

This paper is well over 5,000 words. Those who are pressed for time should feel free to read only Parts II and III, starting on p. 10.

PROPORTIONAL *MENS REA* AND THE FUTURE OF CRIMINAL CODE REFORM

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The topic of *mens rea* has historically played a foundational role in both motivating and guiding criminal code reform efforts. For example, the centerpiece of the most influential criminal code reform project in recent history, the American Law Institute’s Model Penal Code (“MPC”), is its general *mens rea* provisions, which define and more generally explicate the culpability requirement governing the individual offenses contained in the MPC’s Special Part. The drafters of the MPC intended the so-called “element analysis” reflected in these general provisions to remedy the “variety, disparity and confusion”¹ surrounding judicial definitions of *mens rea* that had proliferated during the first half of the twentieth century. And it was due in large part to the drafters’ success in addressing these problems that the second half of the twentieth century witnessed a cascade of criminal code reform projects structured around the MPC’s general *mens rea* provisions.

In recent years, the flow of MPC-based, *mens rea*-focused criminal code reform projects has slowed to a trickle. Even still, much of the scholarly literature on criminal code reform remains centered on issues related to *mens rea*. For the most part, the reforms proposed in this area are either relatively modest, emphasizing minor adjustments to MPC-based general *mens rea* provisions, or, alternatively, quite controversial, comprising changes to the kinds of threshold *mens rea* requirements currently dividing criminal from non-criminal conduct. Often overlooked, though, is a more fundamental, but paradoxically, less controversial, flaw underlying the treatment of *mens rea* in both model and real-world criminal codes: the pervasive disregard of the principle of proportional *mens rea*—roughly, the idea that more blameworthy states of mind should be punished more severely, while less blameworthy states of mind should be punished more leniently.

This Essay, written for the “Theorizing Criminal Law Reform” conference, argues that this oversight—the failure to codify legislative sentencing policies that account for key distinctions in *mens rea*—is normatively problematic from a variety of perspectives, and yet is also widespread, providing a key justification and source of guidance for future criminal code reform efforts. My argument proceeds in three parts. Part I sets forth the theory of proportional *mens rea* and criminal legislation animating this Essay. Part II highlights the extent to which American criminal codes, as well as American sentencing policies more generally, fail to live up to this normative benchmark. Part III then concludes with a discussion of the two main models of criminal code reform, what I respectively refer to as the thick model and the thin model, through which efforts to better align criminal codes with the principle of proportional *mens rea* might proceed.

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¹ *Morrisette v. United States*, 342 U.S. 246, 252 (1952).

I. A THEORY OF PROPORTIONAL *MENS REA* AND CRIMINAL LEGISLATION

At the heart of our social practices of blaming and punishing, as well as the negative reactive attitudes of anger, outrage, and resentment that underwrite them, is the concept of moral responsibility,² or what Anglo-American legal systems refer to as *mens rea*.³ Normative theorizing about *mens rea* has been a mainstay of Anglo-American legal scholarship and case law for more than a century.⁴ During this period of time, much has been illuminated regarding the nature of *mens rea*, but little has been agreed upon regarding the particular role it ought to play in our penal practices: whether and to what extent any particular aspect of an actor's moral psychology translates into liability and punishment remains a source of perennial dispute.⁵ Underlying these wide ranging debates over matters of criminal responsibility, however, is an overarching commitment to a basic idea: all else being equal, more blameworthy states of mind should be punished more severely, while less blameworthy states of mind should be punished more leniently.⁶

This principle of proportional *mens rea* is “[d]eeply ingrained” in the Anglo-American “legal tradition.”⁷ Most obviously, it is at the heart of all classical theories of retributivism⁸—still “the majority view” on the justification for punishment held by penal theorists.⁹ Yet many of those who subscribe to utilitarian theories of punishment also champion the principle based

² See, e.g., Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 329-31 (1985); P.F. Strawson, *Freedom and Resentment*, in FREE WILL 72-73 (Gary Watson ed., 2d ed. 2003).

³ The term *mens rea* is, of course, “chameleon-like” in nature. Francis Bowes Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in HARVARD LEGAL ESSAYS 399 (1934). On the broader (and older) conception, *mens rea* refers to all mental (or quasi-mental) phenomena that influence whether and to what extent an agent who has engaged in wrongful or harmful conduct is deemed to be blameworthy, and, therefore, deserving of punishment. On the narrower (and more modern) conception, *mens rea* is understood to comprise merely the purpose, knowledge, recklessness, or negligence necessary to prove a given element of a crime. See Douglas Husak, “Broad” Culpability and the Retributivist Dream, 9 OHIO ST. J. CRIM. L. 449, 454-60 (2012) [hereinafter Husak, *Retributivist Dream*]; Sanford Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 274-75 (1968). Unless otherwise noted, this Essay’s usage of the term *mens rea* follows the broader conception, with one important modification: I am primarily focused on the relevant features of an actor’s state of mind as they relate to engaging in prohibited conduct. This narrower lens excludes other mental (or quasi-mental) phenomena—such as remorse and prior criminal acts—which may correlate with an actor’s blameworthiness, but which are not centrally related to commission of the crime itself.

⁴ See, e.g., Francis E. Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932); JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960); H.L.A. Hart, PUNISHMENT & RESPONSIBILITY (2d ed. 2008); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978); LARRY ALEXANDER & KIMBERLY FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW (2009).

⁵ To take just one example: theorists dispute whether the fact that a reasonable person would have been aware of the risk of harm of which an actor was otherwise unaware ought to be relevant to criminal liability. See, e.g., Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075 (1997); Douglas Husak, *Negligence, Belief, Blame and Criminal Liability: The Special Case of Forgetting*, 5 CRIM. L. & PHIL. 199 (2011); Michael S. Moore & Heidi M. Hurd, *Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence*, 5 CRIM. L. & PHIL. 147 (2011).

⁶ See, e.g., sources cited *supra* note 4.

⁷ *Tison v. Arizona*, 481 U.S. 137, 156 (1987). That is, “the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.” *Id.*

⁸ Husak, *Retributivist Dream*, *supra* note 3, at 453.

⁹ Paul H. Robinson et al., *Empirical Desert, Individual Prevention, and Limiting Retributivism: A Reply*, 17 NEW CRIM. L. REV. 312, 353 (2014).

upon its purported benefits of deterrence,¹⁰ incapacitation,¹¹ and expressive condemnation.¹² The principle of proportional *mens rea* also has a wide judicial following; Anglo-American courts “ha[ve] long considered a defendant’s intention—and therefore his moral guilt—to be critical to ‘the degree of [his] criminal culpability.’”¹³ And most recently, a growing area of research on popular intuitions of justice (“justice intuitions”) strongly indicates that the people similarly support it.¹⁴

Given the robust socio-legal pedigree of the principle of proportional *mens rea*, it is perhaps unsurprising that the people, no less than the experts, support the principle—at least in the abstract. What is surprising, however, is the nature of the consensus: it appears to be both nuanced and comprehensive, cutting across all of the major areas of criminal responsibility. For example, a range of studies suggests that lay assessments of relative blameworthiness revolve around, and ultimately account for, the same basic concepts at the heart of much theorizing on *mens rea*: risk and reasons,¹⁵ normative competence,¹⁶ and situational control.¹⁷ Not only that,

¹⁰ See, e.g., Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1221-28 (1985); MORRIS B. HOFFMAN, *THE PUNISHER’S BRAIN: THE EVOLUTION OF JUDGE AND JURY* 66 (2014); Ernest Van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 RUTGERS L. REV. 706, 713 (1981). But see Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 945 (2000).

¹¹ See, e.g., MARK H. MOORE ET AL., *DANGEROUS OFFENDERS: THE ELUSIVE TARGET OF JUSTICE* 65-66 (1984); GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 30 (2d ed. 1961). But see A. VON HIRSCH, *PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS* 77-91, 128-38 (1985).

¹² See, e.g., Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 352-54 (1996); Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 1032-59 (2008). But see Alan Brudner, *Agency and Welfare in the Penal Law*, in *ACTION AND VALUE IN THE CRIMINAL LAW* 21, 43 (Stephen Shute et al. eds., 1993).

¹³ *Enmund v. Florida*, 458 U.S. 782, 800 (1982) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)).

¹⁴ See, e.g., Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829 (2007); PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995) [hereinafter ROBINSON & DARLEY, *COMMUNITY VIEWS*]; Norman J. Finkel, *Commonsense Justice, Culpability, and Punishment*, 28 HOFSTRA L. REV. 669 (2000). For research suggesting that even children possess this intuition, see, for example, Norman J. Finkel et al., *Equal or Proportionate Justice for Accessories? Children’s Pearls of Proportionate Wisdom*, 18 J. APPLIED DEVELOPMENTAL PSYCHOL. 229 (1997).

¹⁵ In the eyes of many penal theorists, the reasons an actor imposes a given risk of harm and the extent of that actor’s awareness of the risk—or, for some, culpable inattentiveness—constitutes the foundation of *mens rea*. See, e.g., Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 938-39 (2000); Kimberly Kessler Ferzan, *Holistic Culpability*, 28 CARDOZO L. REV. 2523, 2532-34 (2007); Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 408-10 (2011). For empirical work suggesting that the people hold similar views, see, for example, ROBINSON & DARLEY, *COMMUNITY VIEWS*, *supra* note 14 (Studies 5, 6, 8, 9, and 16); Paul H. Robinson & John M. Darley, *Testing Competing Theories of Justification*, 76 N.C. L. REV. 1095 (1998); Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255 (2012). Note, however, that two recent studies call into question whether greater consciousness of a risk correlates with increased blameworthiness in the eyes of the people. See, e.g., Matthew R. Ginther et al., *The Language of Mens Rea*, 67 VAND. L. REV. 1327 (2014); Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306 (2011).

¹⁶ Many penal theorists place significant emphasis on the extent to which an agent possesses cognitive and volitional capacities to distinguish right from wrong and to conform one’s conduct to that normative knowledge—also referred to as reasons-responsiveness, ANTONY DUFF, *ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW* 39-40 (2001)—in their assessments of blameworthiness. See, e.g., David O. Brink & Dana K. Nelkin, *Fairness and the Architecture of Responsibility*, in *OXFORD STUDIES IN AGENCY AND RESPONSIBILITY* 285 (David Shoemaker, ed. 2013); Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329, 340 (1998) [hereinafter Morse, *Excusing*]. For empirical work suggesting that the people hold similar views, see ROBINSON & DARLEY, *COMMUNITY VIEWS*, *supra* note 14 (Studies 12 & 13).

but, in contrast to the wide ranging scholarly debates over many of the key issues, there appears to be broad agreement among the people regarding both their resolution and relevance to the distribution of punishment in a criminal justice system.¹⁸

Which raises the following question: what impact, if any, should these findings have on the actual distribution of punishment employed in a criminal justice system? The general implications of justice intuitions for penal policy—often framed in terms of empirical desert—is a topic that has been the subject of significant academic debate in recent years.¹⁹ Insofar as the deontological valence of justice intuitions for the shape of the criminal law is concerned, however, much of the focus has been placed on the relationship between justice intuitions and “real” justice in the abstract.²⁰ This is an endlessly fascinating question, but it may not be the right one to ask if the goal is to determine whether and to what extent justice intuitions have a deontological claim to recognition by a criminal justice system.²¹ The reason? The democratically elected officials charged with the task of creating and overseeing that system do not, in the view of most normative theories of representation, operate from such an unencumbered perspective.²² Rather, these “public fiduciaries” are understood to function in a relational context comprised of a constellation of cross-cutting duties and obligations, which afford the people’s views a privileged place in the policymaking calculus.²³

Viewing the debate over justice intuitions through the lens of political representation in this way yields, I believe, two important insights for the principle of proportional *mens rea*. The

¹⁷ Many penal theorists highlight the extent to which the operation of a person’s normative capacities may have been hindered by any situational factors beyond the control of the actor; when an agent’s ability to distinguish right from wrong or to conform his conduct to that normative assessment is overridden by a “hard choice”—or some other situational factor for which the agent was not otherwise responsible—blameworthiness assessments, it is often argued, ought to be calibrated accordingly. See, e.g., Brink & Nelkin, *supra* note 16, at 285; Morse, *Excusing*, *supra* note 16, at 340. For empirical work suggesting that the people hold similar views, see ROBINSON & DARLEY, *COMMUNITY VIEWS*, *supra* note 14 (Studies 13 & 14).

¹⁸ This is not to say, of course, that the people agree on particular sentences in individual cases; as is well known, people vary widely with respect to their overall harshness and leniency. “But whether harsh or lenient punishers, people tend to agree on the relative degree of blameworthiness among a set of cases. That is, while they may disagree as to the point to which the punishment continuum should extend at its high end, they agree on the relative placement of cases along that continuum.” Robinson & Kurzban, *supra* note 14, at 1854.

¹⁹ See, e.g., Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997); Adam J. Kolber, *How to Improve Empirical Desert*, 75 BROOK. L. REV. 433 (2009); Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77 (2013).

²⁰ See, e.g., Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635, 650-58 (2000); Christopher Slobogin, *Is Justice Just Us? Using Social Science to Inform Substantive Criminal Law*, 87 J. CRIM. L. & CRIMINOLOGY 315, 323-26 (1996).

²¹ For a clear recognition of this distinction in perspectives, see Mark Kelman, *Intuitions*, 65 STAN. L. REV. 1291, 1322-23 (2013).

²² See, e.g., Vincent Price, *The Public and Public Opinion in Political Theories*, in THE SAGE HANDBOOK OF PUBLIC OPINION RESEARCH (Michael Traugott et al., eds. 2007); Bernard Manin et al., *Introduction to DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* (Adam Przeworski et al., eds. 1999). For two recent re-conceptualizations of normative representation, see Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515 (2003); Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214 (2009).

²³ See, e.g., Ethan J. Leib, Michael Serota, David L. Ponet, *Fiduciary Principles and the Jury*, 55 WM. & MARY L. REV. 1109 (2014); Ethan J. Leib, David L. Ponet, Michael Serota, *A Fiduciary Theory of Judging*, 101 CAL. L. REV. 699 (2013).

first, and least controversial, is this: popular support for the principle of proportional *mens rea* provides elected officials with a greater imperative to ensure that the principle is recognized by the criminal justice system. That the concepts of choice and rationality upon which our intuitive assessments of blameworthiness rest are so central to constructing meaning and creating value in our lives arguably imposes upon public fiduciaries a defeasible obligation, rooted in the intrinsic virtues of democracy and self-determination, for ensuring that a polity's penal policies account for them.²⁴ Which is not to say, of course, that legitimate political representation demands a one-to-one correspondence between policy and the public's views on any issue.²⁵ Where, however, both expert and popular opinion align on a single fundamental principle—as is the case with the principle of proportional *mens rea*—there is all the more of an imperative for an elected official to give voice to it.

The second, and perhaps more controversial, takeaway is that justice intuitions arguably constitute a necessary component of a viable—indeed, perhaps the only viable—framework for operationalizing the principle of proportional *mens rea*. Given the divergent scholarly viewpoints on multifarious aspects of criminal responsibility, the normative lodestar for policymaking—expert opinion—seemingly fails to provide legislators with a reliable basis for translating the principle of proportional *mens rea* into a concrete set of policies concerning the distribution of punishment. Viewed in light of this kind of dissensus, then, the existence of justice intuitions on matters of *mens rea* presents itself as a democratically legitimate tiebreaker.²⁶ Here is the overarching theory of political representation one might envision:

²⁴ For an argument that respect for *mens rea* both inside and outside of the criminal justice system is a primary means of constructing meaning and creating value in our lives, see Samuel Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719 (1992), and Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL'Y 51 (2003) [hereinafter Morse, *Inevitable Mens Rea*]. For recognition of the inherent democratic value of recognizing justice intuitions, see Andrew E. Taslitz, *Empirical Desert: The Yin and Yang of Criminal Justice* and Matthew Lister, *Desert: Empirical Not Metaphysical*, in CRIMINAL LAW CONVERSATIONS (Paul H. Robinson et al., eds., 2009).

²⁵ Indeed, in some contexts—where racial, gender, or other forms of bias appear to be influencing justice intuitions—legislators arguably ought to ignore community sentiment altogether. For example, as Vera Bergelson observes, “[p]ublic views on the allocation of responsibility for rape are well known for their unfairness to the victim,” such that reliance on community sentiment might support “a ‘mini-skirt’ defense to the crime of rape.” Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 428–30 (2005).

²⁶ This argument is rooted in a deontological conception of political morality, not a consequentialist one; therefore, it is not contingent upon whether “a distributive theory that tracks the community’s perceived principles of justice” ultimately “has a greater power to gain compliance with society’s rules of lawful conduct.” Robinson & Darley, *Utility of Desert*, *supra* note 19, at 456. I will note, however, that among the consequentialist critics of empirical desert, few have attempted to develop a concrete and comprehensive alternative distribution of punishment, *but see* Christopher Slobogin, *Prevention As the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases*, 48 SAN DIEGO L. REV. 1127 (2011), and none have—as far as I can tell—provided compelling and persuasive evidence that this distribution would increase social welfare, broadly construed, to a greater extent than would one that accounted for the people’s views on *mens rea*. Nor, it seems to me, could they. While recent developments in cost benefit analysis surely have many useful things to say about why our criminal justice system should be less punitive and expansive *overall*, see Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 325 (2004), our current grasp of empirical methodologies does not appear to be sophisticated enough to confidently establish that—having set the endpoints in the punishment continuum—the benefits of adopting a distribution of punishment that conflicts with the people’s views on *mens rea* outweigh the costs imposed by doing so. *See, e.g.*, Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization*

privilege the expert view of proportional *mens rea* in determining the relative distribution of punishment where reasonable consensus exists, but, where it diverges and justice intuitions are stable—a description that likely encompasses a great many issues—rely on community sentiment as the appropriate normative default.²⁷

Assuming *arguendo* that an elected representative is obligated to align the distribution of punishment in a penal system with the principle of proportional *mens rea* as just laid out in turn raises a host of difficult questions concerning the practical realization of this alignment. Consider, for example, two of the most significant: (1) how much policy discretion should the legislature directly exercise (as opposed to delegate to another institution) over matters of *mens rea*; and (2) for those matters of *mens rea* that the legislature opts to regulate itself, what should the exercise of that policy discretion look like?²⁸

The resolution of these issues is complicated by the wide array of potential political arrangements that exist in the context of criminal justice policy making.²⁹ Theoretically, a legislature is free to statutorily resolve as many (or as few) criminal justice policy issues as it pleases. Practically, however, elected officials possess neither the resources nor incentives to legislate away the entirety of the substantive criminal law.³⁰ As a result, and given the residual nature of policy discretion over such matters, a legislature must self-consciously decide which issues are worth spending time on, and which are appropriately submitted to the policy discretion of other institutions—for example, the judiciary and the sentencing commission. For those areas of the criminal justice policy space that the legislature chooses to fill, moreover, the legislature has a variety of legal structures at its disposal. To statutorily address any particular issue of substantive criminal law, for example, the legislature might formulate a hard-and-fast rule or a flexible standard comprised of varying levels of specificity and subject to varying degrees of legal effect.³¹

of Discrimination, 66 STAN. L. REV. 803 (2014); Sonja B. Starr, *On the Role of Cost-Benefit Analysis in Criminal Justice Policy: A Response to the Prisoner's Dilemma*, 98 IOWA L. REV. BULL. 97 (2013).

²⁷ Note that my argument focuses on justice intuitions related to the role of *mens rea* in mediating the relative distribution of punishment in a criminal justice system. My argument could be extended to justice intuitions related to other matters of criminal responsibility that are the subject of perennial scholarly dispute and significant popular consensus—for example, causation (and therefore the general relevance of results). See, e.g., Michael Moore, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS AND METAPHYSICS (2009); ROBINSON & DARLEY, COMMUNITY VIEWS, *supra* note 14 (Studies 17, 33 & 34); David Pizarro et al., *Causal Deviance and the Attribution of Moral Responsibility*, 39 J. EXP. SOC. PSYC. 653 (2003). However, I am less sanguine about, and ultimately take no position on, the deontological relevance of justice intuitions concerning other issues that do not fit these criteria—for example, demarcating the line between criminal and non-criminal conduct, determining the overall severity of a criminal justice system, or ranking social harms.

²⁸ Of course, these issues are intimately related given that the “design of criminal law rules directly affects the balance of power between the various institutional players in the criminal justice system.” Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 888 (2007) [hereinafter Cahill, *Design of Criminal Law*].

²⁹ For a good discussion of these potential arrangements, see Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124 (2005).

³⁰ For a good discussion of the constraints on legislators in the context of criminal justice policymaking, see Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 474-75 (1996) [hereinafter Kahan, *Federal Criminal Law*].

³¹ See, e.g., Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CAL. L. REV. 447 (2016); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

There are, then, multifarious institutional and structural alternatives available to any legislator seeking to implement the principle of proportional *mens rea* as a matter of course. At the same time, however, it is by no means clear—given the distinct suite of public values and difficult tradeoffs implicated by pursuing one avenue rather than another—which set of political arrangements is the “right” one.³² In the face of this kind of uncertainty, the legality principle—as well as the “central values of liberal societies”³³ that it rests upon—provides a useful normative compass.³⁴

Among other manifestations, the legality principle is understood to compel the direct legislative resolution of the most significant issues of penal policy by statute.³⁵ This is a product of the fact that the primary benefits of duly-enacted legislation—for example, its political legitimacy, empowerment of the jury, and tendency to promote uniformity—directly further a cluster of public values—democracy, fairness, liberty, and equality—across a range of contexts.³⁶ Although (with a few notable exceptions³⁷) the codification of *mens rea* policies is not a topic traditionally associated with discussions of legality, upon closer analysis the legislative treatment of *mens rea* turns out to be intimately related to the legality principle.

To understand why, consider the extent to which the two following basic criteria of code drafting are part and parcel with the legality-related values of democracy, fairness, liberty, and equality:

Criterion One. Does a criminal code clearly express the broad contours of the threshold *mens rea*—that is, the culpable mental state, if any, governing the objective elements of an offense, the general culpability principles that interact with these culpable mental states, and the defenses that fully negate a person’s blameworthiness—alongside the statutorily authorized range of punishment applicable to a person who meets that threshold?

Criterion Two. Does a criminal code clearly express, through a sufficiently nuanced statutory grading scheme, the most significant distinctions in *mens rea* that aggravate or mitigate the blameworthiness of an otherwise criminal actor alongside the broad distributive import—that is, the impact on the statutorily authorized range of punishment—of these deviations?

³² For utilitarian analyses relevant to identifying the “optimal” set of political arrangements, see Robinson & Spellman, *supra* note 28; Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992). For a discussion of the potentially confounding effects of “hydraulic discretion,” see Terance D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155 (1987).

³³ FRANCIS A. ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW* 15 (1996).

³⁴ See, e.g., HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 79-80 (1968); Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the “Equal Culpability” Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 30-33 (1994).

³⁵ See, e.g., Paul Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190-91 (1985); Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 332-366 (2005) [hereinafter Robinson, *Two Kinds of Legality*].

³⁶ MICHAEL MOORE, *ACT AND CRIME: THE IMPLICATIONS OF THE PHILOSOPHY OF ACTION FOR THE CRIMINAL LAW* 239-40 (1993) [hereinafter MOORE, *ACT AND CRIME*].

³⁷ See, e.g., Husak & Callender, *supra* note 34, at 34; Robinson, *Two Kinds of Legality*, *supra* note 35, at 365.

The extent to which Criterion One serves democratic interests is perhaps most obvious. “The value of *democratic decision-making* requires that the elected legislature decide what is and what is not criminal.”³⁸ Given the essential role that threshold *mens rea* assessments play in making this demarcation, as well as the inherently social nature of the blameworthiness judgments they represent, the value of democracy requires the legislature to statutorily specify them.³⁹

Perhaps less obvious, but ultimately no less important, is the extent to which the same democratic interests are served by Criterion Two.⁴⁰ This is a product of the fact that the amount of punishment imposed, no less than the decision to impose any punishment at all, is intimately tied to “the moral condemnation of the community.”⁴¹ Consistent with this equivalency, the legislative creation of a grading scheme that meaningfully communicates the relative penal importance of the most significant distinctions in *mens rea* constitutes a primary means of ensuring that the overall distribution of punishment meted out in a criminal justice system reflects the community’s norms (as articulated through its elected representatives).⁴²

Criterion Two is also essential to vindicating the community’s interest in fairly and accurately assessing whether these key *mens rea* distinctions exist in the context of any given case—at least insofar as a criminal justice system materially distinguishes between its treatment of trial facts and sentencing facts. Illustrative is the two-track system applied in many jurisdictions within the American criminal justice system: whereas trial facts are subject to the proof beyond a reasonable doubt standard applied by the jury, sentencing facts may be tried before a judge under a lesser standard, such as a preponderance of the evidence.⁴³ Where this “procedural differential”⁴⁴ operates, *mens rea*-based grading schemes have the dual effect of ensuring that: (1) the “*fair* arbiter of a criminal defendant’s moral blameworthiness,”⁴⁵ the jury, has an opportunity to assess the relevant distinctions; and (2) that these distinctions are afforded the appropriate liberty-maximizing standard, proof beyond a reasonable doubt.⁴⁶

Perhaps most important, however, is the extent to which Criterion One and Criterion Two safeguard the interests of equality. At the heart of the relationship is the fact that the alternative to meeting these criteria—drafting “incompletely specified”⁴⁷ criminal statutes silent on the role

³⁸ MOORE, ACT AND CRIME, *supra* note 36, at 239-40.

³⁹ For a nice recent illustration of the role that *mens rea* plays in drawing the line between criminal and non-criminal conduct, see *Elonis v. United States*, 135 S. Ct. 2001 (2015).

⁴⁰ See, e.g., Gerard Lynch, *The Sentencing Guidelines as a Not-so-Model Penal Code*, 7 FED. SENT. R. 112, 114 (1998).

⁴¹ *United States v. Bass*, 404 U.S. 336, 348 (1971).

⁴² See, e.g., Kahan & Nussbaum, *supra* note 12, at 364–65.

⁴³ Kevin R. Reitz, *Proof of Aggravating and Mitigating Facts at Sentencing*, in MITIGATION AND AGGRAVATION AT SENTENCING 231-34 (Julian Roberts ed., 2011) [hereinafter Reitz, *Proof at Sentencing*]. That is, with the exception of those sentencing facts subject to the U.S. Supreme Court’s decision in *Blakely v. Washington*, 542 U.S. 296 (2004). See *infra* note 84.

⁴⁴ *Id.* at 231.

⁴⁵ Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury As Fault-Finder*, 2005 U. CHI. LEGAL F. 91, 95 (2005) [hereinafter Cahill, *Jury As Fault-Finder*]; see Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 299 (2003) [hereinafter Morse, *Diminished Responsibility*].

⁴⁶ See, e.g., ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 375-76 (5th ed. 2010).

⁴⁷ Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 348 (1994).

of *mens rea* in setting the threshold for and determining the extent of liability—is likely to delegate the relevant policy issues to the courts.⁴⁸ However, this dynamic creates a notoriously problematic regime of judicial lawmaking: not only do the courts have a particularly poor track record of making clear and coherent *mens rea* policy,⁴⁹ but other institutional features of the judiciary—the decentralized nature of lower court decision making, limited publication of trial orders, and the lack of horizontal *stare decisis* amongst lower courts—all but ensure a marked lack of uniformity in the process.⁵⁰

The inequalities associated with neglect of Criterion Two, it’s worth noting, are particularly pronounced. Whereas the disparate judicial resolution of threshold *mens rea* issues left unaddressed by a criminal code are likely to dissipate once a hierarchically superior court has had an opportunity to weigh in on the relevant policies, legislative silence on the role of *mens rea* in the distribution of punishment presents the spectre of perennial sentencing inequalities. This is a product of the fact that neither the contours of the relevant distinctions nor the relative weight of those distinctions are as likely to be subject to hierarchical judicial resolution.⁵¹ In practical effect, then, legislative silence on the role of *mens rea* in the distribution of punishment may ultimately delegate the relevant policy issues to trial courts for resolution on a case-by-case, frequently unguided, and often unreviewable basis⁵²—a decisionmaking regime that invites the kind of “carelessness, subjectivity, inconsistency, and explicit and implicit bias” that is anathema to the legality principle.⁵³

Fortunately, there is an obvious mechanism for substantially mitigating these kinds of inequalities, while at the same time bolstering the other legality-related values of democracy, fairness, and liberty: drafting criminal statutes that are consistent with the two basic criteria proposed in this section. With that in mind, the next Part considers the extent to which American criminal codes, as well as American sentencing policies more generally, live up to the relevant standards.

⁴⁸ This is a function of the fact that legal discretion “is like the hole of a doughnut”: it “does not exist except as an area left open by a surrounding belt of restriction.” RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31 (1977). Note that another potential recipient of this delegated discretion is a sentencing commission. For general discussion of the treatment of *mens rea* distinctions by American sentencing commissions, see *infra* notes 82-91 and accompanying text.

⁴⁹ See, e.g., Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341 (2001); Michael Serota, *Mens Rea, Criminal Responsibility, and the Death of Freddie Gray*, 114 MICH. L. REV. FIRST IMPRESSIONS 31 (2015).

⁵⁰ See, e.g., Kahan, *Federal Criminal Law*, *supra* note 29, at 470, 495; *United States v. Harriss*, 347 U.S. 612, 635 (1954); Michael Serota, *Stare Decisis and the Brady Doctrine*, 5 HARV. L. & POL’Y REV. 415, 422 (2011).

⁵¹ See, e.g., Anders Kaye, *Excuses in Exile*, 48 U. MICH. J.L. REFORM 437, 452-58 (2015); Allan Manson, *The Search for Principles of Mitigation: Integrating Cultural Demands*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 40-42 (Julian Roberts ed., 2011).

⁵² As discussed *infra* notes 82-91, sentencing guidelines theoretically could—but in practice generally do not—ameliorate some of these disparities.

⁵³ Kaye, *supra* note 51, at 457. Of course, legality considerations aside, the number of *mens rea* distinctions that ought to be recognized by a criminal code is also contingent on practical considerations concerning the capacities of the jury. “For example, juries would likely find it difficult to reliably distinguish diminished capacity that reduces responsibility thirty percent from diminished capacity that reduces it thirty-five percent.” *Id.* at 487–88. That being said, Criterion Two asks only that a criminal code address *mens rea* distinctions “in broad strokes.” *Id.* at 488.

II. PROPORTIONAL *MENS REA* AND AMERICAN CRIMINAL LAW

The theory of proportional *mens rea* and criminal legislation presented in Part I provides a basic framework for conceptualizing the treatment of *mens rea* issues by the legislative branch of government that is rooted in a diverse set of deeply held liberal values. A consideration of American criminal codes paradoxically reveals both a general acceptance of this framework and, at the same time, a pervasive failure to live up to it. To appreciate the dissonance one need only consider the theoretical and practical blueprint for much of American criminal law: the Model Penal Code.

At the heart of the MPC project was a thoroughgoing commitment to ensuring legislative primacy in the realm of *mens rea* policy.⁵⁴ When the MPC drafters began their work in the mid-twentieth century, they were confronted with a broad-based regime of judicial policymaking in the realm of *mens rea* that had been created by the characteristically sparse legislative treatment of such issues up until that point. The MPC drafters appreciated the legality-related issues this regime created: not only did it violate the basic principle that the legislature, and not the judiciary, should make what are, at their core, fundamentally moral decisions about the nature of criminal responsibility, but, perhaps more importantly, judges often struggled mightily to resolve the relevant *mens rea* issues, disparately applying judicially-created policies that were themselves “inconsistent and confusing.”⁵⁵

To remedy these problems, the drafters devised a statutory framework, often called element analysis, that provided legislatures with the tools necessary to clearly and comprehensively communicate the elements governing every offense in a criminal code. These tools were comprised of four basic components: (1) a culpable mental state hierarchy comprised of four mental states—purposely, knowingly, recklessly, and negligently—comprehensively defined in a manner sensitive to the form of objective element to which it applies;⁵⁶ (2) rules of interpretation for distributing—and, where necessary, implying—these culpable mental states;⁵⁷ (3) general culpability principles clarifying the interaction between the culpable mental states and a host of issues related to criminal responsibility;⁵⁸ and (4) general defense provisions, which relied on those culpable mental states to articulate the contours of justifications and excuses.⁵⁹

The foregoing provisions went a long way toward asserting legislative primacy in the realm of *mens rea* policy, providing the states with a sound—if imperfect—basis for clarifying the threshold *mens rea* governing any given offense.⁶⁰ The problem, however, is that this

⁵⁴ See, e.g., Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 331-32 (2007); David Wolitz, *Herbert Wechsler, Legal Process, and the Jurisprudential Roots of the Model Penal Code*, 51 TULSA L. REV. 633, 637 (2016); Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1436 (1968).

⁵⁵ PETER W. LOW ET AL., CRIMINAL LAW: CASES AND MATERIALS 198-99 (2d ed. 1986).

⁵⁶ See, e.g., MPC § 2.02(2).

⁵⁷ See, e.g., MPC §§ 2.02(3), (4).

⁵⁸ See, e.g., MPC §§ 2.04(1), 2.08(2).

⁵⁹ See, e.g., MPC § 2.09.

⁶⁰ Generally speaking, the MPC’s general part “accomplished what no legal system had ever expressly tried to do: orchestrate the noise of culpability into a reasonably uniform and workable system.” Shen et al., *supra* note 15, at

assertion of legislative primacy was incomplete; it mostly ignored the second legality-related criterion discussed in Part I. It did so, moreover, notwithstanding a clear recognition of the importance of making key *mens rea* distinctions through a criminal code. Illustrative is a comparison of the MPC's approach to grading homicide offenses with that applied to every other offense.

The MPC's homicide provisions statutorily recognize two major categories of *mens rea* distinctions. The first focuses on *mens rea* in the narrow sense. For example, the threshold culpable mental state necessary to constitute homicide is criminal negligence.⁶¹ From there, a person who commits homicide recklessly is subject to elevated liability for manslaughter,⁶² while a person who commits homicide purposely, knowingly, or with extreme recklessness is subject to even greater liability for murder.⁶³

The foregoing culpable mental state-based grading distinctions are complemented by the Code's nuanced treatment of "partial defenses,"⁶⁴ which address *mens rea* in the broad sense. For example, the Code's Special Part explicitly treats a homicide committed with any of the culpable mental states necessary for murder as manslaughter when it is committed "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."⁶⁵ Other forms of partial defenses, such as killings motivated by culpably mistaken factual beliefs concerning the necessity of force or killings that involve culpable contributions to the conditions giving rise to the need for defensive force, are subject to a complex "sliding scale"⁶⁶ approach wherein the appropriate grade of homicide tracks the person's culpable mental state in making the relevant mistake or causal contribution.⁶⁷

The relatively nuanced treatment of *mens rea* reflected in the MPC's grading of homicide offenses is in stark contrast to the Code's grading of other offenses: outside of the homicide context, nearly all of the foregoing *mens rea*-based distinctions are ignored. Perhaps most striking is that, notwithstanding the effort the MPC drafters put into creating the culpable mental state hierarchy, the Code's Special Part rarely recognizes a grading distinction based solely on whether the *actus reus* of an offense is committed with a culpable mental state beyond the threshold for liability.⁶⁸ Nor, for that matter, does any other offense in the Code's Special Part

1315-16. Even the MPC's treatment of threshold *mens rea* issues was not without its flaws, however. For a good overview of those flaws, see Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983). For a recent attempt at ameliorating them, see D.C. Criminal Code Reform Commission, REPORT NO. 2, FIRST DRAFT RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—BASIC REQUIREMENTS OF OFFENSE LIABILITY (December 16, 2016), available at <http://ccrc.dc.gov/page/ccrc-documents>.

⁶¹ MPC § 210.4.

⁶² MPC § 210.3.

⁶³ MPC § 210.2.

⁶⁴ Douglas Husak, *Partial Defenses*, in THE PHILOSOPHY OF CRIMINAL LAW 311 (2010).

⁶⁵ MPC § 210.3.

⁶⁶ Paul H. Robinson et al., *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37, 73 (2015) [hereinafter, Robinson et al., *General Defenses*]; PAUL H. ROBINSON, 1 CRIM. L. DEF. § 102.1 (Westlaw 2017).

⁶⁷ See, e.g., MPC §§ 2.02(10), 2.09(2), 3.02(2). For a critique of these and similar provisions, see Paul H. Robinson et al., *Making Criminal Codes Functional: A Code of Conduct and A Code of Adjudication*, 86 J. CRIM. L. & CRIMINOLOGY 304, 325 (1996) [hereinafter, Robinson et al., *Making Criminal Codes Functional*].

⁶⁸ But see MPC §§ 220.1(1)-(2), 220.2(1).

recognize the mitigating impact of extreme mental or emotional disturbance, which is otherwise recognized by the Code's manslaughter offense. And while the same sliding scale approach applied by the Code to deal with other partial defenses in the homicide context is similarly applicable to other offenses, the pertinent rules primarily operate as clarifications of the contours of threshold *mens rea*, rather than serve a grading function, in these other contexts.⁶⁹

Now, to be fair to the MPC drafters, the prevailing theory of sentencing in effect when they undertook their work was one that envisioned a privileged role for the operation of judicial discretion. This is reflected in the fact that the MPC defines only five offense grades: first-degree felony, second-degree felony, third-degree felony, misdemeanor, and petty misdemeanor.⁷⁰ Today, however, this position has largely been rejected by American legislatures—at least in theory. The predominant view of sentencing has become one of limited judicial discretion subject to enforceable legal constraints, which include, among other mechanisms, more refined grading categories⁷¹ accompanied by sentencing guidelines promulgated by legislatively-created sentencing commissions.⁷²

Surprisingly, however, this modern legislative shift toward curtailing judicial sentencing discretion has not brought American criminal codes closer to realizing the principle of proportional *mens rea*. In a few areas of criminal law, a handful of jurisdictions have modestly improved upon the MPC's treatment of the principle.⁷³ On the whole, however, even the American criminal codes that most closely track the MPC in general ultimately disregard the principle of proportional *mens rea* to a significantly greater extent.⁷⁴

⁶⁹ This is because these rules generally depend upon pre-existing distinctions between culpable mental states—otherwise absent from the Code's Special Part—in order to serve a grading function. See, e.g., provisions cited *supra* note 67. Absent such distinctions, they merely clarify the threshold for liability.

⁷⁰ As Michael Cahill observes: “By placing the full range of offenses into only five categories, the Code drastically curtails the potential, and proper, role of grading in the liability-assigning process.” Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for a Model Penal Code Second*, 1 OHIO ST. J. CRIM. L. 599, 602 (2004) [hereinafter Cahill, *New Challenges*].

⁷¹ For example, many jurisdictions have nearly doubled the number of grading categories originally recognized by the MPC. See Paul H. Robinson, Michael T. Cahill, and Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 52-53 (2000) [hereinafter Robinson et al., *American Criminal Codes*].

⁷² See Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005). In the view of American legal practice, “the best possible sentencing scheme is one built around moderately flexible presumptive sentencing guidelines under a legislated maximum sentence, along with marginal parole release flexibility.” Robert Weisberg, *How Sentencing Commissions Turned Out to Be A Good Idea*, 12 BERKELEY J. CRIM. L. 179, 180 (2007).

⁷³ Notable exceptions highlighted by others include: (1) a few states that “make the provision of knowing aid a separate crime of criminal facilitation with punishment set at some fraction of that provided for the crime committed,” Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 389–90 (1997); and (2) a “couple of states [that] allow for a lesser form of assault to be charged when the victim provoked the attack or the defendant acted in the heat of passion,” Bergelson, *supra* note 25, at 432. I'd also add that: (1) at least one state recognizes grading distinctions based purely on culpable mental states in the context of assault offenses, see Or. Rev. Stat. Ann. §§ 163.165-185; and (2) at least one state explicitly differentiates for penalty purposes between substantial step attempts and dangerous proximity attempts, see N.D. Cent. Code § 12.1-06-01.

⁷⁴ This is to say nothing of the sizable minority of American criminal codes have never been subject to a comprehensive reform project based upon the MPC, and, therefore, lack the basic hardware—culpable mental state definitions, rules of interpretation, general culpability principles, and defense provisions—necessary to clarify even the threshold *mens rea* governing a criminal offense. See Robinson et al., *American Criminal Codes*, *supra* note 71.

This is a product of two phenomena. First, many MPC-based jurisdictions have watered down—through a mix of legislative revision and judicial mismanagement—the relatively robust threshold *mens rea* requirements proposed by the MPC.⁷⁵ This is reflected in, among other trends, rejection of the “principle of correspondence,”⁷⁶ the more frequent utilization of negligence as the basis for liability,⁷⁷ and the circumscription of complete defenses.⁷⁸ Second, many MPC-based jurisdictions have, over the years, added numerous overlapping offenses above and beyond those recommended by the Code.⁷⁹ The lowering of threshold *mens rea* expands the class of offenders subject to a single statutory maximum, while the addition of overlapping offenses—when viewed in light of the formalistic merger rules applied in these jurisdictions—multiplies the number of statutory maxima to which a single class of offenders is subject.⁸⁰ Both have the practical effect of significantly increasing judicial discretion over the contours and weight of *mens rea* distinctions at sentencing.⁸¹

To be sure, at least some of this increased judicial policy discretion is at least theoretically offset by the rise of sentencing guidelines, which many jurisdictions have adopted since completion of the MPC.⁸² In practice, however, American sentencing guidelines do little to address the principle of proportional *mens rea* discussed in Part I.⁸³

Although the nature of these guidelines varies in a range of ways, most often they are promulgated by sentencing commissions, applied by judges, and subject relevant sentencing facts to a standard less demanding than proof beyond a reasonable doubt.⁸⁴ Given these features,

⁷⁵ Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285 (2012).

⁷⁶ ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 76 (6 ed. 2007).

⁷⁷ See, e.g., Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 BUFF. CRIM. L. REV. 399 (2000); Matthew A. Pauley, *The Pinkerton Doctrine and Murder*, 4 PIERCE L. REV. 1 (2005); Kimberly R. Bird, *The Natural and Probable Consequences Doctrine: “Your Acts Are My Acts!”*, 34 W. ST. U. L. REV. 43 (2006).

⁷⁸ See Robinson et al., *General Defenses*, *supra* note 66.

⁷⁹ See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001); Paul H. Robinson, *The Rise and Fall and Resurrection of American Criminal Codes*, 53 U. LOUISVILLE L. REV. 173, 178 (2015). For discussion of the prosecutorial abuses to which offense overlap can lead, see Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and A Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 465 (2009).

⁸⁰ See, e.g., Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261, 270 (2003). The wide latitude afforded to trial judges in running multiple convictions for overlapping offenses concurrently may mitigate some of these issues; however, length of sentence aside, “conviction of a crime is by itself a form of punishment, a social stigma and an obstacle to a successful life.” Bergelson, *supra* note 25, at 444.

⁸¹ At the same time, the rise of harsh mandatory minima applied to offenses subject to low threshold *mens rea* may practically preclude judges from accounting for these distinctions in the first place by creating sentencing “cliffs instead of smooth slopes.” Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2487 (2004); see Adam J. Kolber, *The Bumpiness of Criminal Law*, 67 ALA. L. REV. 855, 877 (2016) [hereinafter Kolber, *Bumpiness of Criminal Law*].

⁸² See Frase, *supra* note 72, at 1191.

⁸³ For a discussion of the extent to which “most guideline systems around the world” evidence similar mistreatment, see Andrew Ashworth, *Re-Evaluating the Justifications for Aggravation and Mitigation at Sentencing*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 21-23 (Julian Roberts ed., 2011).

⁸⁴ See Frase, *supra* note 72, at 1195-1206. The exception are those “aggravating facts that increase the penalty above an otherwise prescribed ‘statutory maximum’ which ‘include[s] the upper limit of an enforceable sentencing guideline’ under the U.S. Supreme Court’s decision *Blakely v. Washington*, 542 U.S. 296 (2004). Reitz, *Proof at*

the utilization of sentencing guidelines to address the principle of proportional *mens rea* would, even in its most idealized form,⁸⁵ be inconsistent with the legality-related values of democracy,⁸⁶ fairness,⁸⁷ and liberty.⁸⁸

And yet, the manner in which American sentencing guidelines almost universally treat *mens rea* considerations—as departure factors—disserves the single legality-related value of equality that they could potentially address.⁸⁹ For example, conceptualizing *mens rea* distinctions in this way necessarily fails to provide guidance regarding the “extent to which the sentencer should modify the wrongdoer’s sentence to reflect the [departure].”⁹⁰ And as a matter of practice, it frequently leaves judges with unfettered discretion in deciding whether to give effect to *mens rea*-related aggravating or mitigating facts at all.⁹¹

When viewed as a whole, then, post-MPC developments in American criminal law—both at the legislative and administrative levels—fall exceedingly short of respecting the principle of proportional *mens rea*. Prior to concluding this Part, however, one final aspect of this mistreatment bears notice: the comparatively little scholarly attention it has received.

The past century of theorizing about *mens rea* has, in large part, focused on the role of *mens rea* in establishing the threshold for criminal liability. In one sense, that is not surprising; the line between criminal and non-criminal conduct is intuitively compelling, while the practical difference between a criminal conviction and a complete exoneration—given the collateral consequences and social stigma associated with the former—could hardly be more significant. At the end of the day, however, the amount of punishment imposed by the state, no less than whether punishment is imposed, is part of the same architecture of criminal responsibility—and, in at least some respects, the role that *mens rea* plays in the distribution of punishment should be less controversial.⁹² Consistent with these insights, there appears to be a growing trend, reflected in more recent scholarship, toward emphasizing the distributive dimension of *mens rea*.⁹³ With

Sentencing, *supra* note 43, at 231. These kinds of sentencing facts must be tried before a jury and proven beyond a reasonable doubt.

⁸⁵ That is, a form consistent with Criterion Two, discussed *supra* Part I.

⁸⁶ See Kahan & Nussbaum, *supra* note 12, at 364–65.

⁸⁷ See Morse, *Diminished Responsibility*, *supra* note 45, at 298–99.

⁸⁸ See Robinson et al., *American Criminal Codes*, *supra* note 71, at 19.

⁸⁹ See Carissa Byrne Hessick & Douglas A. Berman, *Towards A Theory of Mitigation*, 96 B.U. L. Rev. 161, 162–63 (2016).

⁹⁰ Kaye, *supra* note 51, at 454. For a summary of empirical research indicating that judges “often disagree with respect to the weight and significance of various sentencing factors,” see Julian V. Roberts, *Punishing, More or Less: Exploring Aggravation and Mitigation at Sentencing*, in *MITIGATION AND AGGRAVATION AT SENTENCING 3* (Julian Roberts ed., 2011).

⁹¹ Kaye, *supra* note 51, at 454–55; see Frase, *supra* note 72, at 1198–1200; Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 161–69 (2005).

⁹² Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 146–47 (2009).

⁹³ Contemporary contributions include: Paul H. Robinson, *A Sentencing System for the 21st Century?* 66 TEX. L. REV. 1 (1987); Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857 (1994); Bergelson, *supra* note 25; Smith, *supra* note 92; Morse, *Diminished Responsibility*, *supra* note 45; Husak, *Retributivist Dream*, *supra* note 3; Kaye, *supra* note 51; Kolber, *Bumpiness of Criminal Law*, *supra* note 81. For a notable early discussion of relevant issues, see G. E. Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like*, 62 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 313 (1971).

that in mind, the third and final part of this Essay considers how this increased attention might be channeled through criminal code reform efforts.

III. PROPORTIONAL *MENS REA* AND THE FUTURE OF CRIMINAL CODE REFORM

Discontent with the treatment of *mens rea* in Anglo-American criminal law was both a motivating and guiding force for the work of the MPC drafters as well as the wave of criminal code reform the Code inspired. Nevertheless, for the reasons discussed in Part II, there remains much work to be done. Just as the disarray surrounding threshold *mens rea* evaluations helped drive and shape the criminal code reform movement of the twentieth century, the neglect of *mens rea* in the distribution of punishment might play a similarly directive role in guiding the criminal code reform efforts of the twenty-first century. In what follows, I discuss the two basic models of criminal code reform—what I refer to as the thick model and the thin model⁹⁴—through which such efforts might proceed, and consider what a commitment to the principle of proportional *mens rea* in each context might look like.

The thick model of criminal code reform, as I conceive of it, involves a systematic and comprehensive rewrite of a given jurisdiction's substantive criminal laws. A revision of this nature entails a holistic rethinking of the state's existing criminal code, including a consideration of the basic values (both first and second order) that ought to animate the substantive criminal justice policies employed in a given jurisdiction. Thereafter, these values must be translated into a comprehensive criminal code comprised of general provisions, offense definitions, and a penalty structure that coherently synthesizes (and, where necessary, reconciles) them. Accomplishing this kind of project is resource intensive, and, therefore, typically requires the assistance of one or more expert bodies—historically, a professional organization such as the American Law Institute to provide a blueprint for reform and a government-appointed commission to aid the legislature with fine-tuning it.⁹⁵ An illustrative example of the thick model of reform would be the MPC and the many state criminal code reform projects that were based upon it.⁹⁶

The thin model of criminal code reform, in contrast, refers to a more piecemeal, targeted approach. Like the thick model, the thin model begins with a consideration of the key values that ought to animate the substantive criminal justice policies employed in a given jurisdiction. However, whereas the thick model emphasizes comprehensiveness, and thus subjects to potential revision every aspect of a criminal code, the thin model works within a criminal code's preexisting structure, seeking to identify those substantive criminal justice policies that are most problematic and at the same time most susceptible to change through targeted solutions. The reason for this more limited focus is one of efficiency, which is a defining feature of the thin model of criminal code reform. For this reason, thin model reforms can be developed and driven by non-profits, think tanks, and the like—or perhaps a coalition of them, as reflected in the

⁹⁴ This terminology is borrowed from Cahill, *Design of Criminal Law*, *supra* note 28, which makes the distinction between “thick” and “thin” criminal codes. *Id.* at 938-56.

⁹⁵ See, e.g., Robinson & Dubber, *supra* note 54, 326-27.

⁹⁶ See, e.g., Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 252-53 (2007).

bipartisan coalition of organizations that make up the so-called Smart on Crime movement.⁹⁷ An illustrative example of the thin model of reform is the federal sentencing reform legislation that was considered by the U.S. Senate and the U.S. House of Representatives during the last Congress.⁹⁸

What, then, might the foregoing schema have to say about a reform agenda oriented toward realizing the principle of proportional *mens rea*? Insofar as the thick model is concerned, the endgame is relatively clear: the enactment of a comprehensive criminal code comprised of non-overlapping offenses subject to a carefully tailored *mens rea*-sensitive grading scheme which—consistent with the two legality-based criteria proposed in Part I—affords to all offenses a level of nuance comparable to that reflected in the MPC’s homicide provisions.⁹⁹ At the same time, however, the cross-cutting evaluation of expert and lay assessments of *mens rea*—a key feature of the theory of political representation presented in Part I—is likely to necessitate some material departures from the MPC.

For example, although the MPC’s overall approach to grading homicide mirrors the “continuous function”¹⁰⁰ that *mens rea* seems to play in popular and expert assessments of relative blameworthiness, both the particular *mens rea* distinctions that the Code recognizes (or, for that matter, doesn’t recognize) and the weight it affords them, might be reworked in a manner that renders the overall framework more consistent, comprehensive, and proportionate.¹⁰¹ In addition, the MPC’s monolithic approach to grading inchoate crimes, broadly applicable both inside and outside of the homicide context,¹⁰² might be replaced with a more nuanced scheme that recognizes at least a few of the key *mens rea* distinctions that the people appear to perceive.¹⁰³ Finally, justice intuitions aside, the MPC’s overbroad approach to substituting

⁹⁷ See Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”*: American Criminal Justice Reform—Legacy and Prospects, 7 J.L. ECON. & POL’Y 597, 608 (2011).

⁹⁸ See Jared P. Cole & Charles Doyle, *Sentencing Reform: Comparison of Selected Proposals*, CONGRESSIONAL RESEARCH SERVICE REPORT (October 26, 2015).

⁹⁹ That is, all of the offenses in this code would be graded based upon key distinctions in culpable mental states, while, at the same time, accounting for the mitigating impact of a broad array of partial defenses. Whether and to what extent negligence or extreme recklessness ought to play a role in this grading scheme, as well as the particular contours of the pertinent partial defenses, are issues that would need to be resolved by the code drafters.

¹⁰⁰ ROBINSON & DARLEY, COMMUNITY SENTIMENT, *supra* note 14, at 208-10.

¹⁰¹ For an overview of the problems reflected in, as well as potential solutions to, various aspects of the Code’s treatment of partial defenses both inside and outside the homicide context, see Robinson, et al., *Making Criminal Codes Functional*, *supra* note 67. For an overview of judicial and community sentiment on issues related to partial defenses, see Hessick & Berman, *supra* note 89. And for two studies calling into question the ability of lay jurors to differentiate between, as well as their moral support for, some of the MPC’s culpable mental state distinctions, central to both the narrow and broad *mens rea* distinctions governing the Code’s law of homicide, see Matthew R. Ginther et al, *supra* note 15; Shen et al., *supra* note 15.

¹⁰² See MPC § 5.05(1); Paul H. Robinson, *The Role of Harm & Evil in Criminal Law: A Study in Legislative Deception?* 1994 J. CONTEMP. LEGAL ISSUES 299.

¹⁰³ For example, the Robinson and Darley study on criminal attempts not only found robust support for a modest “no-harm discount,” but, perhaps more importantly, an even greater “incomplete-conduct discount” for those actors who had failed to complete their criminal scheme. See ROBINSON & DARLEY, COMMUNITY SENTIMENT, *supra* note 14 (Study 1). Consistent with these findings, and separate and apart from how code drafters resolve the perennial “do results matter” question, a criminal code might recognize the distinction in *mens rea* between the complete attempter, who has actually released the risk of harm implicated by her criminal scheme, and the incomplete attempter, who has not and therefore may ultimately refrain from completing the offense. See Stephen J. Morse,

mental elements to deal with *mens rea* problems such as culpable mistakes,¹⁰⁴ divergence,¹⁰⁵ and voluntary intoxication¹⁰⁶ might be scaled back to avoid the disproportionate grading implications—highlighted by a range of commentators—that the relevant forms of imputation otherwise produce.¹⁰⁷

Whatever *mens rea* distinctions are ultimately recognized, however, one thing is clear: reconciling the thick model of code reform with the principle of proportional *mens rea* is likely to be a substantial undertaking. For starters, the established blueprint for contemporary criminal code reform efforts, the MPC, lacks the basic conceptual hardware necessary to accommodate the kinds of distinctions just noted across offenses, which—absent the creation of a Model Penal Code Second¹⁰⁸—in turn places the architectural burden on any given jurisdiction seeking to undertake such reform.¹⁰⁹ Apart from the challenge of code design, moreover, are the various challenges related to localization: competently assessing justice intuitions raises a range of operational complexities, as does the process of reconciling them with expert opinion and thereafter synthesizing the results into normative prescriptions.¹¹⁰

Given the breadth and diversity of the foregoing challenges, a legislature could not accomplish them on its own. Rather, it would need to rely on the assistance of an independent commission with a level of autonomy, staffing, and time commensurate to the mission. However, the mere acts of creating and sustaining—through annual reauthorization—a commission of this nature requires the expenditure of significant political capital, to say nothing of the political capital that would be necessary to actually enact the code produced by this commission. Moreover, at the end of the day, that expenditure may all be for naught: undertaking the thick model of code reform is an all-or-nothing affair, which, as the federal experience reveals, can indeed amount to nothing.¹¹¹

Reason, Results, and Criminal Responsibility, 2004 U. ILL. L. REV. 363, 389 (2004); cf. Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1170-71 (1997).

¹⁰⁴ See MPC § 2.04(2).

¹⁰⁵ See MPC § 2.03(2).

¹⁰⁶ See MPC § 2.08(2).

¹⁰⁷ For analysis of the overbreadth problems inherent in the Code's approach to culpable mistakes, divergence, and voluntary intoxication, see, for example, Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984) (mistakes); *Transferred Intent*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 65 (1996) (divergence); and Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. L. 545 (2012) (voluntary intoxication).

¹⁰⁸ For an argument that the “dynamics of local criminal law politics make it very difficult, if not impossible, to achieve general criminal law recodification without the kind of outside help provided by the Model Penal Code in the 1960s and 70s,” see Paul H. Robinson & Michael T. Cahill, *Can A Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 173 (2003) [hereinafter Robinson & Cahill, *Model Penal Code Second*].

¹⁰⁹ At least one example of a pared down criminal code with the capacity to accommodate such distinctions already exists. See Robinson et al., *Making Criminal Codes Functional*, *supra* note 67. It is an open question, however, whether this proposal's “thinness” renders it so aesthetically distinct from legislative norms as to preclude code drafters from relying on it. Cahill, *Design of Criminal Law*, *supra* note 28, at 945-46. For a fascinating discussion of various considerations that might be brought to bear on code drafting, see Stuart P. Green, *Prototype Theory and the Classification of Offenses in a Revised Model Penal Code: A General Approach to the Special Part*, 4 BUFF. CRIM. L. REV. 301 (2000).

¹¹⁰ See, e.g., Deborah W. Denno, *The Perils of Public Opinion*, 28 HOFSTRA L. REV. 741 (2000); Kelman, *supra* note 21.

¹¹¹ See, e.g., Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45 (1998); Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. CRIM. L. REV. 195 (1997).

Finally, it's worth noting that even where thick model reforms succeed there exist underappreciated costs associated with the administration and preservation of the final product. For example, upending decades of legal practice to transition to a new criminal code is likely to impose significant "post-code retooling costs"¹¹² in the short term, though such costs are heavily outweighed by the long-term administrative benefits promised by thick model reforms.¹¹³ Importantly, however, the preservation of these administrative benefits—as well as the more fundamental first and second-order values implicated by the thick model—will require legislators to forgo the short-term political gain promised by passing crime legislation in response to the news cycle, rather than actual shortcomings.¹¹⁴ One potentially durable mechanism for safeguarding the integrity of a comprehensive criminal code from the "pathological politics of criminal law"¹¹⁵ would be the creation of a standing Criminal Law Commission—such as those utilized in various commonwealth countries¹¹⁶—to oversee and review future criminal law reforms.¹¹⁷

Given the significant costs associated with the thick model, it's worth considering whether and to what extent the more efficient alternative, the thin model, can be squared with the principle of proportional *mens rea*. Answering this question in the abstract is difficult given the diversity of the problems affecting American criminal codes. For purposes of this Essay, then, I will focus on what the thin model might have to say about reforming the federal criminal "code,"¹¹⁸ a uniquely large and disorganized body of criminal statutes characterized by four basic attributes: (1) broad and overlapping offense definitions; (2) ambiguous (or non-existent) culpable mental state requirements; (3) high statutory maxima (and, not infrequently, severe mandatory minima); and (4) silence on culpability issues of general applicability (such as the contours of general inchoate liability and defenses).¹¹⁹

When viewed collectively, these attributes indicate that the U.S. Congress has largely declined to exercise direct policy discretion over the vast majority of *mens rea* issues, both threshold and distributive, that arise under federal law. In light of this pervasive congressional

¹¹² Kathleen F. Brickey, *Federal Criminal Code Reform: Hidden Costs, Illusory Benefits*, 2 BUFF. CRIM. L. REV. 161, 188 (1998).

¹¹³ See, e.g., Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001, 1056 (2001); Gainer, *supra* note 111, 83-86.

¹¹⁴ See, e.g., Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997); Philip Pettit, *Is Criminal Justice Politically Feasible?*, 5 BUFF. CRIM. L. REV. 427 (2002).

¹¹⁵ Stuntz, *supra* note 79, at 505.

¹¹⁶ See, e.g., England and Wales Law Commission, *available at* <http://www.lawcom.gov.uk>; Australian Law Reform Commission, *available at* <http://www.alrc.gov.au>.

¹¹⁷ E.g., Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 653-54 (2005); Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971, 979-81 (2010); Pettit, *supra* note 114, at 442-49. For relevant insights concerning the institutional design of these commissions, see Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005).

¹¹⁸ Julie R. O'Sullivan, *The Federal Criminal "Code" Is A Disgrace: Obstruction Statutes As Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643 (2006).

¹¹⁹ For descriptions along these lines, see, for example, Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225 (1997); Cahill, *Punishment Decisions at Conviction*, *supra* note 45; Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249 (1998). Of course, to the extent that the criminal code in any other jurisdiction is comprised of similar problems, the below observations concerning the nature of thin model reforms would be similarly applicable.

disregard of *mens rea* policy—and given that threshold *mens rea* assessments are a prerequisite to distributive *mens rea* assessments—any package of legislative reforms premised on the thin model would need to be comprised of self-contained strategies for simultaneously aligning individual aspects of federal criminal law with *both* of the legality-related criteria discussed in Part I.

The most straightforward approach would be the enactment of targeted revisions to the definitions of, and penalty structure governing, particular sets of routinely charged offenses in a manner that explicitly accounts for both narrow and broad *mens rea* distinctions at the threshold and distributive levels to the extent feasible without reliance on general provisions.¹²⁰ For a broader approach, Congress might (re)consider one or more generally applicable default rules governing culpable mental states,¹²¹ which could perhaps be accompanied by a “generic, doctrinal mitigating excuse of partial responsibility that would apply to all crimes, and that would be determined by the trier of fact.”¹²²

Federal legislative reforms such as these focus on the treatment of *mens rea* at the liability stage, which, for the reasons discussed in Part I, is the normative ideal. Nevertheless, in a world of second-best options—which the thin model inhabits—legislative reforms targeting the treatment of *mens rea* at the sentencing stage would also be worthy of consideration. One concrete possibility would be the adoption of a sentencing statute that supplants the formalistic merger doctrine applied by federal courts with a proportionality-based approach authorizing the courts to vacate one or more multiple convictions in the interests of justice.¹²³ Other, more general avenues worth exploring include statutory reforms that direct either (or both) of the primary delegates of *mens rea* policy discretion in the federal system, the U.S. Sentencing Commission and federal district court judges, to afford *mens rea* a more prominent role at the sentencing stage.¹²⁴

¹²⁰ Federal criminal statutes subject to mandatory minima so harsh as to effectively preclude courts from distinguishing between actors of distinct *mens rea* in the first place would be a good place to focus such efforts. See Kolber, *Bumpiness of Criminal Law*, *supra* note 81, 878-80; *Dean v. United States*, 556 U.S. 568, 585 (2009) (Stevens, J., dissenting).

¹²¹ For a general overview of what such a provision should look like, see Darryl K. Brown, *Criminal Law's Unfortunate Triumph Over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 671-72 (2011) [hereinafter Brown, *Triumph over Administrative Law*]. For a summary of the last Congress's effort at developing such a provision, see Richard M. Thompson II, *Mens Rea Reform: A Brief Overview*, CONGRESSIONAL RESEARCH SERVICE REPORT (April 14, 2016).

¹²² Morse, *Diminished Responsibility*, *supra* note 45, at 289.

¹²³ See Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 785-86 (2013). For one proposal, see Cahill, *Offense Grading and Multiple Liability*, *supra* note 70, at 605. Note, however, that the proposed approach seems to focus on a comparison of offense elements alone, “without reference to the particular facts of specific cases.” *Id.* at 607. But whether or not multiple convictions (and punishments) is disproportionate also seems contingent upon a consideration of the facts, as reflected in the judicially-developed merger rules governing kidnapping and other crimes of violence. See Wayne R. LaFave, 3 SUBST. CRIM. L. § 18.1 (Westlaw 2017). For an example of one state court that has developed a generally applicable fact-based merger rule that explicitly accounts for a range of proportionality-related considerations, see *State v. Tate*, 216 N.J. 300 (2013).

¹²⁴ For a discussion of the shortcomings of the U.S. Sentencing Commission's and federal judiciary's treatment of *mens rea* and its relationship to (revisable) federal statutes, see Carrie Legus, *Quantitative Justice: Have the Federal Sentencing Guidelines Forsaken Quality?*, 21 VT. L. REV. 1145 (1997); Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENT'G REP. 121 (1994); Joseph E. Kennedy, *Making the*

There is, then, no shortage of possibilities for reconciling the thin model with the principle of proportional *mens rea*—at least insofar as the legality-related considerations discussed in Part I are concerned. The challenge, however, is in translating any of these general proposals or ideas into normatively sound, enactable pieces of legislation that accord with the theory of political representation presented in Part I.

For example, any attempt at giving *mens rea*-related justice intuitions their due in the context of thin model reforms is complicated by the fact that their primary value corresponds to judgments of relative blameworthiness.¹²⁵ To the extent that thin model reforms leave many—indeed, most—areas of penal policy untouched, then, it’s harder to make the case that any particular set of reforms truly reflects these judgments when viewed in broader context.¹²⁶

Perhaps more problematic is that it may be difficult even to ascertain what that broader context looks like—or accurately predict how any particular reform would operate—given the breadth and diversity of federal criminal laws to which such reforms might apply.¹²⁷ As a result, devising any thin model reforms to address *mens rea* issues (but particularly those of general applicability) poses a substantial risk of unintended consequences, and, therefore, would require a substantial amount of thought and care in their development.

Which raises the most critical question of all: would—or even should—the key interest groups typically involved in thin model reforms at the federal level be willing to devote the time and resources necessary to develop them and drive their enactment?¹²⁸ Disregard of the principle of proportional *mens rea* is not the only—or even the most significant—problem confronting the federal criminal justice system.¹²⁹ Nor is it one that has intuitive appeal from a political messaging standpoint, even if the underlying issues are themselves intuitive. Worst of

Crime Fit the Punishment, 51 EMORY L.J. 753 (2002); William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to S 3553 After Booker and Its Progeny*, 40 CONN. L. REV. 631 (2008).

¹²⁵ It’s also an open question for thin model reforms whether and to what extent any non-governmental organization is suited to accurately and credibly assess justice intuitions.

¹²⁶ For discussions of the relational nature of blameworthiness assessments, see, for example, Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention As Criminal Justice*, 114 HARV. L. REV. 1429, 1442–43 (2001); VON HIRSCH, *supra* note 11, at 40.

¹²⁷ For two analyses of the most recent effort at generally applicable federal *mens rea* reform along these lines, see Orin Kerr, *A confusing proposal to reform the ‘mens rea’ of federal criminal law*, THE VOLOKH CONSPIRACY (November 25, 2015), available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/25/a-confusing-proposal-to-reform-the-mens-rea-of-federal-criminal-law/?utm_term=.a8f4e83e2912; Alex Sarch, *How to solve the biggest issue holding up criminal justice reform*, POLITICO: THE AGENDA (May 16, 2016), available at <http://www.politico.com/agenda/story/2016/05/criminal-justice-reform-mens-rea-middle-ground-000120>.

¹²⁸ For an overview of the relevant players, see Fairfax, *supra* note 97, at 608. For a proposal to create a federal version of a standing Criminal Law Commission to take on this task, see Brown, *Triumph Over Administrative Law*, *supra* note 121, at 657-58 (2011); REINING IN OVERCRIMINALIZATION: ASSESSING THE PROBLEM, PROPOSING SOLUTIONS: HEARING BEFORE THE H. S. COMM. ON CRIME, TERRORISM AND HOMELAND SECURITY, 111th Cong. 62-65 (2010) (statement of Stephen F. Smith, Professor of Law, University of Notre Dame Law School).

¹²⁹ See, e.g., Marie Gottschalk, *Bring It on: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559 (2015). In the view of most federal advocacy groups, the primary problem is that there exist too many people in prison for too long. Implementing the principle of proportional *mens rea* does not inherently entail ratcheting down the overall severity of the federal criminal justice system, though the need to distinguish between actors of varying *mens rea* might be marshaled as the basis for identifying those classes of actors who are most deserving of sentencing reductions.

all, any of solutions to this problem may—as the recent federal experience with threshold *mens rea* reform illustrates—engender partisan rancor, and, therefore, preclude the kind of bipartisan support that would bolster its chances of enactment.¹³⁰

In the final analysis, then, criminal code reforms organized around the principle of proportional *mens rea*—whether premised on the thin model or the thick model—are likely to confront significant political, social, and organizational challenges.¹³¹ Nevertheless, they are challenges that—for the reasons set forth in Parts I and II of this Essay—are worthy of confrontation.

This Essay has argued that legislative neglect of the principle of proportional *mens rea* is both a significant and underappreciated flaw that future criminal code reform efforts might be structured around. It also attempted to provide a rough sketch of what such efforts might look like, as well as the principles that ought to animate them. This brief exploration has raised, but ultimately not resolved, a range of significant normative, conceptual, and descriptive issues implicated by the intersection of proportional *mens rea* and criminal code reform. Hopefully, those working on criminal law reform, whether on the ground or in the academy, find them worthy of further consideration in the pursuit of a fairer and more effective criminal justice system.

¹³⁰ See Gideon Yaffe, *A Republican Crime Proposal That Democrats Should Back*, N.Y. Times (Feb. 12, 2016), available at https://www.nytimes.com/2016/02/12/opinion/a-republican-crime-proposal-that-democrats-should-back.html?_r=0.

¹³¹ As one commentator phrases it, criminal law reform is “a project of awesome scope and complexity entailing not merely legal considerations but also sensitivity to history, politics, social psychology, penology and the religious, ethnic and economic tensions within this nation.” Louis B. Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics, and Prospects*, 41 LAW & CONTEMP. PROBS. 1, 15 (1977).