette* had concluded that the traditional requirement of moral blameworthiness does not extend to public welfare offenses.[40]

37. *See* 31 U.S.C. § 5324(a)(3) (2012).

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

39. 401 U.S. 601 (1971).

40. According to *Morissette v. United States*, public welfare offenses "heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare" by requiring them, at their peril, to "comply with reasonable standards of quality, integrity, disclosure and care." 342 U.S. 246, 254 (1952). Given the regulated party's voluntary pursuit of

Based on *Freed*, the government argued that the defendant merely had to know that the item he possessed was a gun. The defendant responded that the government had to prove knowledge that the weapon had the particular characteristics which subjected it to federal registration requirements.

The Court again held that heightened mens rea requirements were necessary to avoid punishment without culpability. Invoking what it described as the "tradition of widespread lawful gun ownership by private individuals in this country,"[41] the *Staples* majority concluded that, without more, there is nothing blameworthy in possessing an item known to be a gun. In order blameworthiness to exist, the defendant had to know that the firearm fell into a "quasi-suspect" category and thus did not constitute the kind of firearm that may be possessed, free of registration requirements, for legitimate purposes.[42] Thus, absent proof that Staples actually knew his rifle could fire automatically, he was entitled to acquittal.

The significance of these cases is difficult to overstate. They extended *Morissette*'s central concern with ruling out punishment without culpability to *all* federal crimes, even public welfare offenses. This move did not abolish strict liability; *Staples*, after all, specifically accepted the holding in *Freed* that the National Firearms Act was a strict liability crime.[43] It did, however, establish that exercises in formalism, such as placing particular crimes into "public safety" or other doctrinal boxes, no longer control mens rea selection. Rather, mens rea questions must be determined through a common-sense assessment of whether or not individual elements of a crime are essential to afford would-be offenders notice that certain activities would be considered wrongful. Each and every element necessary to the definition of the blameworthy act requires a "guilty" state of mind, even if (as in *Staples*) the statute is silent on the subject.

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hazardous activities, courts construe health and safety regulations "mak[ing] no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime." *Id.* at 256. *Morissette* cautioned, however, that public welfare offenses are minor crimes, typically misdemeanors punished by fines only or short jail terms. *See id.* ("[P]enalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.").

41. Staples v. United States, 511 U.S. 600, 610 (1994).

42. *Id.* at 611–12.

43. *Id.* at 617–18. Strict liability should be distinguished from absolute liability. Crimes of strict liability require mens rea as a whole, but they dispense with mens rea for part of the offense. Strict liability, as in the case of public welfare offenses, "tends to apply only when proof of mens rea is unnecessary to reveal culpability . . . ." Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, 75 LAW & CONTEMP. PROBS. 109, 126 (2012). Absolute liability, by contrast, refers to liability based on acts alone, without regard to the offender's state of mind. The Model Penal Code reserves absolute liability for noncriminal law offenses called "violations," which require no mens rea but are punishable only by fines. MODEL PENAL CODE § 2.05 (AM. LAW INST. 1962).

2. *The Mens Rea Selection Methodology*

The decisions in *Liparota*, *Ratzlaf*, and *Staples* followed a common analytical path which comprises the prevailing method of mens rea selection in federal cases.[44] The first step is to determine the actus reus elements and any mens rea requirements included in the legislative definition of the offense, plus any additional mens rea requirements the government accepts as essential.[45] The Court then looks beyond the facts of the case, including whether or not the particular defendant's conduct was blameworthy, and asks, as one leading account explains, "as a hypothetical matter whether morally blameless people could violate [the statute]."[46] If (and, controversially, only if) the answer is "yes," then heightened mens rea requirements are required: courts must "formulate an additional . . . element about mental state to shield blameless conduct from criminal condemnation."[47]

The fairly recent decision in *Arthur Andersen LLP v. United States*[48] nicely illustrates the operation of the mens rea method. The government charged the consulting firm Arthur Andersen with "corruptly persuad[ing]" its employees to destroy Enron-related documents with intent to cause those documents to be unavailable to federal

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44. For a detailed explanation of how this analytical method derives from the case law, see Wiley, *supra* note 10, at 1026–57.

45. As stated, the first step goes beyond the actus reus and mens rea requirements specified by Congress and also takes account of any additional mens rea requirements accepted by the prosecution. Even when statutes are silent as to mens rea, the government often agrees that certain implied mens rea requirements apply. In *Staples*, for example, the National Firearms Act contained no express mens rea requirements—it simply made it a felony, punishable by up to ten years in prison, to possess statutory "firearms" that are not duly registered on the federal registry. *See* 26 U.S.C. § 5861(d) (2012). Nevertheless, the government agreed that the defendant had to know he was in possession of items and that those items were weapons (such as a gun in *Staples*, or hand grenades in *Freed*). These additional implied mens rea requirements are taken into account in determining whether heightened mens rea requirements are required.

46. Wiley, *supra* note 10, at 1023. The reference to "morally blameless people" in Wiley's insightful account is a bit imprecise. Mens rea selection does not call for judges to inquire into the character of the defendant or other potential offenders, in the manner of a confessor examining a penitent. The focus, rather, is on *conduct*: if the conduct prohibited by the statute is morally blameless, then there is an innocence-protection problem to be solved by heightened mens rea requirements. This is so even if, based on other conduct not relevant to the definition of the charged offense, the defendant before the court could be deemed morally blameworthy.

47. Wiley, *supra* note 10, at 1023. Heightened mens rea requirements fall into one of two categories. The first includes judicially created culpability standards read by implication into statutes which are entirely or partially silent as to mens rea. *See, e.g.*, *Staples*, 511 U.S. at 606 (imposing implied requirement of knowledge of the pertinent facts); Liparota v. United States, 471 U.S. 419, 425 (1985) (imposing implied requirement of knowledge of the law). The second includes the construction of ambiguous statutory mens rea terms. *See, e.g.*, Ratzlaf v. United States, 510 U.S. 135 (1994) (interpreting statutory requirement of "willfulness").

48. 544 U.S. 696 (2005).

investigators.[49] As the method called for, the Court started by identifying the elements of the crime. These elements were (1) knowingly (2) and "corruptly" (3) persuading another person (4) to destroy or withhold evidence (5) with intent to "influence, delay, or prevent the testimony of any person in an official proceeding."[50]

The interpretive issue focused on the meaning of the "corrupt[]" requirement, as modified by "knowingly." The government claimed it did not matter whether the alleged "corrupt persuader" lacked bad intent or even believed it was acting lawfully; all that mattered was that its conduct impeded a federal investigation through the intentional suppression or destruction of evidence. The defendant countered that a good-faith belief in the propriety of destroying or withholding evidence should be a defense.

The Court then asked, hypothetically, whether the government's interpretation would allow conviction for morally blameless conduct. The answer was "yes." Attorneys often advise clients to withhold documents or testimony from the government on privilege grounds, and businesses commonly destroy documents that might potentially be of interest to the government pursuant to corporate document-retention policies.[51] Based on examples such as these, the Court concluded that "'persuad[ing]' a person 'with intent to . . . cause' that person to 'withhold' testimony or documents from a Government proceeding or Government official is not inherently malign."[52] Thus presented with a prosecution theory so broad that the law "covered innocent conduct," the Court construed the "knowingly . . . corrupt[]" requirement to "limit[] criminality to persuaders conscious of their wrongdoing."[53]

Notice that the mens rea analysis illustrated in *Arthur Andersen* is framed in terms that seemingly preclude consideration of proportionality concerns. On its face, the mens rea analysis only aspires to "shield *blameless conduct* from criminal condemnation."[54] The implication, previously endorsed in *Carter v. United States*,[55] is that heightened mens

49. *Id.* at 702 (describing indictment). "Corrupt persuasion" is a form of obstruction of justice prohibited by 18 U.S.C. § 1512(b). Arthur Andersen was charged pursuant to section 1512(b)(2), which subjects to conviction anyone who "knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to— . . . (2) cause or induce any person to—(A) influence, delay, or prevent the testimony of any person in an official proceeding; [or] (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(b)(2)(A)–(B) (2012).

50. 18 U.S.C. § 1512(b)(1) (2012).

51. *Arthur Andersen*, 544 U.S. at 705–06.

52. *Id.* at 703–04.

53. *Id.* at 706.

54. Wiley, *supra* note 10, at 1023 (emphasis added).

55. 530 U.S. 255, 269 (2000).

rea requirements cannot be employed to prevent disproportionately severe punishment for blameworthy acts. As one scholar has concluded, the mens rea method only allows courts to require a "*minimally sufficient* element about mental state to shield blameless conduct from criminal condemnation,"[56] a limitation he describes as a "rule against requiring superfluous culpability."[57]

These claims are understandable but mistaken. It is true, so far as it goes, that the analysis only seeks to determine whether or not there is a danger of punishment for blameless conduct. It thus, as conventionally framed, provides no affirmative support for imposing more demanding mens rea requirements where there is no risk of punishment without culpability.[58] This hardly means, however, that proportionality concerns play no role in mens rea selection. To the contrary, proportionality concerns enter the analysis through what I have described in prior work as the "back door"—that is, in responding to potential punishment for blameless conduct.[59]

If "minimally sufficient" culpability were all that mens rea doctrine 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.[60] Nevertheless, in *Liparota*, *Ratzlaf*, and *Staples*, the Supreme 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*, not "minimal," levels of culpability.

Take *Staples v. United States* first. The Court there ruled that it is not a crime to possess an unregistered "machinegun" unless the defendant actually knew the weapon could fire automatically.[61] The two

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56. Wiley, *supra* note 10, at 1023 (emphasis added).

57. Wiley, *supra* note 10, at 1128.

58. This, I shall argue, changed in Elonis v. United States, 135 S. Ct. 2001 (2015). *See infra* Part II.

59. *See* Smith, *supra* note 11, at 137–44.

60. *See* Smith, *supra* note 11, at 137; *see also* MODEL PENAL CODE §§ 2.02(2)(c)–(d) (AM. LAW INST. 1962) (recognizing recklessness and negligence as culpable mental states). The Code defines "negligence" as involving unawareness of risks that are so substantial and unjustifiable that the actor's failure to perceive them amounts to a "gross deviation from the standard of care that a reasonable person" would have observed under the circumstances. *Id.* § 2.02(2)(d). Recklessness, by contrast, involves "conscious[] disregard[]" of risks that are so substantial and unjustifiable 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. *Id.* § 2.02(3). The Code also recognizes two higher standards of culpability; they are, in ascending order, "knowledge" and "purpose." *Id.* § 2.02(2)(a)–(b).

61. Staples v. United States, 511 U.S. 600, 619 (1994).

other cases in the foundational trilogy, *Liparota* and *Ratzlaf*, adopted even more stringent mens rea requirements. These cases did not simply require knowledge of the facts bearing on the legality of the charged conduct, as *Staples* did; they required proof that the defendants actually knew the law. Brushing aside the maxim that "ignorance of the law is no excuse," *Liparota v. United States* ruled that defendants cannot be convicted of misusing food stamps unless they knew that they were violating applicable food stamp regulations.[62] Similarly, the *Ratzlaf v. United States* Court ruled 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 for the purpose of avoiding federal currency transaction reporting requirements.[63]

In each case, if it intended merely to guarantee some minimal level of moral culpability, the Supreme Court would have ruled that the defendants could be convicted if they acted unreasonably. This would have meant that Staples was guilty if he should have known of his gun's automatic-firing capability and that Liparota and Ratzlaf were guilty if they should have known their conduct was illegal. Instead, in each case, the Court imposed the considerably more demanding requirement of actual knowledge.[64]

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 speaks as if the propriety of heightened mens rea requirements turns solely on whether or not the statute would otherwise allow punishment without culpability. On the other hand, when the Court perceives such a risk, it does not simply ratchet up mens rea requirements to a level sufficient to ensure some minimal level of culpability on the part of offenders. Instead, it raises the required mens rea to a level that is sufficient to ensure that the prohibited acts are *sufficiently culpable* to deserve the penalties authorized by Congress.

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62. 471 U.S. 419, 433 (1985).

63. 510 U.S. 135, 149 (1994).

64. The same dynamic played out in United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), a prosecution for knowing possession and distribution of child pornography. A minimal-culpability standard would have allowed conviction as long as the defendant should have known that the materials in question were pornographic in nature and featured minors. After all, possessing material that any reasonable person would know to be child pornography can hardly be considered "innocent." *Accord* New York v. Ferber, 458 U.S. 747, 756–69 (1982) (discussing the serious harms flowing from child pornography). Nevertheless, the Court required actual knowledge that the depiction features minors engaging in sexually explicit conduct. *See X-Citement Video, Inc.*, 513 U.S. at 78 ("[W]e conclude that the term 'knowingly' in § 2252 extends both to the sexually explicit nature of the material and to the age of the performers.").

II. CONTINUITY AND CHANGE IN THE "GUILTY MIND" REQUIREMENT: *ELONIS V. UNITED STATES*

This Part addresses the recent decision in *Elonis v. United States*,[65] the case involving a prosecution for violent "rap" lyrics posted on Facebook. After summarizing the facts of the case, I turn to a discussion of *Elonis*'s impact on mens rea doctrine. As will become clear, the decision took a major first step toward elevating proportionality of punishment into an independent goal of mens rea doctrine, separate and apart from avoiding punishment without culpability. If the Court follows through on this fundamental reconception of the meaning of "innocence"—and it should—*Elonis* could represent the single most important federal mens rea decision since *Morissette*.

Next, I discuss two self-defeating elements in the *Elonis* Court's analytical approach. *First*, although the Court properly took proportionality concerns into account, it did not follow them to their logical conclusion. Whereas prior decisions imposing heightened mens rea requirements demanded proof of knowledge, a high level of mens rea, in order to fend off punishment without blameworthiness (decisions I have described as exercises in "back door" proportionality),[66] *Elonis* left the door open to recklessness as a sufficiently culpable mental state in threats prosecutions. This suggests that the "front door" allowing proportionality concerns to enter into mens rea selection may not be as wide as the "back door." *Second*, the Court gave needless breadth to the threats statute. The term "threat" could, and should, have been narrowly interpreted as covering only communications intended to be understood as menacing, yet the Court broadly construed the term to include *any* statement that might cause listeners to fear bodily harm. In this sense, the potential for morally undeserved—perhaps even unconstitutional—punishment in threat prosecutions represents a self-inflicted wound caused by the Court's puzzling penchant for construing federal criminal statutes broadly.

A. THE ALLEGED "THREATS" IN *ELONIS*

Anthony Douglas Elonis, who used online rap-style names such as "Tone Dougie" and "Tone Elonis," began listening to violent rap music and posting his own equally violent lyrics on Facebook after his wife left him and he was fired from his job. According to disclaimers he posted online, the posts he made concerning his ex-wife and various other persons were "fictitious" only, with no "resemblance to real persons."[67]

65. 135 S. Ct. 2001 (2015).
66. *See* Smith, *supra* note 11, at 137–44.
67. *Elonis*, 135 S. Ct. at 2005.

Much like his idol, the controversial rapper known as Eminem, his intended purpose was to work through difficult life experiences: "I'm doing this for me. My writing is therapeutic." He added: "Art is about pushing limits. I'm willing to go to jail for my Constitutional rights. Are you?"[68]

Despite these disclaimers, the posts understandably inspired fear among those who came across them. Although the posts were not communicated to anyone, having merely been posted on Elonis's personal Facebook page, his former supervisor discovered the posts because he was a "friend" of Elonis's on Facebook. The Federal Bureau of Investigation opened an investigation and begin monitoring Elonis's online activity.

The following are representative of the various online statements underlying the charges. In one post, based on a well-known sketch comedy routine about threats against the President of the United States called "It's Illegal to Say. . .," Elonis wrote "Did you know that it's illegal for me to say I want to kill my wife? . . . [W]hat's interesting is that it's very illegal to say I really, really think someone out there should kill my wife."[69] Evidently angered that his wife had obtained an order of protection against him, he wrote: "Fold up your [protective order] and put it in your pocket. Is it thick enough to stop a bullet? . . . [I]f worse comes to worse I've got enough explosives to take care of the State Police and the Sheriff's Department."[70]

Later adding that "hell hath no fury like a crazy man in a Kindergarten class,"[71] he took rhetorical aim at the FBI agent who interviewed him about his online posts. He wrote: "Little Agent lady stood so close[.] Took all the strength I had not to turn the b*tch ghost . . . . So the next time you knock, you best be serving a warrant[.] And bring yo' SWAT and an explosives expert . . . Cause little did y'all know, I was strapped wit' a bomb[.] Why do you think it took me so long to get dressed with no shoes on?"[72]

Although he described himself as "just an aspiring rapper who likes the attention,"[73] the attention he received came neither from recording studios nor adoring fans. He was arrested and indicted for having made threatening communications in violation of 18 U.S.C. § 875(c), a felony punishable by up to five years in prison. The statute makes it a crime to "transmit[] in interstate or foreign commerce any communication

68. *Id.* at 2005–06.
69. *Id.* at 2005.
70. *Id.* at 2006.
71. *Id.*
72. *Id.*
73. *Id.* at 2007.

containing any threat to kidnap any person or any threat to injure the person of another."[74]

Dismissing claims that Elonis never intended to harm or intimidate anyone, the District Judge ruled that the crime was proven if Elonis's statements would have caused a reasonable person to fear bodily injury. The jury deemed the standard met on all but one count and returned a guilty verdict. Elonis was sentenced to forty-four months in prison, followed by three years of supervised release. The Third Circuit affirmed, adding that the statute, so construed, did not violate the First Amendment.[75]

B. THE PURPOSE OF FEDERAL MENS REA REQUIREMENTS, REVISITED

Without a doubt, Elonis's conduct was morally blameworthy. Although he may not have intended to harm or intimidate his ex-wife or anyone else, his violent online posts could easily inspire fear in a reasonable person. He singled out his wife, by name, while they were engaged in an acrimonious separation and divorce—raising obvious concerns of potential domestic violence. Furthermore, he discussed using explosives against law enforcement officials and innocent schoolchildren. The fact that these violent ruminations took the form of rap-style lyrics posted online, instead of more conventional forms of intimidation transmitted directly to victims, does not detract from their potential to cause fear. He might or might not have been within his "[c]onstitutional rights," as he claimed, in making his statements,[76] but he certainly had fair warning that it is wrongful to make menacing statements causing innocent third parties to fear a violent attack.

For those who believe that mens rea doctrine merely rules out punishment without culpability, *Elonis* was an easy case for affirmance. This view comes through, loud and clear, in Justice Clarence Thomas's separate opinion in *Elonis*. Thomas argued Elonis's negligence in the words he used was a "guilty" enough mental state to warrant conviction. As he put it:

> A defendant like Elonis . . ., who admits that he "knew that what [he] was saying was violent" but supposedly "just wanted to express [him]self," acted with the general intent required under § 875(c), even if he did not

74. 18 U.S.C. § 875(c) (2012).

75. Elonis v. United States, 730 F.3d 321, 335 (3d Cir. 2013), *rev'd*, 135 S. Ct. 2001 (2015).

76. *Elonis*, 135 S. Ct. at 2006. For especially thoughtful arguments that menacing speech is constitutionally protected absent proof of subjective intent to intimidate, see Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255 (2014); G. Robert Blakey & Brian Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829.

> know that a jury would conclude that his communication constituted a "threat" as matter of law.[77]

The lynchpin of Thomas's analysis was his prior majority opinion in *Carter v. United States*,[78] which he read to make "general intent" only the default culpability standard in federal cases.[79]

Importantly, Thomas stood alone on the sufficiency of negligence as a sufficiently blameworthy mental state. The seven-Justice majority, joined by Justice Samuel Alito in partial concurrence, specifically rejected negligence (which it construed Thomas and the government as advocating)[80] as a legally insufficient basis for conviction under the threats statute. To the Court, negligence simply was not blameworthy enough to warrant punishment.

The Court's analysis on this point was, functionally speaking, a proportionality analysis. The Court made no claim that Elonis's conduct was morally blameless. The problem was essentially that the government's approach would punish in excess of blameworthiness, an issue of disproportionately severe punishment. As the majority explained:

> Elonis's conviction . . . was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law, but is inconsistent with "the conventional requirement for criminal conduct—awareness of some wrongdoing." Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes." Under these principles, "what [Elonis] thinks" does matter.[81]

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77. *Elonis*, 135 S. Ct. at 2021 (Thomas, J., dissenting).

78. 530 U.S. 255 (2000).

79. *See Elonis*, 135 S. Ct. at 2019 (Thomas, J., dissenting) (quoting *Carter*, 530 U.S. at 268) ("[A]bsent such [showing], we ordinarily apply the 'presumption in favor of scienter' to require only 'proof of *general intent* . . . ."). Although the distinction is complicated by inconsistent usage, crimes of "general intent" are best understood as satisfied by proof of negligence or recklessness, whereas "specific intent" crimes require proof that the accused acted purposely or knowingly. LAFAVE, *supra* note 6, § 5.2(e), at 353–55. For a thoughtful exploration of the differences between general and specific intent, see Eric A. Johnson, *Understanding General and Specific Intent: Eight Things I Know for Sure*, 13 OHIO ST. J. CRIM. L. 521 (2016).

80. *Elonis*, 135 S. Ct. at 2011; *see also id.* ("Elonis can be convicted, the Government contends, if he himself knew the contents and context of his posts, and a reasonable person would have recognized that the posts would be read as genuine threats. That is a negligence standard."); *id.* at 2015 (Alito, J., concurring in part and dissenting in part) (agreeing that "we should presume that an offense like that created by § 875(c) requires more than negligence with respect to a critical element like the one at issue here.").

81. *Id.* at 2011 (citations omitted). Justice Thomas objected that, under general intent, "the defendant must *know*—not merely be reckless or negligent with respect to the fact—that he is committing the acts that constitute the *actus reus* of the offense." *Id.* at 2022 (Thomas, J., dissenting).

This is not "back door" proportionality. Rather, it is, at long last, proportionality through the "front door," in which preventing punishment in excess of moral blameworthiness is itself a legitimate goal of mens rea doctrine. Even though the government's preferred negligence standard would have prevented punishment without culpability, it would have ensnared people whose only crime was essentially speaking carelessly. People who neither intended to do harm nor cause others to fear bodily harm, but imprudently used words that a reasonable person might view as threatening, could be convicted and imprisoned for up to five years.[82] Even if such persons deserve some appropriate level of punishment, mens rea doctrine, as utilized in *Elonis*, helps ensure that punishment in excess of culpability will not be imposed.

This is as it should be. Criminal law theorists have emphasized proportionality as an important precondition for the just imposition of punishment. As Professor Richard Burgh has explained:

> [I]n order to render punishment compatible with justice, it is not enough that we restrict punishment to the deserving, but we must, in addition, restrict the degree of punishment to the degree that is deserved. The idea is that, in committing an offense, we do not think of the offender as deserving unlimited punishment; rather we think of him as deserving a degree of punishment that is proportional to the gravity of the offense he committed . . . . Justice, in other words, not only requires a principle of desert, but also requires a principle of proportionality between the gravity of the offense and the punishment deserved.[83]

The emphasis on proportionality of punishment flows naturally from retributive theories of punishment but, importantly, is also embraced by utilitarians. In fact, "[t]he most sustained and detailed

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This claim is incorrect. Under the general intent standard, even if the defendant did not know an actus reus element existed, he or she is still guilty if a reasonable person would have known. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §§ 12.03–12.05 (2d ed. 1995). As *Elonis* correctly concluded, to punish a defendant for not knowing facts that would have been apparent to a reasonable person is the very definition of a negligence standard. *See* MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 1962) (stating that a person acts negligently "when he [or she] should be aware of a substantial and unjustifiable risk" and "the actor's failure to perceive [the risk] . . . involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.").

82. The same basic objection applies to a recklessness standard for threats prosecutions (which *Elonis* left open as a sufficient basis for conviction). A recklessness standard would go beyond negligence and require the defendant to have been aware of the risk that his or her words might be understood as threatening bodily harm. *See* MODEL PENAL CODE § 2.02(2)(c) (defining recklessness as "conscious[] disregard[]" of pertinent risks). Even so, as a standard for determining when speech can be punished as a threat, recklessness resembles negligence in that both involve unintentionally placing others in fear through poor judgment about the proper manner in which to express oneself. Perhaps for this reason, the Third Circuit on remand reaffirmed Elonis's conviction, not on recklessness grounds, but on the dubious ground that a properly instructed jury would have found that Elonis *knew* his statements would inspire fear. *See* United States v. Elonis, 841 F.3d 589, 599 (3d Cir. 2016) ("Reviewing the whole record, we find that even if Elonis had contested the knowledge element in his testimony, no rational juror would have believed him."), *cert. denied*, 138 S. Ct. 67 (2018).

83. Richard Burgh, *Do the Guilty Deserve Punishment?*, 79 J. PHIL. 193, 197–98 (1982).

arguments for proportional punishments come not from retributive theorists, but from their philosophical adversaries: advocates of utilitarian theories of punishment."[84] H.L.A. Hart, for example, contended that the "guiding principle" in grading offenses should be "proportion," by which he meant a "commonsense scale of gravity" based on "very broad judgments both of relative moral iniquity and harmfulness of different types of offence."[85] It is thus wrong to suggest, as Justice Antonin Scalia once did, that "[p]roportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution."[86]

Consistent with the consensus view of criminal law theorists, criminal law tradition squarely supports proportionality of punishment as a goal of the mens rea requirement. In his famous lectures on the common law, Oliver Wendell Holmes, Jr. gave the example of the crime of larceny, in which intent to steal is required. The "intent to steal" requirement does guarantee culpability among potential offenders—for example, by affording a defense to persons who, as the defendant claimed in *Morissette v. United States*,[87] mistakenly believed they were entitled to take the property. Importantly, however, it also serves a vital proportionality function by reserving the strict penalties the crime of larceny authorizes for the most blameworthy takings of property: those intended to be permanent. As Holmes explained:

> A momentary loss of possession [of property] 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.[88]

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84. Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 272 (2005) (discussing the prominence of proportionality principles in the utilitarian theories of Jeremy Bentham and Cesare Beccaria).

85. H.L.A. HART, *Reform and the Individualization of Punishment, in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 25 (1968). Deviation from proportionality-based limits on punishment, Hart recognized, would "risk . . . either confusing common morality or flouting it and bringing the law into contempt." *Id; see also, e.g.*, Robinson & Darley, *supra* note 24, at 477–78 ("Enhancing the criminal law's moral credibility requires, more than anything, that the criminal law . . . earn a reputation for (1) punishing those who deserve it under rules perceived as just, (2) protecting from punishment those who do not deserve it, and (3) where punishment is deserved, imposing the amount of punishment deserved, no more, no less . . . even if a non-desert distribution appears in the short-run to offer the possibility of reducing crime.").

86. Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring in the judgment). For an extensive discussion of proportionality-based limits on punishment in utilitarian theory (and a refutation of Scalia's position in *Ewing*), see generally Ian P. Farrell, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment*, 55 VILL. L. REV. 321 (2010).

87. 342 U.S. 246, 248–49 (1952).

88. HOLMES, *supra* note 22, at 71.

A more dramatic example comes from the law of homicide. Originally, the mandatory penalty for murder was execution, and English judges, self-consciously motivated by proportionality concerns, responded by creating the lesser crime of manslaughter.[89] Mens rea, in the form of the vague but critically important concept of "malice aforethought," became the definitional mechanism through which the law sought to exempt less culpable killings from the death penalty: only killings committed with malice aforethought constitute murder. Killings committed without malice aforethought often are morally blameworthy, as the existence of manslaughter and other lesser homicide crimes (such as negligent or vehicular homicide) readily affirms. Nevertheless, malice aforethought is treated as a necessary element for murder—and properly so. The stiff penalties murder statutes afford, ranging up to the ultimate sanction (the death penalty) and life imprisonment, require very serious culpability. Mens rea is the means by which the law differentiates the killings deserving of the penalties for murder from those meriting only the punishments for less serious forms of homicide.[90]

Even within the separate categories of murder and manslaughter, mens rea is used to differentiate between different grades of the respective offenses. For example, apart from the felony-murder rule, intent to kill is required to convict of murder in the first degree, and unintentional killings (such as killings committed knowingly or through extreme recklessness) are classified as second-degree murder.[91] Similarly, the penalty for taking human life, in the absence of the malice required for murder, depends on mens rea: the highest category of manslaughter (voluntary manslaughter) is reserved for intentional killings, and unintentional (reckless or negligent) killings fall within the lower category of involuntary manslaughter.[92] In all of these cases, mens rea serves to achieve proportional punishments by matching up the culpability of killings with the appropriate ranges of punishment.

89. *See* ROY MORELAND, THE LAW OF HOMICIDE 9–12, 60 (1952) (examining the roots of the different levels of culpability for homicide).

90. In the federal system, murder is potentially punishable by death or life imprisonment, but the maximum penalty for manslaughter—killing without malice aforethought—is ten years in prison. *Compare* 18 U.S.C. § 1111(b) (2012) (murder), *with id.* § 1112(b) (2012) (manslaughter).

91. *Id.* § 1111(a). As the Supreme Court has recognized, watering down the mens rea requirements for first-degree murder would upset Congress's careful attempt to grade murders into the appropriate categories of punishment. *See* Lewis v. United States, 523 U.S. 155, 172–73 (1998) (ruling that the federal murder statute limiting first-degree murder to intentional killings precludes prosecutors from using the Assimilative Crimes Act, 18 U.S.C. § 13(a), to borrow state first-degree murder statutes with lesser mens rea requirements).

92. *Id.* § 1112(a).

A more contemporary example comes from aggravated assault statutes. Assault, in any form, is morally blameworthy,[93] yet modern legislatures often peg the level of offense and punishment for particular types of assaults to mens rea. Basic assault is a crime, often punished as a misdemeanor, but the penalties for assault increase based on mens rea: intent to inflict serious bodily harm, rape, or kill results in felony convictions and progressively more severe penalties.[94] In cases such as these, no less than in Holmes's example of larceny or crimes of homicide, mens rea serves the goal of achieving proportional punishment.[95]

Seen in this light, mens rea requirements often do more than require moral culpability on the part of the defendant. Instead, they require proof of a *sufficiently culpable* mental state, judged in light of the seriousness of penalties available for the crime or crimes charged. This broader, considerably more robust requirement brings into the mens rea analysis the traditional requirement that, to be just, criminal punishment must be proportional to (or "fit") the defendant's crime.

In rejecting negligence, then, the *Elonis* Court, without being as clear as it might have, considerably broadened the purpose of federal mens rea requirements. Those requirements should no longer be understood as merely ruling out punishment for morally blameless *conduct*, as the Court has incorrectly suggested on occasion. Rather, the requirements rule out morally unjustified *punishment*—including excessive punishment for blameworthy acts. Proper mens rea analysis, duly informed by proportionality concerns, thus provides an important legal safeguard against unjust conviction in federal prosecutions.[96]

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93. *See, e.g.*, United States v. Feola, 420 U.S. 671, 685 (1975) (treating the "federal officer" element in the federal assault statute as a strict liability element because assault is itself "wrongful" regardless of its intended target).

94. *See generally* 2 WHARTON'S CRIMINAL LAW § 198 (15th ed. 1994) (explaining that assault or battery "will constitute a higher degree of the offense if the defendant acted intentionally; it is less aggravated or of a lesser degree if he acted recklessly; and it is the least serious or of the least degree if he acted negligently.").

95. The very statute at issue in *Elonis* provides a further example. It prohibits a variety of different threats, using mens rea to match particular threats to the levels of punishment Congress deemed appropriate. Threats of bodily harm made with intent to extort or, in the case of kidnapping, to obtain ransom are punishable by a maximum of twenty years in prison. 18 U.S.C. § 875(a)–(b). In the absence of such intent, however, the same kinds of threats are subject to a much lower five-year maximum. *See id.* § 875(c).

96. Apart from legal safeguards against morally undeserved punishment, there is prosecutorial discretion as a potential failsafe. If prosecutors could be trusted to charge only blameworthy offenders and to seek only proportional penalties in the event of conviction, then legal safeguards against morally undeserved punishment might be unnecessary. The Supreme Court's emphasis on using implied mens rea requirements to prevent punishment without culpability necessarily (and, in my view, rightly) reflects reluctance to leave that vital work to prosecutorial whim. *See* Wiley, *supra* note 10, at 1058–68. Even so, there is considerably less justification for relying on prosecutorial discretion to prevent excessive punishment. As I have explained in prior work, "federal prosecutors are categorically barred from taking proportionality into account in pending cases and must, from start to finish, pursue the

C. A BRIEF POSTSCRIPT: STATUTORY INTERPRETATION AT WAR WITH ITSELF

As radical as *Elonis* potentially is concerning the relevance of proportionality concerns to mens rea selection, the decision is otherwise quite typical of the Supreme Court's approach to the interpretation of federal criminal laws. Although *Elonis* lifted the blinders to proportionality considerations in mens rea selection, it kept them firmly in place when construing the actus reus elements of the crime of the threats statute. These elements are: (1) the defendant transmitted a communication; (2) the communication was in interstate or foreign commerce; and (3) the communication "contain[ed]" a "threat to injure the person of another."[97] The Court treated the statute as completely silent as to mens rea and devoted itself to the task of determining whether (and, if so, what) implied mens rea requirements should be read into the law.

The Court was understandably troubled by the possibility that unintentionally threatening speech could be punished as a felony, but failed to recognize its own role in facilitating that unsettling outcome. Under the guise of adhering to dictionary meaning, the Court breezily construed the term "threat" so broadly as to encompass *any* statement that might be viewed as indicative of an intention to injure another. In the majority's view, all that matters is that the communication could signify *an* intention to injure, not a *genuine* intention within the mind of the speaker.[98]

This interpretation is hardly compelled. Indeed, a decent case can be made for the opposite reading based on the same dictionary definitions cited in *Elonis*. As one judge explained in a prior threats case: "Every relevant definition of the noun 'threat' or the verb 'threaten,' whether in existence when Congress passed the law (1932) or today, includes an intent component."[99] On this view, there is a critical difference between *menacing* and *threatening* communications. Menacing communications are statements that reasonably tend to inspire fear, whereas threatening communications are *intended* to cause

highest supportable sentence under the guidelines given the law and facts of particular cases." Smith, *supra* note 11, at 154. There is thus real value added in using mens rea to prevent disproportionate punishment.

97. 18 U.S.C. § 875(a)–(b) (2012).

98. Dictionary definitions of "threat," the Court thought, "speak to what the statement conveys—not to the mental state of the author. For example, an anonymous letter that says 'I'm going to kill you' is 'an expression of an intention to inflict loss or harm' regardless of the author's intent." Elonis v. United States, 135 S. Ct. 2001, 2008 (2015) (citations omitted).

99. United States v. Jeffries, 692 F.3d 473, 483 (6th Cir. 2012) (Sutton, J., *dubitante*).

fear by informing the victim that the speaker plans to do him or her bodily harm.

Indeed, the Court missed the fact that the government should have lost even on the broad interpretation of "threat." If, as *Elonis* held, a "threat" "is 'an expression of an intention to inflict loss or harm,'"[100] the defendant's admittedly violent posts did not qualify as such. After all, the posts did not state or otherwise express any intention to harm anyone, as in the Court's example of "an anonymous letter that says 'I'm going to kill you.'"[101] Unlike the Court's example, Elonis's supposed intention to inflict harm was *inferred* from his statements, which is significant because the threats statute specifically requires that the communication itself "*contain*[]" the threat.[102] The threats in question were not "contained" in Elonis's writings but rather were inferred from them. Properly read, therefore, the threats statute determines liability solely on the basis of what the communications actually say, as opposed to what listeners read into them by way of inference.[103]

This narrow reading, unlike the Court's, fits with the threats statute as a whole. The other kinds of threats prohibited by section 875 are made for particular purposes, such as to extort money or property, or, in the case of kidnapping, to obtain ransom.[104] Those other threats are *intended* to place the victim in fear because fear is what will cause the victim to acquiesce in the perpetrator's unlawful demands. Reading threats to kidnap or injure pursuant to section 875(c) similarly to require intent to inspire fear thus fits with the overall statutory scheme's concern with prohibiting communications designed to intimidate others by causing them to fear violence or other unlawful reprisals.

To the extent the term "threat" is not free of ambiguity, however, the prudent course in *Elonis* was to construe it narrowly to require proof that the speaker intended to inspire a fearful reaction. The narrow

100. *Elonis*, 135 S. Ct. 2001, 2008 (2015).

101. *Id.*

102. 18 U.S.C. § 875(c) (2012) (emphasis added).

103. There is a close analogy in the law of perjury. Under Bronston v. United States, 409 U.S. 352, 361–62 (1973), which flatly rejected the notion of "perjury by implication," the perjurious nature of a sworn statement is determined on the truth or falsity of the statement itself, without reference to the inferences one might draw from it. *See id.* at 357–58 (holding that the perjury statute "does not make it a criminal act for a witness to . . . state any material matter that *implies* any material matter that he does not believe to be true"). Thus, no matter how misleading a sworn statement is, it is not perjury if it is literally true—and that is so even if the witness's intent was to mislead the factfinder.

104. *See* 18 U.S.C. § 875(a) (proscribing "demand[s] or request[s] for a ransom or reward for the release of any kidnapped person"); § 875(c) (proscribing threats to kidnap); § 875(d) (proscribing threats made "with intent to extort . . . money or other thing of value").

construction would have ensured the statute's constitutionality[105] and restricted the law to the most blameworthy of threats (those designed to place others in fear by communicating the speaker's intent to inflict bodily harm). Nevertheless, the Supreme Court engaged in what might be called statutory interpretation at war with itself. The Court expansively construed the actus reus, which raised serious problems of unjust (and possibly unconstitutional) applications. Having done so, the Court then sought to narrow the statute, as judicially enlarged, by creating implied mens rea requirements to fend off at least some of the troubling applications the Court itself had made possible.

Though regrettable, this approach to the interpretation of federal criminal statutes is hardly unique to *Elonis*. Rather, the Supreme Court routinely ignores proportionality and other pertinent concerns in its rush to expand the reach of federal criminal laws in cases involving blameworthy offenders. To that extent, the Court shares with Congress the blame for the federalization of crime and rampant overpunishment in the federal system. As I have explained elsewhere:

> Far from being innocent bystanders in the federalization of crime, federal judges have been all too willing to construe federal crimes expansively, without regard to the often dramatic effects expansive interpretations will have on the punishment federal defendants face. The root of the problem is that the courts view themselves as having an obligation to ensure that no morally blameworthy defendant ever slips through the federal cracks. In focusing on the culpability of the conduct for which prosecutors seek to convict, courts lose sight of the disproportionality of the penalties to which their expansive interpretations often expose federal defendants. The inevitable result of how courts approach their interpretive tasks is a broader and more punitive federal code.[106]

III. METHODOLOGICAL FLAWS IN FEDERAL MENS REA DOCTRINE

As previously explained, *Elonis* helped close a major gap in mens rea doctrine by, for the first time, taking proportionality concerns into account in deciding whether to impose heightened mens rea requirements. In this Part, the focus is on how well mens rea doctrine accomplishes its stated goal of preventing punishment for morally blameless conduct, as opposed to disproportionately severe punishment. At first blush, the approach seems almost sublime in its pursuit of the objective of guaranteeing culpability: the Court asks whether a federal statute would permit conviction for morally blameless conduct absent more demanding mens rea requirements, and imposes such

105. After all, for reasons explored by Professor Leslie Kendrick, there can be no social value in statements actually intended to put others in fear of bodily injury instead of to communicate an idea. Kendrick, *supra* note 76, at 1286–90.

106. Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 884 (2005).

requirements where necessary to prevent that possibility from materializing. On closer inspection, however, the doctrine does not work nearly so well.

Two areas have proven particularly problematic for the doctrine to handle. One concerns ignorance of law defenses. These defenses are especially potent tools for limiting the potential for punishment without fault, yet the new method only allows such defenses in exceedingly narrow circumstances. Another area of difficulty concerns the potential for express mens rea requirements in different criminal laws, or the wording or structure of the same law, to be read as impliedly precluding courts from adopting heightened mens rea requirements essential to exempt blameless conduct from punishment. These limitations, I argue, are the result of confusion concerning separation of powers. Unless the Court makes the right choice among the competing visions of the separation of powers, mens rea selection will continue to be ineffective in fully accomplishing its stated objectives.

A. "IGNORANTIA JURIS NEMINEM EXCUSAT"

The most significant shortcoming in the new approach to mens rea is that it does not satisfactorily answer the following question: what if a law prohibits conduct that ordinary, adequately socialized citizens have no reason to believe is either morally wrong or unlawful? In this situation, the usual approach of requiring high levels of mens rea as to the facts that comprise the offense will afford no protection to the well-intentioned citizen, precisely because the conduct is so innocuous. Where citizens are not socialized to expect that prohibited conduct is subject to legal regulation, criminal law operates as a trap for the unwary.

To illustrate the problem, consider the following example. Suppose that, to avoid compromising ongoing American military operations, Congress makes it a crime for persons within the United States to communicate with nationals of countries in which American military forces are engaged in combat operations. An Afghan student, enrolled at an American university, calls home to make sure no one was injured in the armed conflict. The telecommunications provider alerts federal authorities, and the student is arrested. The question to be considered is this: assuming prosecutors are unwilling to decline prosecution, is there a guaranteed path for acquittal for the student?

Unfortunately, the student's fate would seem to depend entirely on whether or not heightened mens rea requirements apply. The actus reus of the crime is plainly satisfied. To speak by telephone with someone is to "communicate" with them and, just as plainly, the student placed the call from within the United States to nationals of a country in which American forces were engaged in military operations. There also appear

to be no applicable defenses.[107] Finally, the prospects for a successful constitutional challenge appear to be slim at best. The statute does not infringe on constitutionally protected activity and, though overbroad in light of its stated purpose, almost certainly has a rational basis.[108] The strongest basis for a constitutional challenge would seem to be *Lambert v. California,*[109] which is perhaps the best indication of how dire the student's situation really is.

If this is right, then the student's only potential "out" is mens rea. Here, too, the student appears to be out of luck. As the Court noted in *Staples v. United States*, "a conventional *mens rea* element . . . would require that the defendant know the facts that make his [or her] conduct illegal."[110] This would solve some potential problems of punishment without culpability, such as the possibility of charges for calls made by persons who were unaware that American forces were conducting operations in the countries they called. It would do nothing, however, to help the student. Quite simply, the student knows all the facts made relevant by the definition of the offense—namely, that he or she placed an international call to foreign nationals in a location where U.S. forces were engaged in combat operations.

The difficulty in the student's case is more fundamental. Making an international telephone call for legitimate purposes is morally neutral conduct that no one would expect to be a crime, even if American forces happen to be deployed in the region called. Traditional mens rea requirements cannot protect the student against conviction because the legislatively prescribed elements of the crime do not define an act that ordinary citizens would expect to be considered wrongful.

This is not to say that mens rea cannot solve the hypothetical innocence-protection problem. To the contrary, there is a ready solution

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107. The best possible defense would be necessity. The defense of necessity exempts from punishment individuals who committed a crime as an essential means of preventing a greater harm from occurring. *See, e.g.*, DRESSLER, *supra* note 81, at § 22.01. Although the student could argue that placing the illegal call was justified in order to avoid harm to his family, the defense would almost certainly fail. To be justified, the harm avoided by the commission of the crime must be "'clear and imminent.'" DRESSLER, *supra* note 81, at § 22.02. In the hypothetical, it is not even clear that the student's family was in any danger, much less an imminent danger requiring immediate action on the part of the student. Moreover, the necessity defense does not apply where there are lawful alternative means of averting the greater harm. DRESSLER, *supra* note 81, at § 22.02. As recent events in troubled hot spots around the globe illustrate, the Red Cross and other international organizations can be utilized to ascertain the fate of loved ones in regions of conflict, not to mention foreign embassies and consulates. For these reasons, the defense of necessity would be unlikely to succeed in the hypothetical.

108. Rational-basis scrutiny is notoriously undemanding. All it requires is that the challenged law bear a "rational relation" to a legitimate governmental interest. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 491 (1955).

109. 355 U.S. 225 (1957).

110. 511 U.S. 600, 605 (1994).

to situations in which the prohibited conduct is neither intrinsically immoral nor illegal. That solution is to require proof that the defendant knew that his or her conduct was illegal. Unfortunately, current mens rea doctrine would not allow courts to recognize ignorance of the law as a defense.

To be sure, the Supreme Court has made inroads on *ignorantia juris neminem excusat*, the dogma that ignorance of the law is never an excuse. In *Ratzlaf v. United States*, for instance, the Court ruled that breaking up of a cash transaction worth $10,000 or more into smaller increments to avoid currency transaction reporting requirements is not a crime unless the defendant knew it was illegal to do so.[111] Similarly, *Liparota v. United States* ruled out conviction for improper use of food stamps absent knowledge that the defendant's use of food stamps was prohibited.[112]

An even clearer example of ignorance-of-law defenses is *Cheek v. United States*.[113] The case arose out of a prosecution of a taxpayer who, allegedly in the belief that federal tax laws did not apply to him, failed to file income-tax returns for years on end.[114] When he did happen to file returns, he claimed an excessive number of deductions, resulting in an underpayment of taxes. He was convicted of "willfully attempting" to evade his federal tax obligations and "willful[ly] failing" to file federal tax returns.[115] The Supreme Court reversed his conviction, ruling that a "good-faith misunderstanding and belief" as to the existence of a legal duty to pay taxes and file tax returns is a complete defense.[116] The reason is that failing to file income-tax returns and underpaying taxes is not blameworthy if attributable to ignorance or mistake of one's legal obligations under the tax code.

These cases provide ample precedent for using mens rea doctrine to require knowledge of the law in appropriate contexts. The cases, however, do not solve the hypothetical student's dilemma. The statute under which the student faces charges differs in two critical respects from the laws the Supreme Court has construed to make ignorance of the law a defense.

First, the mistake-of-law defenses that the Court has endorsed in cases like *Cheek* and *Liparota* involved mistakes of *noncriminal* law—that is, of legal rules that originate outside of the criminal code. In *Cheek*, for example, the duty to file tax returns and pay taxes came from

111. 510 U.S. 135, 140, 149 (1994).
112. 471 U.S. 419, 425 (1985).
113. 498 U.S. 192 (1991).
114. *Id.* at 192.
115. *Id.*
116. *Id.* at 202.

the Internal Revenue Code; in *Liparota*, the relevant body of law was the body of regulations prohibiting certain uses of federal food stamps.[117] In the hypothetical, however, the student is not ignorant or mistaken as to noncriminal law; indeed, as is often the case, there are no rules of noncriminal law that determine his or her criminal liability. Rather, the mistake is of the *criminal* law: the student did not know the charged conduct is a crime.

The fact that mens rea doctrine has occasionally been used to require knowledge of noncriminal law does not compel the conclusion that it can be used to require knowledge of the criminal law. Courts sharply distinguish between mistakes of criminal and noncriminal law. Though historically receptive to mistakes involving legal rules emanating from outside the criminal law,[118] courts remain notoriously hostile to claims that defendants did not know their conduct was a crime. As the Supreme Court declared in *Cheek v. United States*:

> The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common-law rule has been applied by the Court in numerous cases construing criminal statutes.[119]

Thus, even after *Liparota* and its progeny, the rule that ignorance of the criminal law is no excuse remains alive and well in the federal system.

Second, even if it might otherwise be possible to require knowledge of the criminal law, the hypothetical crime differs in an important respect from the situations in which ignorance of the law has been recognized as

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117. *Ratzlaf* is harder to peg for this purpose. The prohibition on structuring was originally contained in a statute that simply made structuring unlawful without specifying any penalties, civil or criminal, for violating it. *See* 31 U.S.C. § 5324(a)–(c) (2012). The case was brought under a separate catch-all statute applicable to "willful violations" of a variety of federal statutory requirements and administrative regulations. *See* 31 U.S.C. § 5322(a) (2012) (penalty for willful violations of "this subchapter or a regulation prescribed or order issued under this subchapter"). These facts might suggest that *Ratzlaf* involved ignorance or mistake of noncriminal law. On the other hand, the apparent absence of any noncriminal mechanism for enforcing the anti-structuring law (such as civil or administrative enforcement actions against violators) might cut in the opposite direction.

118. The traditional common law rule was that mistakes of noncriminal law are a defense to specific intent but not to general intent. *See, e.g.*, DRESSLER, *supra* note 81, § 13.02[D][2]–[3]. The Model Penal Code recognizes such mistakes as defenses whenever they are logically relevant to negate the mens rea required for conviction. MODEL PENAL CODE § 2.04(1) (AM. LAW INST. 1962).

119. 498 U.S. 192, 199 (1991) (citations omitted). *See* LAFAVE, *supra* note 6, § 5.6(d), at 408 (discussing the continued vitality of the rule that ignorance or mistake of criminal law is no defense). Even the Model Penal Code broadly disallows mistakes of criminal law: "Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of the offense is an element of such offense, unless the definition of the offense or the Code so provides." MODEL PENAL CODE § 2.02(9) (AM. LAW INST. 1962). The only defense the Code offers for mistakes of criminal law involves situations in which the government essentially caused the defendant to break the law, either by failing to publish the law in question or falsely assuring him or her that the offending conduct was lawful. *Id.* § 2.04(3)(a)–(b).

a defense. The hypothetical law is defined solely in factual terms: the defendant must have engaged in conduct (communicate with foreign nationals) while two circumstances exist (the call originated within the United States and was placed to a country in which American forces were engaged in military operations). There is no legal dimension to the definition of the crime.

This is in sharp contrast to the crimes at issue in *Liparota* and *Cheek*. In each case, the statute of conviction expressly defined the crime in terms that required a violation of some independent legal rule. For example, the statute at issue in *Liparota v. United States* specifically premised criminal liability on the use of food stamps in a manner that was not "authorized by [applicable statutes] or the regulations."[120] Likewise, in *Cheek*, the charged tax crimes could not be committed unless the taxpayer was "required under this title . . . or by regulations made under authority thereof to make a return"[121] or subject to "a[] tax imposed by [the Internal Revenue Code]."[122] By their own terms, and quite unlike the hypothetical telecommunications crime, these statutes specifically made criminal liability contingent upon proof of a violation of a free-standing legal rule.

Additionally, in several of the cases in which the Supreme Court made ignorance of the law a defense, the statutes contained an express mens rea term which made the defendant's knowledge of the law relevant. In several cases, the government not only had to prove a violation of a legal rule drawn from outside the criminal code, but also that the violation was "willful" in nature.[123] This is highly significant because "willfulness" is often interpreted in federal criminal statutes as requiring "'pro[of] that the defendant acted with knowledge that his conduct was unlawful.'"[124]

To be sure, the obstruction crime charged in *Arthur Andersen LLP v. United States* did not contain a willfulness requirement.[125] It did, however, require that efforts to persuade others to obstruct a federal

120. 471 U.S. 419, 420 (1985) (citing 7 U.S.C. § 2024(b)(1)).

121. 26 U.S.C. § 7203 (2012).

122. 26 U.S.C. § 7201 (2012).

123. To be guilty, the defendant in *Cheek* must have "willfully fail[ed]" to file a federal income tax return or "willfully attempt[ed]" to defeat a tax imposed by federal law. 26 U.S.C. § 7203 (2012); *id.* § 7201. In Ratzlaf v. United States, criminal penalties were available only if the defendant "willfully violate[d]" the statutory prohibition of structuring a cash transaction to evade a bank's currency transaction reporting requirements. 510 U.S. 135, 136 (1994); 31 U.S.C. § 5322(a) (2012). The same was true in Bryan v. United States, which involved a prosecution for "willfully violating" federal firearms laws. 524 U.S. 184, 186 (1998); 18 U.S.C. § 924(a)(1)(D) (2012).

124. *Bryan*, 524 U.S. at 192 (quoting *Ratzlaf*, 510 U.S. at 137). *See generally* Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341 (1998) (discussing cases interpreting the requirement of "willfulness" in federal criminal statutes).

125. 544 U.S. 696, 698 (2005).

investigation must be "knowingly . . . corrupt[]" in order to be unlawful.[126] It was this express (and rather inelegant, even by low congressional standards of draftsmanship) requirement that demanded proof of "consciousness of wrongdoing." As the Court explained, "'[c]orrupt' and 'corruptly' are normally associated with wrongful, immoral, depraved, or evil [acts]."[127]

These admittedly fine distinctions in the language of criminal statutes make all the difference to a mens rea selection methodology that operates within the legislative definition of crimes. In *Liparota v. United States*, the Court emphasized the presence of "a legal element in the definition of the offense" as the basis for its ruling that defendants cannot be convicted for misusing food stamps unless they knew their use of food stamps was illegal.[128] The clear suggestion is that the case would have come out the other way had Congress not defined the crime in terms that required a violation of food stamp regulations. Moreover, in *Ratzlaf, Cheek*, and *Bryan*, the Court explicitly invoked the statutory term "willfully" as the basis for its holding that the defendants could not be convicted unless they knew their conduct was illegal.[129] Again, the implication is that knowledge of the law would not have been required in any of these cases had Congress not included the term "willfully" into the definition of each crime.

To the extent the new approach prevents courts from allowing ignorance-of-law defenses to crimes that do *not* require proof of a legal element or "willful" or "corrupt" action, it will be severely hampered in

126. *Id.* (quoting 18 U.S.C. § 1512(b) (2012)).

127. *Arthur Andersen*, 544 U.S. at 705. Even so, some courts have treated statutory requirements of "corrupt" behavior as something akin to mere surplusage. In United States v. Alfisi, 308 F.3d 144, 150 (2d Cir. 2002), a divided panel of the Second Circuit rejected the defendant's argument that his payment of bribes to a federal health and safety inspector was not "corrupt," as the federal bribery law requires, because the inspector had extorted the payment from him as the price for an honest inspection. The panel dismissed as irrelevant the risk that payments "by those facing insistent extortionists" will be criminalized as bribes. *Id.* at 151. The dissent, by contrast, advocated an outcome similar to *Arthur Andersen*: "if an official threatens to abuse his position in a way that will harm an individual, and that individual then makes a payment to avoid the abuse, the individual does not act 'corruptly' because his intent is not to corrupt, but only to avoid the effects of corruption." *Id.* at 154–55 (Sacks, J., dissenting).

128. 471 U.S. 419, 425 n.9 (1985); *see also Ratzlaf*, 510 U.S. at 149 ("We do not dishonor the venerable principle that ignorance of the law generally is no defense to a criminal charge. In particular contexts, however, Congress may decree otherwise. That, we hold, is what Congress has done with respect to 31 U.S.C. § 5322(a) and the provisions it controls.") (citations omitted).

129. *See Bryan*, 524 U.S. at 196 (interpreting "the willfulness requirement of § 924(a)(1)(D)" as requiring "knowledge that the conduct is unlawful"); *Ratzlaf*, 510 U.S. at 137 ("To establish that a defendant 'willfully violat[ed]' the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful."); Cheek v. United States, 498 U.S. 192, 206–07 (1991) (holding that "it was error for the court to instruct the jury that petitioner's asserted beliefs that wages are not income and that he was not a taxpayer within the meaning of the Internal Revenue Code should not be considered by the jury in determining whether Cheek had acted willfully").

its stated goal of preventing punishment for morally blameless conduct. The more innocuous the prohibited conduct, the less likely it is that normally socialized individuals will expect the conduct to be subject to legal regulation, much less punished as a crime. In the hypothetical foreign-communications example, absent a widespread public awareness campaign, there would be no reason for anyone to think that placing an international call for legitimate purposes could be illegal.

As the hypothetical shows, obscure regulatory criminal laws create vexing problems for the task of preventing morally undeserved punishment. For such laws, the normal means by which citizens deal with legal uncertainty and avoid the coercive influences of the criminal law—namely, limiting their conduct well short of the point at which the line separating legal and illegal conduct starts to get hazy, or not engaging in the potentially illegal conduct at all—will be ineffective. After all, the strategy assumes that citizens can intuit that there may be a law applicable to their planned course of conduct. From the standpoint of preventing punishment without culpability, obscure regulatory crimes are problematic because the existence of such laws may very well come as a complete surprise to ordinary citizens, and understandably so, given how large, sprawling, and poorly defined federal criminal law is.[130]

These are the situations in which a special rule grounded on innocence-protection is needed most. Unfortunately, however, the new approach will likely be unavailing in those situations. As previously shown, Supreme Court case law provides no support for reading knowledge-of-law requirements into statutes which do not make guilt contingent in some way on either (1) the existence of a violation of an independent legal rule, or (2) "willfulness" or "corrupt" behavior on the part of the defendant. To the extent that mistake-of-law defenses are ruled out in other contexts, the central aspiration of mens rea doctrine—that there be a guaranteed path for acquittal for morally blameless conduct—will remain unfulfilled, and unfulfilled in precisely the situations in which moral innocence is most seriously threatened.

Lest this be thought to be a hypothetical problem only, consider the Seventh Circuit's decision in *United States v. Wilson*.[131] *Wilson* involved

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130. As Professor Julie O'Sullivan has pointedly noted:

> Any discussion of federal penal law must begin with an important caveat: There actually *is* no federal criminal "code" worthy of the name. A criminal code is defined as "'a systematic collection, compendium, or revision' of laws." What the federal government has is a haphazard grab-bag of statutes accumulated over 200 years, rather than a comprehensive, thoughtful, and internally consistent system of criminal law.

Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMONOLOGY 643, 643 (2012) (footnotes omitted).

131. 159 F.3d 280 (7th Cir. 1998).

a defendant who was, by any definition, a very bad man: he regularly beat his wife during their stormy marriage, and even threatened to kill her at one point during their separation.[132] Despite his obvious moral shortcomings, the conduct for which he was jailed, possession of a firearm while subject to an order of protection, was morally blameless under the circumstances.[133] After all, the protective order did not notify him that he could no longer possess firearms, and it was apparently legal under state law for him to remain in possession of his firearms after entry of the order.[134]

Although he evidently obeyed all provisions in the protective order, Wilson was prosecuted under a then-recently enacted federal statute making it a crime for anyone "who is subject to a court order" for the protection of an "intimate partner or child" to possess firearms.[135] As sensible as the law is, at least as applied to persons duly adjudged to be dangerous,[136] the Department of Justice had inexplicably made no effort to publicize the law to the state court judges responsible for issuing and enforcing the protective orders that trigger the federal firearms disqualification. Wilson apparently first learned of the disqualification when police stopped to provide him roadside assistance and saw his weapon, at which point he was arrested.

As with the hypothetical Afghani student previously discussed, Wilson admittedly knew all the pertinent facts. He knew he was subject to an order of protection, and he knew he possessed a firearm. The only thing he did not know was that upon entry of the protective order it automatically became illegal under federal law for him to possess firearms. The elements of the crime as defined by Congress were insufficient to give a normally socialized person notice that entry of a protection order, itself silent on the subject of gun possession, would make it illegal to retain guns that were previously lawfully acquired. The only potential ground of defense for Wilson was that he did not know it was illegal for persons subject to protective orders to possess firearms.

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132. *Id.* at 280.

133. Recall that mens rea doctrine requires courts to look to the blameworthiness of the charged *conduct* and not of the *offender*. *See supra* note 48.

134. *Wilson*, 159 F.3d at 290.

135. 18 U.S.C. § 922(g)(8) (2012). Section 924, which provides the penalties for violations of section 922, makes it a felony, punishable by up to ten years in prison, to "knowingly violate" section 922(g)(8). *Id.* § 924(a)(2) (2012).

136. Under federal law, a finding of dangerousness is not a prerequisite to forfeiture of the right to possess firearms. All that matters is that, after notice and a hearing, a protective order has been entered which "by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury." 18 U.S.C. § 922(g)(8)(c)(ii) (2012); *see also* United States v. Emerson, 270 F.3d 203, 213 (5th Cir. 2001) (rejecting "the argument that section 922(g)(8) requires that the predicate order contain an express judicial finding that the defendant poses a credible threat to the physical safety of his spouse or child.").

In *Wilson*, Chief Judge Richard Posner astutely grasped the danger of punishment without culpability. He began with a strong reaffirmation of the importance of moral blameworthiness in the criminal law:

> It is wrong to convict a person of a crime if he had no reason to believe that the act for which he was convicted was a crime, or even that it was wrongful. This is one of the bedrock principles of American law. It lies at the heart of any civilized system of law.[137]

He recognized that ignorantia juris is also an established principle, but concluded that, in cases of conflict, that "maxim of expedience" had to yield to the "bedrock principle" that morally blameless conduct should not be subject to punishment.[138] Given that Congress provided criminal penalties only for "*knowing* violations" of the federal firearms disqualification,[139] Posner would have construed the law to require proof that "[Wilson] knew that he was committing a crime."[140]

Unfortunately for Wilson, however, the panel majority saw matters very differently. In its view, the controlling legal principle was the "traditional rule in American jurisprudence . . . that ignorance of the law is no defense to a criminal prosecution."[141] Knowledge of the law could be required only in the context of "'highly technical statutes,'" such as the tax code, that might easily be misunderstood by the regulated public.[142] No such knowledge was required in situations, such as Wilson's, where the only problem is that the defendant was "unaware" of what the criminal law required.[143] To convict, the majority concluded, it was enough that Wilson knew that facts that constituted the violation.

Wilson illustrates some of the key limitations inherent in existing mens rea doctrine. The doctrine works well when the crime is defined in terms of behavior that normally socialized individuals would suspect is immoral or illegal. In that event, the mens rea requirement accomplishes its purpose simply by ensuring that convicted offenders will have understood enough about the nature of their conduct and the attendant circumstances to appreciate the wrongfulness of their actions. The

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137. *Wilson*, 159 F.3d at 293 (Posner, C.J., dissenting).

138. *Id.* (Posner, C.J., dissenting).

139. 18 U.S.C. § 922(g)(8) (2012) (emphasis added).

140. *Wilson*, 159 F.3d at 293 (Posner, C.J., dissenting). Note that Posner went beyond requiring knowledge of the law and insisted on proof that the defendant "knew that he was committing *a crime*." *Id.* (emphasis added). In doing so, he may have required too much culpability. For moral blameworthiness to exist, Wilson need merely have known that he was committing an illegal act as opposed to a crime. Where the charged conduct is illegal only because it is a crime, then knowledge of illegality is equivalent to knowledge of criminality. This, however, is not invariably so, as *Wilson* itself shows: the prohibition on firearm possession by persons under orders of protection is set forth in a statute other than the statute providing criminal penalties. *See supra* note 135.

141. *Id.* at 288.

142. *Id.* at 295 (Posner, C.J., dissenting) (quoting *Bryan*, 524 U.S. at 194).

143. *Id.* at 289.

approach does not work in cases like *Wilson*, in which the prohibited conduct is morally innocuous activity that one would not expect to be illegal. In these cases, even high levels of mens rea, such as purpose and knowledge, as to the factual elements of the crime will fail to guarantee blameworthiness.

The difficulty, in short, is that the right answer in *Wilson* was wrong under existing mens-rea doctrine. The *Wilson* majority was correct that statutes prohibiting "knowing" (as opposed to "willful") violations of law are read as requiring only awareness of the facts that constitute the violation, as opposed to the violation itself.[144] In addition, federal mens-rea doctrine provides no support whatsoever for reading knowledge-of-law requirements into statutes, such as section 922(g)(8), that neither demand proof of a violation of an independent legal rule as an actus reus element nor require "willfulness" or "corrupt" behavior on the part of the defendant. These doctrinal deficiencies are serious because, in cases such as *Wilson*, they rule out the only mens rea requirement that can prevent punishment without culpability—that is, knowledge of illegality.[145]

B. IMPLIED PRECLUSION OF NECESSARY MENTAL STATES

Another serious limitation in current mens rea doctrine is that heightened mens rea requirements can be derailed by fairly weak inferences of congressional intent. Clearly, as long as mens rea selection operates at the level of statutory interpretation, courts will be unable to override clear legislative choices concerning the mens rea that is sufficient for conviction. Even so, the Supreme Court is too quick to infer that Congress intended to preclude mens rea options that may be essential to prevent morally undeserved punishment.

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144. *See* Bryan v. United States, 524 U.S. 184, 193 (1998) (reaffirming the view that "unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense."). One could argue, as Chief Judge Posner did in *Wilson*, that "knowing violation" can be construed to required knowledge of the law where necessary to avoid conviction for morally blameless conduct. That argument, though sensible, is hard to reconcile with *Bryan*'s insistence that exceptions to the usual construction of "knowing violations" as requiring knowledge of the facts constituting the offense are warranted only when "the *text* of the statute" requires them. *Id.* (emphasis added). Nothing in the text of the firearms statutes, fairly read, rules out the usual construction.

145. Professor Jeffrey Meyer has collected lower court decisions involving other firearms offenses, as well as immigration and environmental crimes, which he views as allowing punishment without culpability. *See* Meyer, *supra* note 12, at 161–75. I do not discuss these decisions here because many of them seem indefensible even under current doctrine. *Wilson* is different in this respect because it *is* faithful to the current method and thus illustrates the shortcomings of the doctrine in accomplishing its stated goal. The Posner dissent was right that blameworthiness cannot be guaranteed in cases like *Wilson* without proof that the defendant knew he or she had lost the right to possess firearms upon entry of a protective order, yet the majority was also right that existing doctrine provided no path to that normatively correct outcome.

Consider, for example, the decision in *United States v. Yermian*.[146] There, the defendant was prosecuted under the false statements statute, which provides that "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of Government of the United States, knowingly and willfully . . . makes any materially false . . . statement" shall be guilty.[147] The question presented in *Yermian* was whether "knowledge" should be adopted as the mens rea for the jurisdictional element, in which case ignorance of the existence of federal jurisdiction would be a defense.

Under the current approach to mens rea selection, the proper answer, at least as the Justices framed the question,[148] would be to require some level of mens rea concerning existence of federal jurisdiction. To be sure, jurisdictional elements typically do not require mens rea, the theory being that they do not serve to define the wrongfulness of the prohibited act but merely tie the exercise of criminal jurisdiction in particular cases to a constitutional basis of authority.[149] Nevertheless, the false statements statute is a special case in which mens rea should be required. As the dissent argued, unless knowledge that a false statement implicates federal jurisdiction is a prerequisite for conviction, any lie that happens to make its way to a federal official is a felony, no matter how far removed from official proceedings.[150] The only sure way to forestall that sweeping result is to require proof that the accused knew his or her lie was within the jurisdiction of a federal agency.

The key point to note is that the *Yermian* majority did not consider this interpretation as even a *potential* reading of section 1001. The majority concluded that the structure of the statute impliedly precluded

146. 468 U.S. 63 (1984).

147. 18 U.S.C. § 1001(a) (2012).

148. The Justices did not consider the fact that section 1001 requires the defendant to act "willfully" as well as "knowingly." *See* 18 U.S.C. § 1001 (2012) (providing that the false statements have to be made "knowingly *and willfully*") (emphasis added). The fact that "willfulness" is also required is highly salient because, as previously noted, "willfulness" is often understood to require a bad purpose to act illegally. *See Bryan*, 524 U.S. at 191–92 ("[A] 'willful' act is one undertaken with 'bad purpose.'"). Apparently, the Justices in *Yermian* assumed that, when conjoined with "knowledge" under section 1001, "willfulness" was mere surplusage that required no added culpability.

149. As *Yermian* noted, "[j]urisdictional language need not contain the same culpability requirement as other elements of the offense." 468 U.S. at 68. The jurisdictional nature of the element, however, is not dispositive. Indeed *Yermian* itself left open the possibility that the jurisdictional element in the false statements offense might require some level of mens rea other than "knowledge" (which it found to be impliedly precluded). *Id.* at 74–75, 75 n.14. Thus, *Yermian*'s statement that jurisdictional elements may not be subject to usual mens rea requirements is best understood as a "default rule" only. *See* Torres v. Lynch, 136 S. Ct. 1619, 1631 (2016).

150. *See Yermian*, 468 U.S. at 82 (Rehnquist, J., dissenting) (noting that not requiring "knowledge" of federal jurisdiction "criminalize[s] the making of even the most casual false statements so long as they turned out, unbeknownst to their maker, to be material to some federal agency function").

"knowledge" as the mens rea for the jurisdictional element. The jurisdictional element was set off by commas from the rest of the crime, as to which Congress had expressly specified "knowledge" as the mens rea, and the statutory "knowledge" requirement followed rather than preceded the jurisdictional element. These structural features of section 1001, the majority concluded, "*unambiguously* dispense[d] with" a "knowledge" requirement for the jurisdictional element.[151] Thus, even if knowledge of federal jurisdiction was necessary to exempt innocent conduct from the statute's reach, the majority considered itself powerless to demand such proof.

It is striking just how weak the basis for the implied-preclusion argument was in *Yermian*. It hardly seems likely that Congress wrote section 1001 in the manner that it did in order to signal a definitive view about what the mens rea is for the jurisdictional element. Most likely, Congress was making sure that defendants will not face conviction unless they knew their statements were false, without addressing the mens rea required for other elements of the crime.[152] If, as *Yermian* demonstrates, legislative intent to preclude mes rea options is easily inferred from the wording and structure of criminal statutes, then implied preclusion will be a potential outcome in many cases in which a criminal statute contains an express mens rea requirement.

Although *Yermian* predated the current mens rea methodology, subsequent cases endorse the implied preclusion of mens rea terms. *Bates v. United States*[153] is a case in point. The defendant was convicted of "knowingly and willfully misapplying" federally insured student loan funds, in violation of 20 U.S.C. § 1097(a).[154] He argued acquittal was required absent proof that he intended to defraud the federal government. The Supreme Court disagreed, citing a contemporaneously enacted provision of section 1097 (subsection (d)).[155] The fact that, unlike subsection (a), subsection (d) specifically required proof of "intent to defraud the United States" implied that Congress intended not to treat fraudulent intent as an element of the section 1097(a) offense.[156] Therefore, even if such intent might be necessary to exempt innocent

151. *Id.* at 69 (emphasis added).

152. As Professor Dan Kahan has explained, "criminal statutes typically emerge from the legislature only half-formed and must be completed through contentious, norm-laden modes of interpretation . . . ." Kahan, *supra* note 10, at 153.

153. 522 U.S. 23 (1997).

154. *Id.* at 29.

155. *Id.*

156. *Id.* at 29–30.

conduct from punishment under subsection (a), "intent to defraud" was not an available mens rea option.[157]

Implied-preclusion analysis also took center stage (with a vengeance) in *Dean v. United States*.[158] The case involved a robber whose gun accidentally fired as he removed cash from a bank teller's drawer.[159] Apart from the unintended discharge of his weapon, he faced a five-year mandatory minimum for "using or carrying" a firearm during and in relation to a crime of violence.[160] By virtue of a statutory sentence enhancement applicable "if the firearm is discharged,"[161] the applicable mandatory minimum doubled to ten years. The defendant contended that an implied mens rea requirement of "purpose" should be read into the "discharge" element. The Court disagreed. Noting that another sentence enhancement provision (for "brandishing" the firearm) was expressly defined to require intentional conduct by the defendant, the Court concluded that a mens rea of "purpose" could not be read into the "discharge" enhancement.[162]

Dean went farther than prior implied-preclusion cases in one important respect. Prior implied-preclusion cases deemed legislative specification of certain mental states in other statutes (*Bates*) or elsewhere in the same statute (*Yermian*) as precluding the Court from reading those same mental states into parts of the offense for which Congress required no mens rea. *Dean*, however, concluded that Congress impliedly precluded *any* mens rea requirement for the "discharge" element in section 924(c), resulting in strict liability on an element essential to the description of the prohibited act (namely, discharging a firearm during a qualifying crime). The Court explained:

> Congress's use of the passive voice [in the statutory phrase "if the firearm is discharged"] further indicates that subsection (iii) does not require proof of intent. The passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or

157. The *Bates* Court added alternatively that intent to defraud was unnecessary to avoid ensnaring innocent conduct under subsection (a). *See id.* at 31, 31–32, 32 n.7 (finding that, by virtue of the express statutory requirement of "willfulness," "'[i]nnocent . . . maladministration of a business enterprise' or a use of funds that is simply 'unwise' does not fit within [the statute]") (citations omitted). For present purposes, the point is simply that, apart from whatever additional culpability the "willfulness" requirement might demand, the implied-preclusion analysis would have prevented the Court from reading an intent-to-defraud requirement into section 1097(a) even if it *had* been essential to prevent morally undeserved punishment.

158. 556 U.S. 568 (2008).

159. *Id.* at 570.

160. *Id.* at 578 (Stevens, J., dissenting) (citing 18 U.S.C. § 924(c)(1)(A)(i) (2012)).

161. U.S.C. § 924(c)(1)(A)(iii).

162. *Dean*, 556 U.S. at 572–73.

> culpability. It is whether something happened—not how or why it happened—that matters.[163]

As with *Yermian*, the evidence of legislative intent to preclude mens rea in *Dean* was remarkably thin. The happenstance that the discharge enhancement was framed in passive terms ("if the firearm is discharged"), as opposed to the active voice ("if the defendant discharges the firearm"), is an awfully weak basis on which to leap to the conclusion that Congress displaced the usual rule that mental culpability is required for all material elements of a federal crime. Indeed, given that a firearm can only be discharged by the person wielding it, the statement "if the firearm is discharged" is not materially different in meaning from "if the firearm is discharged *by the defendant*," a phrasing that would negate the Court's suggestion that it is irrelevant "how or why [the discharge] happened."[164]

As these cases demonstrate, implied preclusion substantially reduces the range of cases in which mens rea doctrine can prevent morally undeserved punishment. Indeed, the use of heightened mens rea requirements might well retain full vitality only in three contexts: (1) where statutes are completely silent as to mens rea (such as *Staples* and *Elonis*); (2) where all actus-reus elements essential to the blameworthiness of the act are preceded by an express statutory mens rea term (such as "knowingly" in *Liparota*); or (3) where the issue is the meaning of an express mens rea term (such as "willfully" in *Ratzlaf* and *Bryan*). In other cases, the government could plausibly argue that heightened mens rea requirements should be deemed impliedly precluded, as they were in *Yermian, Bates*, and *Dean*.[165]

C. SEPARATION-OF-POWERS CONFUSION

The previous sections of this Part discussed two limitations inherent in the present method of mens rea selection. The first is that, before treating knowledge-of-law requirements as available responses to potential punishment without culpability, the Court will demand some

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163. *Id.* at 572 (citations omitted).

164. *Id.* Indeed, if the Court's suggestion that it is irrelevant "how or why" a firearm is discharged is taken literally, the robber in *Dean* would have received the enhanced sentence even if *the teller* had snatched the gun and fired it at him.

165. In one case, implied preclusion worked against the prosecution. In *Elonis v. United States*, 135 S. Ct. 2001, 2003 (2015), the government argued that heightened intent requirements should not be read into 18 U.S.C. § 875(c) because the statute provided that other prohibited threats had to be made with intent to extort. The Court rejected the claim, reasoning that the presence of express "intent to extort" requirements in other portions of the statute merely indicated that § 875(c) was not limited to extortionate threats and thus left open other implied intent requirements. *Id.* at 2008. In most cases, however, implied preclusion serves, as it did in *Yermian, Bates*, and *Dean*, to rule out heightened mens rea requirements sought by criminal defendants.

textual indication that Congress intended to require some degree of culpability as to the legality of the defendant's conduct. The second is that the Court will be fairly quick to rule out a mental element, no matter how essential to guarantee culpability, if the wording or structure of a crime might suggest that Congress did not want that element. In both cases, the project of limiting the reach of criminal statutes in accordance with moral blameworthiness takes a back seat to inferences of presumed legislative intent. Why?

The answer lies in the fact that the prevailing methodology rests on a fundamental contradiction. The first step of the mens rea analysis, at which the Court seeks to identify the potential for morally undeserved punishment, operates *outside* of the literal definition of the crime. The Court decides whether conduct encompassed within the literal terms of a criminal law might nonetheless be regarded as "innocent" or "blameless." Quite inconsistently, however, the important second stage, devoted to fashioning the heightened standards of mental culpability necessary to guarantee blameworthiness, operates *within* the definition of the offense. That is to say, the Court looks to the wording of the statute for clues about whether or not Congress would have accepted additional, more demanding mens rea requirements. The consequence of the Supreme Court's literalism at the second stage is that, in many instances in which the definition of a federal crime might well encompass blameless conduct, courts may be unable to take ameliorative action.

Simply put, the Court is vacillating between two competing visions of separation of powers in criminal law. The first is the textualist version of the standard "faithful agent" model of statutory interpretation, and the second is what I describe as the "cooperative" or "partnership" model. The efficacy of mens rea doctrine in preventing punishment without culpability depends critically on which model the Court ultimately chooses. My claim is that the cooperative/partnership model is the right model for mens rea selection, but I defer argument in support of the normative claim until Part IV. For now, the goal is simply to sketch the two different conceptions of the judicial role and to show the significance for mens rea doctrine of the choice between the two models.

1. "Faithful-Agent" Textualism

Under the familiar "faithful-agent" model of statutory interpretation, as Professor Cass Sunstein has explained, "judges are agents or servants of the legislature," and their charge is to "discern and apply a judgment made by others, most notably the legislature."[166] This

166. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989).

view, though commonplace in statutory construction, would seem to be even more significant in the context of federal criminal statutes. The supremacy of Congress, and the illegitimacy of judicial crime creation, is reflected, as Professor John Calvin Jeffries, Jr. has demonstrated, in three bedrock principles of criminal law: the principle of legality, the rule of lenity, and the void-for-vagueness doctrine.[167] The normal emphasis on courts being faithful agents of the legislature, combined with special principles of judicial deference to the legislative role in crime definition, seemingly adds up to an especially narrow role for the federal courts in the interpretation of federal criminal statutes.

The judicial role is narrower still when textualism is factored into the faithful-agent model. A strict textualist would argue that it is for Congress alone to determine when conduct encompassed within the literal terms of a federal criminal statute should be exempted from criminal liability.[168] The role of the courts is merely to determine, using applicable canons of statutory construction, whether the charged conduct fits within the terms of the applicable statute. If it does, then, barring any applicable constitutional challenges or statutory defenses, the prosecution should be allowed to proceed.

Seen in light of the postulates of faithful-agent textualism, the limitations inherent in current mens rea doctrine are readily explained. Congress, if it wishes, can make criminal liability dependent on a violation of some other rule of law (such as food-stamp regulations in *Liparota* or the tax code in *Cheek*). When it does so and writes a "legal element" into the definition of a crime,[169] it presumptively knows from prior precedent that all material elements of the crime, *including the legal element itself*, will require mens rea. Similarly, when Congress includes "willfulness" or "corrupt" behavior as an element of a crime, it presumably does so in full awareness that courts "usually" construe those terms as making ignorance of the law a defense.[170] In circumstances such

167. Jeffries, *supra* note 13, at 201–22. The principle of legality posits that the legislature, as the politically accountable branch of government, is the only appropriate institution in a democratic society to make the fundamental policy choice concerning what should, and should not, be a crime. Jeffries, *supra* note 13, at 202. Similarly, the rule of lenity requires (or at least purports to require) courts to construe ambiguous criminal statutes narrowly in favor of the defendant. Jeffries, *supra* note 13, at 198. Finally, vagueness doctrine limits enforcement of statutes which are so indefinite and susceptible to abuse as to shift the legislative crime-definition authority to law enforcers and, ultimately, judges. Jeffries, *supra* note 13, at 197.

168. As Justice Thomas wrote for the Court in United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 490 (2001), the enforcement of non-statutory defenses is "controversial" because "under our constitutional system . . . federal crimes are defined by statute rather than by common law."

169. Liparota v. United States, 471 U.S. 419, 425 n.9 (1985).

170. *See* Bryan v. United States, 524 U.S. 184, 191–92 (1998) (noting that "willfulness" is "usually" construed to require a bad purpose to commit an illegal act); *see also* Arthur Anderson LLP v. United

as these, the statutory text itself may be read as suggesting that Congress intended to demand proof of consciousness of wrongdoing, and the Court, as a faithful agent of Congress, is quite willing to follow the perceived legislative command.

On the other hand, a Court committed to faithful-agent textualism will not impose heightened mens rea requirements when the text does not invite such requirements. When Congress elects to define a crime without reference to any legal element, and omits terms that might be taken to require knowledge of illegality, the inference is that Congress did not intend to require any mens rea as to the legality of the prohibited conduct. The presumption here is that Congress endorsed the maxim that ignorance of the law is no excuse. In light of the textualist faithful-agent model, it makes sense that the Court would not consider itself free in this context to condition criminal liability on proof that the defendant knew that his conduct was illegal.

The same goes for implied preclusion. Where Congress prescribes a particular mens rea requirement for one crime but not another closely related crime, a textualist-minded judge will readily infer that the omission was intentional.[171] After all, the fact that the mens rea was written into one crime shows that Congress knew how to impose that mens rea requirement when it wanted. To be sure, there might be any number of explanations for the omission of the mens rea contained in one statute from a related provision, which is one reason why "expressio unius" (sometimes called the "negative-implication canon") is regarded as "controversial" among legislation scholars.[172] For a Court, however, that is both textualist and highly deferential to Congress, the allure of implied preclusion is understandably hard to resist.

It is thus easy to explain the limitations embedded in the prevailing method of mens rea selection in terms of the textualist, faithful-agent model of the separation of powers. The hard part is seeing the justification for the project of enforcing implied mens rea requirements on the postulates of that model. If the textual literalism which drives the analysis at the mens rea selection stage were applied to the antecedent question of whether it is proper for courts to create and enforce mens rea requirements not prescribed by Congress, it would be difficult to answer in the affirmative.

Given that Congress knows how to prescribe mens rea requirements, and does so with regularity, a straightforward case can be made on the

States, 544 U.S. 696, 705 (2005) (stating that "'[c]orrupt' and 'corruptly' are normally associated with wrongful, immoral, depraved, or evil [acts]").

171. *See, e.g.*, John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1724–25 (2004).

172. *Id.* at 1724, 1724 n.223.

postulates of faithful-agent textualism that courts have no business requiring mens rea for crimes or elements as to which Congress required no mental culpability. To do so, after all, is to propel the courts to some degree into the legislative role of deciding what should and should not be a crime. In essence, by creating implied mens rea requirements essential to conviction, courts are exercising the power to decriminalize conduct that, judging from the statutory text alone, Congress seemingly intended to condemn as criminal.

To be sure, the requirement of mens rea has a long distinguished lineage in the common law. The "guilty mind" requirement has been an established feature of Anglo-American criminal law for centuries.[173] Within the federal system, it has been settled judicial practice for decades that intent to impose strict liability will not be inferred from legislative silence and that federal crimes require mens rea designed to prevent morally undeserved punishment.[174] These facts surely put Congress on notice that a morally culpable (or "guilty") state of mind is an essential feature of criminal liability and will be prescribed by the courts when omitted from the legislative definition of the offense. Consequently, judicial authority to create and enforce implied mens rea requirements in federal cases seems beyond serious dispute.

A strict adherent of faithful-agent textualism might nonetheless recoil at the prospect of judges requiring mens rea in contexts where Congress failed to do so. The argument would be that, by using judicially created mens rea requirements to exempt from punishment conduct which satisfies the literal definition of a federal crime, the Court is making policy choices that do not flow from statutory text. From the standpoint of faithful-agent textualism, Congress alone is institutionally competent to make such choices, and its choices must be respected by the courts, not supplemented or overridden.

In another context, the Supreme Court has signaled a willingness to take the postulates of the textualist faithful-agent model to their logical extreme. In *United States v. Oakland Cannabis Buyers' Cooperative*,[175] a case involving whether necessity is a valid defense to federal drug charges, the majority opinion contained sweeping dicta questioning the propriety of judicial enforcement of necessity (and, by extension, other non-statutory criminal defenses). Absent codification by statute, the Court viewed non-statutory defenses as "controversial" because "federal crimes are defined by statute rather than by common law."[176] Just as

173. *See supra* note 6.
174. *See, e.g.*, United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978).
175. 532 U.S. 483 (2001).
176. *Id.* at 490.

crime-definition questions are for Congress to decide, the question "'[w]hether, as a policy matter, an exemption should be created [from a criminal statute] is a question for legislative judgment, not judicial inference.'"[177]

Ultimately, the Court did not decide the propriety of non-statutory criminal defenses and rested on a narrower ground for decision,[178] but it is difficult to imagine a more striking illustration of faithful-agent textualism at work in federal criminal law. If longstanding congressional acquiescence in defenses as deeply rooted in the common law and prevailing judicial practice as necessity does not justify continued judicial enforcement of those defenses, then the longstanding practice of reading judicially created mens rea requirements into statutes silent on mens rea is equally suspect. After all, the purpose and effect of reading mens rea requirements into criminal statutes is to create, on judicial initiative alone, a defense for persons lacking the state of mind deemed essential by the courts.

2. *The "Cooperative/Partnership" Model*

To the extent the Court continues to ignore the radical suggestion in *Oakland Cannabis Buyers' Cooperative*, and remains in the business of enforcing judicially created mens rea requirements, it must be because the Court is not fully committed to the textualist faithful-agent model in this context. Under a very different conception of separation of powers, which I call the "cooperative/partnership model," crime definition is not left solely to Congress. The initial responsibility for determining what should be punishable as a crime and defining the prohibited act is for Congress. Once the initial criminalization decision is made, however, the judiciary has an important lawmaking role to play in rounding out the definition of statutory crimes. Thus, on this model, crime definition is not the exclusive responsibility of Congress but rather a responsibility that is *shared* by the legislature and judiciary alike, with each cooperating, in their respective ways, to achieve the legislative objectives while keeping criminal liability within appropriate bounds.

The cooperative/partnership model has evolved into a kind of institutional division of labor between Congress and the courts in criminal cases. Congress focuses primarily on defining the prohibited act and grading the offense. The definition of the mental element of federal

177. *Id.* (quoting United States v. Rutherford, 442 U.S. 544, 559 (1979)).

178. As the Court unanimously ruled, the Controlled Substances Act clearly shows that Congress rejected the notion that marijuana and other "Schedule I" drugs have any accepted use that would justify the manufacture or distribution of such drugs outside of certain federally approved research programs. *Id.* at 491.

crimes, however, is left principally to the courts. Naturally, when Congress has selected a particular mens rea option, the choice is binding upon the courts. Courts are otherwise impliedly delegated the power to flesh out the mental elements of the crime in light of background principles of the criminal law, including the notion that "an injury can amount to a crime only when inflicted by intention."[179]

The pattern of congressional overrides of Supreme Court decisions interpreting federal criminal statutes supplies strong evidence of this dynamic. It has long been known that Congress is far more likely to override narrow interpretations of criminal statutes than expansive ones.[180] What has eluded notice is that certain kinds of narrow interpretations are more likely to be overridden than others. It is decisions limiting the *actus reus* of federal crimes (and thus restricting prosecutorial charging authority) that are overridden most frequently. Congress, however, only rarely overrides decisions imposing heightened mens rea requirements. For example, from the time of *Liparota* to the present, Congress has acquiesced in all but one of the Supreme Court decisions imposing heightened mens rea requirements.[181]

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179. Morissette v. United States, 342 U.S. 2476, 250 (1952). There is an obvious parallel between the cooperative/partnership model and the familiar administrative law concept of *"Chevron* deference." In administrative law, the presence of gaps in statutes committed to the administration of federal agencies is understood as an implicit congressional delegation of lawmaking power authorizing the agencies to fill those gaps as they see fit within the broad bounds of permissible textual and policy choices. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984). The cooperative/partnership model in federal criminal law operates quite similarly, with judges rather than agencies assisting Congress in the making of federal law. When, as is often the case, Congress fails to specify the mens rea required for each element of the offense, the Court essentially treats it as a delegation of authority to the judiciary to flesh out the unspecified standards of mental culpability in the manner it deems appropriate, as opposed merely to giving meaning to the precise words used in the text. For a provocative exploration of the implications of *Chevron* for federal criminal cases, see Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996).

180. Based on a study of congressional overrides of statutory interpretation decisions by the Supreme Court, Professor William Eskridge found that:

> [W]hen [criminal law decisions] are overridden, they follow a predictable pattern: the Court's relatively libertarian positions are often overruled by law-and-order overrides that reset the legal rule in favor of prosecutors and the state. The results are even more dramatic for habeas corpus overrides, all fifteen of which went against prisoners, and in favor of prosecutors and the states, in the period we studied (1967–2011).

Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1398–99 (2014).

181. *Ratzlaf v. United States* is the exception that was changed by statute. After *Ratzlaf* was decided, Congress left in place the law there at issue but enacted a new one, identical to the prior version, minus the express "willfulness" requirement construed in *Ratzlaf*. *See generally* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. 103-325, 108 Stat. 2160 (1994). Apart from *Ratzlaf*, Congress has allowed to stand *all* of the Court's decisions imposing stricter mens rea standards. *See* Christiansen & Eskridge, *supra* note 180, app. 1 (listing overridden decisions by subject matter).

The fact that Congress is considerably more likely to override decisions narrowing the actus reus than decisions imposing heightened mens rea requirements is highly significant. It suggests that Congress jealously guards its primacy in defining the conduct element of federal crimes but recognizes shared judicial responsibility for defining the mental element of crimes. Stated differently, Congress views the courts as partners in the effort to define federal crimes but expects judges to focus their efforts on the mental element while deferring to legislative choices concerning the conduct element. Viewed through the lens of the cooperative/partnership model, then, the Court's willingness to assist Congress by fleshing out the incompletely specified mental element of federal crimes is both defensible and sound.

As a consequence, it is to be expected that the two stages of the prevailing method of mens rea selection are working at cross-purposes. Those stages are based on two very different, and mutually exclusive, conceptions of the proper role of the courts in federal crime definition. The first step of the new method, which instructs courts to use implied mens rea requirements to carve blameless conduct out of the reach of criminal statutes, assumes the cooperative/partnership model: courts can limit the reach of federal criminal laws through judicially fashioned mens rea requirements, utilizing authority Congress has implicitly delegated for this purpose.

At the second stage of the mens rea analysis, however, the paradigm abruptly shifts to faithful-agent textualism. In deciding what mens rea requirement to impose, courts must pay close attention to potential clues in the statutory text concerning legislative intent. Courts cannot impose knowledge-of-law requirements without some textual indication that Congress wanted to predicate the defendant's guilt on consciousness of wrongdoing. Additionally, courts often infer from the presence of express mens rea requirements and the phrasing of statutes legislative intent to preclude judicial adoption of mens rea requirements essential to prevent punishment without culpability. Little wonder, then, that the second stage of the analysis is limited in ways that prevent courts from fully accomplishing the doctrine's goal of limiting punishment in accordance with desert.

IV. TOWARDS *REAL* INNOCENCE-PROTECTION

The analysis so far has been somewhat gloomy: yes, the Supreme Court has identified a real problem (incompletely defined federal crimes that all too often fail to preclude the potential for morally unjustified punishment), and, yes, the Court has chosen an appropriate vehicle (the mens rea requirement) to try and solve the problem, but, for a variety of reasons, that vehicle simply will not get the Court where it wants to go.

This Part identifies several reforms that will improve the effectiveness of mens rea doctrine in accomplishing its important goals.

Note, at the outset, these reforms would only make mens rea doctrine better at preventing punishment that is not morally deserved. They would not, however, make the doctrine perfect. Only strictly enforced constitutional standards can have any hope of guaranteeing that punishment will, in all cases, be limited according to blameworthiness. As long as constitutional law continues to fail to provide robust guarantees against unjust punishment, it is all the more imperative that mens rea doctrine effectively protect "innocence."

A. REDEFINING "INNOCENCE"

The Supreme Court should build upon the example of *Elonis v. United States*[182] and declare, in no uncertain terms, that exempting morally blameless conduct from punishment is not the only goal of mens rea doctrine. A separate, equally vital goal is to ensure that the sanctions available in the event of conviction will be proportional to the blameworthiness of the prohibited act. Imposing punishment in excess of blameworthiness is just as offensive in principle as convicting blameless conduct because, either way, courts are imposing punishment that is not justified by the culpability of the offender's act. This is what real innocence-protection entails, and it is the kind of "innocence" that mens rea doctrine has traditionally served to protect against conviction.

To have any hope of precluding morally undeserved punishment, courts must do more than simply adjust mens rea requirements to guarantee some modicum of moral blameworthiness. It is necessary to match up the level of culpability for a particular offense with the maximum penalties applicable to that offense. Crimes for which Congress has prescribed severe penalties should require correspondingly high levels of mens rea (such as purpose or knowledge) so that offenders will be seriously blameworthy. Only then will convicted offenders be morally deserving of the stiff penalties federal law routinely affords.

It would be relatively easy to build proportionality into the prevailing mens rea methodology. Courts should identify, at the first stage of the analysis, the actus reus and mens rea elements set forth in the statute defining the offense, as well as any additional elements the prosecution accepts as essential for conviction. The next step is to attempt to hypothesize blameless conduct that would satisfy all elements of the crime. If it is possible to imagine blameless conduct that would violate the statute in question, courts should impose an additional mens

182. 135 S. Ct. 2001 (2015).

rea requirement sufficient to exempt all potential blameless conduct from the reach of the statute *and* ensure that any blameworthy conduct within its reach is sufficiently blameworthy to warrant the penalties it affords. So far, with one caveat, this is the same analysis the Supreme Court currently employs.[183]

It is at this point that an analysis aimed at preventing morally undeserved punishment in all of its forms significantly diverges from the existing analytical method. Even if heightened mens rea requirements are unnecessary in a particular context to exempt blameless conduct from the scope of a statute, the mens rea analysis is not yet finished. Instead, in situations where culpability is already guaranteed by the definition of the crime, courts must then ask the proportionality question: is the conduct that violates the statute blameworthy enough, as a moral matter, to warrant the penalties authorized by statute? If not, then the Court should impose an additional mens rea requirement to ensure that the sanctions available upon conviction will be proportional to the gravity of the offender's crime.

To see the critical difference a proportionality-based approach would make, consider *Dean v. United States,*[184] the case involving a bank robber whose gun accidentally (and, thankfully, harmlessly) fired inside the bank. Clearly, mens rea was not required on the "discharge" element to avoid punishment without culpability. He was, after all, intentionally engaged in the commission of a bank robbery and brandishing a loaded firearm in the commission of a violent crime, both seriously blameworthy acts. Nevertheless, from the standpoint of proportionality of punishment, it makes no sense to subject bank robbers whose weapons accidentally discharge to the *same* ten-year mandatory minimum applicable to criminals who purposely threaten grave injury or death by *intentionally* firing their weapons. A requirement that the defendant must have purposefully discharged a firearm in order to receive the strict ten-year mandatory minimum would have reserved the "discharge" enhancement for the most blameworthy cases Congress likely had in mind—the proverbial "shoot-em-up" criminal who chooses to put innocent lives at risk. Importantly, those, like Dean, whose guns fired accidentally, would not escape serious punishment on my approach. Instead, they would be sentenced within the basic punishment range for using or carrying a firearm during a qualifying crime, with the eventual

183. The difference is that, as previously explained, proportionality concerns were not explicitly acknowledged as a factor in mens rea selection prior to *Elonis*. Instead, proportionality was given effect *sub rosa,* and only in response to an identified potential for punishment without culpability, resulting in what I have termed "back-door proportionality." *See* Smith, *supra* note 11, at 137–44 (discussing "back-door" proportionality).

184. 556 U.S. 568 (2009).

sentence calibrated under the Sentencing Guidelines to the defendants' precise level of culpability.

At the same time, factoring proportionality concerns into the analysis will not uniformly require heightened mens rea requirements. In situations where the crime is already sufficiently defined to prevent morally undeserved punishment, courts may not demand proof of additional mental culpability. Heightened mens rea requirements are warranted on the approach defended here only where, absent such requirements, there is a risk of morally undeserved punishment.

Consequently, the Supreme Court properly declined to impose heightened mens rea requirements in *Shaw v. United States*[185] and *Bryan v. United States*.[186] The defendant in *Shaw* argued that, to be guilty of bank fraud, it was not enough that he intended to defraud bank depositors of funds held in their accounts. Instead, the government had to prove the defendant intended to defraud the bank itself. The argument was properly rejected because defrauding depositors is not only seriously blameworthy, but also morally equivalent to defrauding the bank. Similarly, in *Bryan*, a prosecution for willfully violating the federal prohibition of dealing in firearms without a license, the statute already demanded serious culpability which fully justified the sanctions authorized by Congress. The law allowed conviction only if the accused actually knew his or her dealing in firearms was unlawful, a seriously culpable mental state even if the accused was unaware of the precise law he or she violated. The Court thus quite properly refused to require actual knowledge by the defendant of the specific legal violation committed.

B. SEPARATION-OF-POWERS CLARITY

Once the Court recognizes that innocence-protection in the broadest sense is the goal of mens rea doctrine, the next step is for the Supreme Court to free the courts from the doctrine's self-defeating limitations. These limitations make it difficult, if not impossible, for courts to guarantee culpability—let alone, culpability *and* proportionality—in all federal criminal prosecutions. The time has come for the Court to stop vacillating between two contradictory conceptions of its institutional role in criminal cases—the textualist faithful-agent and cooperative/partnership models—and to be clear about which of the models represents the governing paradigm for mens rea selection. Unless the Court is willing to abandon its stated desire to achieve innocence-protection, the choice between the two models of the separation of powers should be made based on which of those models can best further

185. 137 S. Ct. 462 (2016).
186. 524 U.S. 184 (1998).

the goal of preventing morally undeserved punishment. So viewed, the proper choice is clear: the cooperative/partnership model is the model that should be adopted.

Congress needs and expects the assistance of the courts in prescribing standards of mental culpability. In rendering that assistance through judicially created mens rea requirements, courts are not intruding on the legislative turf or being "faithless" agents frustrating congressional policy choices. What they are doing instead is fulfilling the intent of Congress by performing the role the legislature expects of them in fleshing out the definition of incomplete crimes.

Time and again, Congress has acquiesced in the Supreme Court's approach to the guilty mind requirement. Long before the cases giving rise to the prevailing mens rea method, Congress remained silent in the face of longstanding rulings that legislative silence as to mens rea does not result in strict liability[187] and that strict liability is disfavored[188]—rulings that were quite explicitly motivated by the desire to prevent morally undeserved punishment. Of the three cases in the trilogy that gave rise to the current approach to mens rea (*Liparota*, *Ratzlaf*, and *Staples*), Congress overrode only one (*Ratzlaf*) and allowed the other two to stand even though *Staples* involved a politically salient issue (gun control) and *Liparota* imposed an unusually high mens rea requirement (knowledge of the law). As previously noted, *Ratzlaf* stands as the only mens rea decision by the Court to have been legislatively overridden.[189] This is particularly striking given how receptive Congress is in general to pleas by the Department of Justice to overturn rulings favoring criminal defendants.[190]

In any one case, it would be hazardous to infer legislative approval of a court decision from subsequent congressional inaction. Even so, it is unthinkable that Congress would remain silent if it disapproved of the longstanding judicial practice of limiting the reach of federal crimes through implied mens rea requirements and of using mens rea as a bulwark against morally undeserved punishment. The only sensible conclusion to be drawn is that Congress *shares* the Court's normative commitment to limiting punishment in accordance with

187. *See generally* Morissette v. United States, 342 U.S. 246 (1952).

188. United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978).

189. *See supra* note 181 (discussing statutory overrides).

190. *See* Christiansen & Eskridge, *supra* note 180 (citing "the popularity of anticrime and antiprisoner measures," as well as "the credibility of the Department of Justice and the dearth of powerful interests opposing the Department when it seeks an override," as reasons that statutory overrides overwhelmingly go against criminal defendants); *see also* Stuntz, *supra* note 13, at 546–47 (demonstrating that legislators and prosecutors are natural allies against the interests of criminal defendants).

blameworthiness and accepts as legitimate the judicial role in fleshing out the mental element of federal crimes.

One might legitimately ask: why leave innocence-protection to the courts if Congress truly wishes to prevent morally undeserved punishment? Undoubtedly, Congress could (and should) do more on its own to avoid unwarranted overbreadth and overpunishment in federal criminal law. For example, it could write narrower criminal statutes, streamline and modernize the sprawling roster of federal criminal statutes, and enact into federal law the culpability structure and mens rea terminology of the Model Penal Code—not to mention pass long-overdue sentencing reform.[191] Does the fact that Congress has done the opposite on many of these points, allowing overcriminalization and overpunishment to persist, suggest that Congress does not really care about limiting punishment in accordance with desert? The answer is "no."

The political economy of federal criminal law makes it exceedingly difficult and costly for Congress to achieve meaningful innocence-protection on its own. In passing criminal statutes, Congress faces an institutional dilemma. It cannot foresee the full range of anti-social behavior that criminals might engage in years down the road. It can only legislate prospectively.[192] Additionally, prosecutors and courts can only respond to unforeseen types of future criminal activity if Congress has previously given them the necessary statutory authority.[193] In this climate, passing narrowly tailored statutes might well result in gaps in the coverage of federal criminal law, gaps through which some future offenders may escape conviction. The risk of gaps is reduced by writing overbroad statutes,[194] but that strategy has serious costs of its own. The

191. *See generally* Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 565–79 (2012); Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45 (1998). The Model Penal Code's greatest innovation was that it streamlined the large, vague, and inconsistently interpreted universe of common law mens rea terms into four carefully defined terms (purpose, knowledge, recklessness, and negligence) and provided strict interpretive rules making it possible to determine, ex ante, the mens rea required for each and every material element of a Code offense. *See* MODEL PENAL CODE § 2.02 (AM. LAW INST. 1962). Unfortunately, "[t]he present federal criminal code is not significantly different in form from the alphabetical listing of offenses that was typical of American codes in the 1800s." Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 327 (2007).

192. *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

193. There are, in other words, no common law crimes in the federal system. *See* United States v. Hudson, 11 U.S. 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court shall have jurisdiction of the offence.").

194. *See generally* Daniel Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ (Michael Klarman et al. eds., 2012); Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008).

precise reach of the statute will often be unclear at or near the margin, and the statute may well encompass "innocent" or other behavior that Congress would not have wanted to criminalize, or result in more severe punishment than even Congress intended.[195]

For a Congress that has almost completely federalized crime in the apparent belief that for virtually any crime there must be a remedy (or multiple remedies) in federal court,[196] there is but one acceptable resolution of the above dilemma. Given such a stark choice, Congress will err on the side of criminalizing too much rather than too little.[197] In other words, Congress will tend to enact crimes in which mens rea requirements are not fully spelled out and the actus reus is cast in broad, often ambiguous terms—terms which, if read literally, could encompass morally innocent conduct as well as blameworthy conduct that might otherwise merit lower punishment.[198]

The key point in this dynamic is why Congress writes overbroad criminal statutes. It does so not because it wants to convict the morally innocent or punish in excess of blameworthiness. It does so, rather, to ensure that the morally guilty in the future (whoever they might turn out to be) will not escape the long arm of the Department of Justice. Once this dynamic is understood, it becomes clear that the federal judiciary has an important, and quite legitimate, lawmaking role to play in rounding out the definition of incomplete crimes and, in particular, in taking "innocence" into account in delineating the proper scope of criminal liability.

The faithful-agent textualism model simply does not make sense in light of the cooperative arrangement that has emerged in which courts and Congress together share the responsibility for defining the mental elements of federal crimes. Whether or not that model is right in other contexts (and it may very well be), the Court should reject that model for purposes of mens rea selection, an enterprise which makes no sense except under the cooperative/partnership model of the separation of

195. *See generally* Smith, *supra* note 106.

196. The explosion of federal criminal law is documented in TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW (James A. Strazzella rptr., 1998).

197. Professor Daniel Richman has explained this phenomenon in terms of the incentives facing legislators: Members of Congress, as the only actors who can supply federal criminal legislation, bear the risk of being blamed if there is no statute allowing a dangerous criminal to be convicted, whereas "the executive branch, not the legislative, takes the political heat for inappropriate prosecutions." Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, 2 CRIM. JUST. 81, 89 (1999). For a detailed exploration of why the incentives facing legislators almost always favor broader liability rules, see Stuntz, *supra* note 13.

198. *See* Smith, *supra* note 106, at 893–930 (demonstrating how expansive interpretation of federal criminal statutes has served to drive up the available punishment for criminal conduct).

powers in criminal law. This would mean that, as long as they respect clearly expressed legislative choices, courts have free rein to require whatever mens rea they believe necessary to prevent morally undeserved punishment. Textual literalism, supplemented by the venerable rule of lenity and other canons of statutory construction, has a place in federal criminal cases only as to the actus reus of the crime, as to which courts are relegated to the usual interpretive posture of searching for and carrying out legislative intent. As applied to mens rea questions, however, textual literalism would prevent the courts from performing the shared lawmaking role that Congress both needs and expects them to perform and that courts have performed for decades.

Once faithful-agent textualism is seen as inapposite to mens rea selection, it becomes possible to save existing doctrine from the self-defeating limitations that undermine its efficacy. Two basic reforms are needed. First, the Supreme Court should make clear that courts can, and should, require knowledge of the law whenever necessary to guarantee culpability and proportionality, and that the propriety of such requirements does not depend on any kind of "magic words" or other signals from Congress. Second, when a court has determined that a particular mens rea requirement (including but not limited to knowledge of the law) is necessary to prevent morally undeserved punishment, it should be very reluctant to infer that the necessary mens rea option is precluded by implication. These proposed reforms are elaborated upon below.

1. Ignorance of the Law

The time has finally come for the Supreme Court to relegate ignorantia juris to the ash heap of legal history. Except if textually foreclosed, all mens rea options—*even ignorance of the criminal law*—should be available whenever there is a danger of exposing blameless behavior to punishment or blameworthy behavior to excessive punishment. As this phrasing suggests, knowledge of the law should no longer be treated as some extreme, presumptively illegitimate mens rea option reserved for truly exceptional situations. It is merely one of many potential mens rea options available to courts. Barring contrary direction from Congress, courts should choose whichever option best serves the goals of mens rea doctrine in particular contexts.

Note that clear textual rejection of knowledge of the law (or any other potential mens rea requirement) as an element of the offense must be respected. This is so because, on any coherent theory of statutory construction, the intent of Congress, clearly expressed in statutory text, binds the courts. As a result, Congress is free to reject heightened mens rea requirements, either through clear language included in the

definition of the offense or (as with *Ratzlaf*) legislative overrides of decisions imposing such requirements. These possibilities, however, are unavoidable as long as mens rea doctrine operates at the level of statutory interpretation. Absent clear text to the contrary (which, apart from overrides, will rarely if ever exist), courts should not hesitate to demand knowledge of the criminal law if necessary to prevent morally undeserved punishment.

Whether knowledge of the law or other heightened standards of mental culpability can be required should turn on the answers to two questions. First, can culpability and proportionality of punishment be guaranteed without more stringent mens rea requirements? Second, does the statutory text clearly indicate that Congress intended to reject the necessary state of mind as an element of the offense? If either question is answered in the affirmative, then it would be improper for the court to impose the element. Otherwise, courts should ratchet up the required mens rea to the level necessary to prevent morally undeserved punishment, without insisting upon "magic words" or other indicia of congressional openness to that result.

Also, if a "magic words" approach is to be retained, the Supreme Court should abandon the presumption that "knowingly violates" merely requires proof of knowledge of the facts that constitute the offense. In *Bryan v. United States*,[199] it made sense to read "knowingly violates" as requiring factual knowledge only because there would otherwise have been no way to distinguish "knowing violations" from "willful violations."[200] The presence within the same statute of provisions treating "knowing" and "willful" violations as distinct offenses clearly indicated, as the Court held in *Bryan*, that a "willful violation" requires knowing illegality. The choice between the two potential interpretations of "knowing violation" in other contexts should turn solely on whether or not factual knowledge is sufficient to prevent morally unjustified punishment.

With this reformed approach, cases like *United States v. Wilson*[201] become easy. Whether or not people should anticipate that their right to possess firearms will be affected by entry of an order of protection that is silent on the issue, their failure to anticipate that result is not sufficiently blameworthy to warrant conviction for a felony punishable by up to ten years in prison. On the precise issue before the court, the dissent by Chief Judge Posner was correct that, to be guilty of a "knowing violation," the

199. 524 U.S. 184 (1998).

200. *Compare, e.g.*, 18 U.S.C. § 924(a)(1)(B) (2012) (knowing violations), *with id.* § 924(a)(1)(D) (willful violations); *see also id.* § 924(d)(1) (prohibiting both knowing violations and willful violations).

201. 159 F.3d 280 (7th Cir. 1998).

government had to prove the defendant knew that it was illegal for him to possess firearms upon entry of an order of protection.[202]

There may be one notable difference between Posner's analysis in *Wilson* and mine. The difference is best illustrated through a hypothetical. Suppose that Congress had not required a "*knowing* violation" of the firearms disqualification and had settled instead just for a "violation." It is unclear whether Posner would have reached the same interpretive result in that situation. To the extent his interpretation hinged on the fact that Congress had required "knowledge" as the existence of the violation, he may have had no way to avoid reaching the majority's result other than to roll out what he called the "heavy artillery of constitutional law."[203] Not so under my approach, however.

Under my approach, mens rea selection does not depend on "magic words" (such as "willful violation" or "knowing violation"). The question, as in the actual case, would simply be whether knowledge-of-law requirements are essential to innocence-protection and, if so, whether such requirements are textually foreclosed. Because the answers to these questions are "yes" and "no," respectively, the outcome would be unchanged: the government would have had to prove that the defendant knew that his possession of firearms was unlawful.[204]

Far from imposing insuperable obstacles to prosecution, wider availability of ignorance of law defenses will be socially beneficial in many cases. In cases involving obviously wrongful conduct or furtive behavior by defendants to conceal their activities, common-sense juries can be trusted to reject ignorance of law defenses. In other cases, where the criminal law might otherwise act as a trap for the unwary, treating ignorance of the law as a defense would promote justice in a variety of ways. It would, first and foremost, exempt from punishment persons who acted in good faith, without awareness of wrongdoing, but leave the government free to utilize any available civil and administrative remedies against violators who cannot be convicted. Furthermore, ignorance of law defenses will give government officials greater incentives to publicize new or obscure legal requirements, affording well-meaning members of the regulated public the notice they need to avoid being branded a criminal. In cases like *Wilson*, for example, it is in everyone's best interest (especially protected parties) that protective orders clearly inform

202. *See id.* at 293 (Posner, C.J., dissenting).

203. *Id.* (Posner, C.J., dissenting).

204. This does not mean that my approach would make the "knowledge" requirement superfluous. The "knowledge" requirement serves to guarantee that culpability will be required as to the existence of the federal firearms violation. Had Congress not written that requirement into the statute, there would have been no statutory guarantee that culpability would be required as to the existence of the violation.

persons accused of domestic violence that they may not possess firearms. There is, in short, no reason for courts to shrink from requiring knowledge of the law where necessary to prevent injustice.

2. *Implied Preclusion*

With one exception, the implied-preclusion doctrine should be abandoned. Courts do not presume that congressional failure to prescribe mens rea requirements necessitates strict liability.[205] Neither should they necessarily presume that the omission in one statute of a mens rea requirement included in a related provision, or that the presence of a mens rea requirement applicable to one element of a crime but not others, results in preclusion of that mens rea. Unless there is a much clearer textual indication that Congress intended to reject a particular mens rea requirement, courts should be free to require any level of mens rea that is necessary either to avoid conviction for morally blameless conduct or the infliction of disproportionate punishment. That is to say, mens rea selection must work *outside* of, rather than *within*, the definition of the offense. The driving force of the analysis should simply be whether or not heightened standards of mental culpability are essential to achieve the twin goals of mens rea doctrine.[206]

For an example of this considerably narrower approach to implied preclusion, consider *United States v. X-Citement Video, Inc.*[207] The case involved a prosecution against a distributor of pornographic films for selling child pornography. The statute expressly provided that the conduct elements of the crime, such as distributing or transporting "visual depictions," had to be "knowing." It was open to serious question, however, whether the "knowledge" requirement applied to the remaining elements of the crime. This was important because it was the elements listed later in the statute—specifically, the fact that the visual depiction was pornographic in nature and involved underage performers—that pertained to the blameworthiness of the regulated conduct and the proportionality of the harsh penalties Congress provided.[208]

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205. United States v. Morissette, 342 U.S. 246 (1952).

206. The exception, in which implied-preclusion is the right outcome, involves lesser-included crimes in which the only difference between the two offenses is a specified mens rea requirement. For example, possession of controlled substances is a crime, but the same act is a more severely punished crime if committed "with intent to distribute." *Compare, e.g.*, 21 U.S.C. § 841(a) (2012) (possession with intent), *with id.* § 844(a) (simple possession). In this situation, reading an "intent to distribute" requirement into the crime of simple possession would make the lesser crime completely redundant, frustrating the obvious intent of Congress that simple possession, for purposes other than distribution, should be a crime in its own right.

207. 513 U.S. 64 (1994).

208. The statute made it a crime, in pertinent part, to "knowingly receive[], or distribute[], any visual depiction . . . if—(A) the producing of such visual depiction involves the use of a minor engaging

The Court required knowledge as to both of these critical elements. In doing so, it conceded that "[t]he most natural grammatical reading . . . suggests that the term 'knowingly' modifies only the surrounding verbs" and does "not modify the elements of the minority of the performers, or the sexually explicit nature of the material, because they are set forth in independent clauses separated by interruptive punctuation."[209] Justice Scalia, in dissent, thought this concession was an "understatement to the point of distortion—rather like saying that the ordinarily preferred total for two plus two is four."[210] Nevertheless, the Court, in part for innocence-protection reasons (and in part to avoid free-speech problems), held that the defendant must have known the visual depictions involved minors engaging in sexually explicit activity.[211]

Even apart from perceived constitutional doubts, the Court reached the correct result on innocence-protection grounds. Justice Scalia's interpretation was superior from the standpoint of faithful-agent textualism, but, as I have argued, that is not the right model for mens rea selection. To give preclusive significance to the fact that the elements pertaining to the nature of the images happened to be set off in separate subsections, distant from the express "knowledge" requirement applicable to the antecedent conduct elements of the crime, would presuppose that Congress implicitly decided what the mens rea should (or should not) be for each element of this fairly complexly structured crime. That, unfortunately, is simply not how Congress approaches the definition of federal crimes.

Absent much clearer textual evidence that Congress intended to dispense with "knowledge" as to the precise nature of the visual depictions, the Court was correct to require proof that the defendant was knowingly trafficking in child pornography. Without that high level of mens rea, it would impossible to guarantee that convicted offenders would be sufficiently blameworthy to deserve the severe penalties that Congress had authorized.[212] The Court got this one right, and the reforms

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in sexually explicit conduct; and (B) such visual depiction is of such conduct." 18 U.S.C. § 2252(a)(2) (2012).

209. *X-Citement Video*, 513 U.S. at 68.

210. *Id.* at 81 (Scalia, J., dissenting). Scalia would have held that knowledge was not required as to either the pornographic nature of the visual depiction or the underage status of one of the performers and, for that reason, would have struck the statute down on First Amendment grounds.

211. *Id.* at 67.

212. As I have explained in prior work:

> [T]rafficking 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. Not surprisingly, the penalties that Congress has authorized for trafficking in obscene adult pornography pale in comparison to the severe penalties available under federal law for child pornography offenses. Limiting conviction to those who actually knew that their pornographic material featured minors thus serves to guarantee that the conduct

proposed here would make it more likely that courts presented with mens rea selection issues in the future would do likewise.

CONCLUSION

Federal criminal offenses should be defined to ensure that no one will be condemned as a criminal unless his or her conduct was both morally blameworthy and sufficiently blameworthy to merit the punishments provided by Congress. The requirement of a "guilty mind" is an important reflection of the criminal law's lofty aspirations in this regard. In its pronouncements concerning federal mens rea doctrine over the last several decades, the Supreme Court has taken giant strides towards ensuring that "innocence," in the moral sense of that term, will be protected against conviction—not merely left to the whims of prosecutorial discretion—and it deserves great credit for doing so.

Still, current mens rea doctrine does not go far enough toward the goal of aligning punishment and blameworthiness. What the Court fails to realize, and must realize if the goals of mens rea doctrine are to be fully realized, is that "innocence" necessarily incorporates considerations of proportionality of punishment. Commission of a blameworthy act is merely the first of two culpability-related inquiries. It is also necessary to ask whether the conduct charged was *sufficiently blameworthy* to warrant the penalties afforded by the relevant statute. If the conduct was only minimally blameworthy, to impose severe penalties for that conduct would be to visit upon the defendant more punishment than is deserved. "Innocence" will never be fully protected until courts recognize, as hinted in *Elonis*, that mens rea must aim to guarantee both culpability and proportionality of punishment for every federal crime.

The Court should reject the excessive literalism that has crept into mens rea doctrine. Congress needs and expects the assistance of the courts in limiting criminal liability to appropriate bounds, especially in fleshing out the elusive but important mens rea requirements of federal crimes. Courts should embrace, rather than shy away from, that salutary role. Apart from situations in which Congress has textually foreclosed a particular mens rea option, courts should be free, and not in the least reluctant, to impose any standard of mental culpability—including knowledge of the criminal law—that is necessary to render the authorized punishment just. To do anything less would be to allow morally undeserved punishment, which any criminal justice system worthy of the name should strive to avoid.

> that can lead to conviction for federal child pornography offenses will be sufficiently blameworthy to deserve the severe penalties available for those offenses.

Smith, *supra* note 11, at 139–40 (footnotes omitted).

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