

**LEGISLATIVE TESTIMONY**

**MENS REA: THE NEED FOR A MEANINGFUL  
INTENT REQUIREMENT IN FEDERAL CRIMINAL LAW**

**Testimony before the Committee on the Judiciary**

**U.S. House of Representatives**

**Task Force on Over-criminalization**

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Mr. Chairman, Mr. Ranking Member, and other Members of Congress:

Thank you for the opportunity to speak with you regarding the fundamental principle of *mens rea*. I applaud the House Judiciary Committee for studying this issue as part of the work of the Task Force and for convening this hearing.

My name is John Baker. I am a Visiting Professor at Georgetown Law School; a Visiting Fellow at Oriel College, University of Oxford; and Emeritus Professor at LSU Law School. In the past, I have been a consultant to the U.S. Senate Judiciary Committee Subcommittee on Separation of Powers, and to the U.S. Department of Justice. Prior to teaching, I prosecuted criminal cases in New Orleans and have since been involved in the defense of a few federal criminal cases. I have written extensively on state and federal criminal law,<sup>1</sup> including a criminal law casebook.<sup>2</sup> I was a member of the ABA Task Force that issued the report “The Federalization of Crime” (1998).

The two issues in criminal law on which I have primarily focused are the federalization of crime and the requirement of *mens rea*. The first issue concerns the respective responsibilities of the federal and state governments for promulgating and enforcing criminal prohibitions. The second issue concerns the requirement that criminal statutes require prosecutions to prove that a criminal defendant had a *mens rea*.

#### I. Mens Rea: Central to Criminality.

The common law of crime requires a union of *actus reus* and *mens rea*, i.e. an act and a guilty mind.<sup>3</sup> The *mens rea* requirement is the essential protection for the innocent. Those who do not intend to commit wrongful acts should not suffer unwarranted prosecution and conviction.<sup>4</sup>

In the mid-19th century, some states for the first time enacted police regulations that punished certain conduct without proof of a *mens rea*. In a law review article that became a classic, Professor Francis B. Sayre coined the term “public welfare offenses” to describe these strict-liability offenses.<sup>5</sup> The article distinguished these “regulatory offenses” from “true crimes.”<sup>6</sup> Although some strict-liability offenses carried possible imprisonment, Sayre reiterated the traditional understanding that it is unjust to punish without proof of criminal intent:

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<sup>1</sup> See, e.g., John S. Baker, Jr., *Mens Rea and State Crimes: 50 Years Post-Promulgation of the Model Penal Code*, 92 CRIM. L. REP. (BNA) 248 (Nov. 28, 2012); see also John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, Legal Memorandum No. 26 (June 16, 2008) available at <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>.

<sup>2</sup> John S. Baker, Jr., Daniel H. Benson, Robert Force, B.J. George, Jr., HALL’S CRIMINAL LAW: CASES AND MATERIALS (5th ed. 1993).

<sup>3</sup> Cf. Oliver Wendell Holmes, THE COMMON LAW 3 (1881) (discussing the deep roots of *mens rea* within Anglo-American law).

<sup>4</sup> See, e.g., 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 20-21 (1769) (distilling the act of criminality to “this single consideration, the want or defect of *will* . . .”) (emphasis in original).

<sup>5</sup> Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

<sup>6</sup> *Id.* at 68.

To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure. Crimes punishable with prison sentences, therefore, ordinarily require proof of a guilty intent.<sup>7</sup>

After World War II, the U.S. Supreme Court echoed Sayre's sentiment. In 1952, the Court in *Morissette v. United States*<sup>8</sup> read a *mens rea* into a federal theft statute. The opinion assumed that, unless Congress clearly stated a contrary intent, federal statutes based on common-law crimes should be construed to have a *mens rea*. The Court emphasized that the prosecutor must persuade the fact-finder that the accused not only possessed "an evil-doing hand," but an "evil-meaning mind."<sup>9</sup> Justice Robert H. Jackson's opinion reaffirmed the *mens rea* principle in the strongest of terms:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It 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. . . .

Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle, but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law.<sup>10</sup>

Since *Morissette*, the Court has several times reiterated these principles – applying "the usual presumption that a defendant must know the facts that make his conduct illegal. . . ." to even non-common law offenses.<sup>11</sup> Unfortunately, Congress has

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<sup>7</sup> *Id.* at 72; see also *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 495 (E.D.N.Y. 1993) (explaining that *mens rea* requirements "flows from our society's commitment to individual choice.").

<sup>8</sup> 342 U.S. 246 (1951).

<sup>9</sup> *Id.* at 251.

<sup>10</sup> *Id.* at 250-52.

<sup>11</sup> See *United States v. Staples*, 511 U.S. 600, 619 (1994); see also *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) (explaining that *mens rea* requirements support the maxim that ignorance

not been nearly as sensitive about including a *mens rea* in statutes carrying criminal penalties.

The erosion of *mens rea* has been greater in federal criminal law than it has been at the state level for several related reasons. State law largely codifies common law offenses, which by definition had a *mens rea*.<sup>12</sup> Although the states have modified the common law offenses and have added many crimes unknown to the common law, adherence to the principle of a *mens rea* remains strong, in part due to the Model Penal Code.<sup>13</sup> The “meat and potatoes” of state criminal prosecutions remains the common law crimes of murder, rape, robbery, burglary, larceny/theft, etc. Federal crimes have always been statutory due to the Supreme Court’s early ruling that there is no federal common law of crimes.<sup>14</sup> Thus, Congress can only enact a crime pursuant to one of its enumerated powers, usually the Commerce Clause. Congress has no general police power like the states.<sup>15</sup> When Congress does enact legislation pursuant to the Commerce Clause, what it actually does is “regulate” commerce among the states in some way that includes a criminal penalty.

The constitutionally-grounded difference between state and federal crimes has an effect on criminal prosecutions. Federal criminal statutes usually make the relationship to commerce (or some other enumerated power, such as the postal power for mail fraud) a jurisdictional requirement for proof of the crime, such as the Hobbs Act’s prohibition on robbery and extortion “affect[ing] commerce.”<sup>16</sup> As a result, most federal crimes are more complex and unfamiliar than state crimes. Even when a federal statute provides what appears to be a *mens rea*, it may be a very weak one such as “knowing.”<sup>17</sup> Presented with a complex federal statute, having a weak *mens rea*, a federal jury may have great difficulty understanding what constitutes guilt. A state jury, on the one hand, may require little or possibly no instruction on the *mens rea* and other elements of murder, rape,

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of the law is no excuse; individuals who know they are committing an “evil” act cannot then claim ignorance of their act’s illegality).

<sup>12</sup> See Blackstone, *supra* note 4.

<sup>13</sup> See Baker, *Mens Rea and State Crimes*, *supra* note 1 (describing both the intended effect of the MPC to preserve culpability in criminal law, as well as the unintended detriment the MPC has on that goal); see also MODEL PENAL CODE § 2.02(4) (1985) (directing courts to apply general *mens rea* terms in a criminal offense to each element of the offense – striving for a “default” *mens rea* term in each statute).

<sup>14</sup> See *United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812) (holding that “jurisdiction of crimes against” the United States exist only from congressionally-enacted statutes, and criminal common law “is not among those [implied] powers” of federal courts).

<sup>15</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 618 (2000); *United States v. Lopez*, 514 U.S. 549, 566 (1995).

<sup>16</sup> 18 U.S.C. §1951. Congress need not actually state a jurisdictional requirement in the offense itself, however – it must simply be satisfied with the underlying activity’s relationship to interstate commerce. See, e.g., *Gonzalez v. Raich*, 545 U.S. 1, 15-19 (2005) (affirming the Controlled Substances Act’s prohibition on marijuana production, distribution, and manufacture because Congress possessed sufficient legislative findings of the substantial effect these activities have on interstate commerce). Incidentally, “jurisdictional requirement,” though common parlance, is not quite right. See, e.g., *United States v. Martin*, 147 F.3d 529, 531-32 (7th Cir. 1998) (“the nexus of interstate commerce . . . is ‘jurisdictional’ only in the shorthand sense that without that nexus, there can be no federal crime. . . . It is not jurisdictional in the sense that it affects a court’s subject matter jurisdiction.”).

<sup>17</sup> Cf. *infra* note 24 (discussing “knowingly” as a *mens rea* for the Endangered Species Act).

robbery, or theft because they readily recognize those crimes. On the other hand, few jurors – or even lawyers – can provide a common sense explanation of what constitutes a federal offense under the Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>18</sup> or the mail and wire fraud statutes.<sup>19</sup>

Even more threatening to the innocent are the many federal crimes which lack any *mens rea*.<sup>20</sup> In 2011, the *Wall Street Journal* chronicled the story<sup>21</sup> of Wade Martin – a native Alaskan fisherman who sold 10 sea otters to another person he thought was also a native Alaskan. Mr. Martin was thus surprised to find himself arrested for violating the Marine Mammal Protection Act, which criminalizes the sale of certain species to those who are not native Alaskans.<sup>22</sup> Even though Mr. Martin believed the buyer to be a native Alaskan, that important fact did not matter. The federal prosecutor would not have to prove that Mr. Martin knew the buyer to be other than a native Alaskan. So on the advice of his attorney, Mr. Martin pleaded guilty and received two years on probation with a \$1,000 fine. He still lives with the stigma of a criminal conviction.

Mr. Martin's misfortune was not attributable to some exceptional federal criminal statute.<sup>23</sup> Statutes with a weak or non-existent *mens rea* requirement range from criminal

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<sup>18</sup> 18 U.S.C. §§ 1961-68.

<sup>19</sup> 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud).

<sup>20</sup> As documented in a report of the Heritage Foundation in 2008:

For the period 2000 through 2007, the great majority of [federal criminal] sections or subsections [of the U.S. Code] appeared to have a *mens rea* requirement, often employing the term "knowingly" or "willfully." Nevertheless, 55 statutory provisions (some of which contain more than one crime) contained no reference to a *mens rea* requirement. Of these 55, 17 are new and 38 amend existing statutes. That means that 17 out of the total of 91 new criminal statutes did not specify a mental element.

John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, Legal Memorandum No. 26 (June 16, 2008) available at <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>.

<sup>21</sup> See Gary Fields and John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, WALL ST. J., Sept. 27, 2011, available at <http://online.wsj.com/article/SB10001424053111904060604576570801651620000.html>.

<sup>22</sup> See 16 U.S.C. § 1361 *et. seq.*

<sup>23</sup> Even within one criminal section of the U.S. Code, there can be a divergence over the existence or applicability of a *mens rea* term:

Consider, for example, 18 U.S.C. § 1960, which prohibits "unlicensed money transmitting businesses" and was amended in the wake of 9/11. The statute contains several subsections. The 2001 amendments added a new subsection expanding the definition of "unlicensed money transmitting business." The added section contains a knowledge requirement. In our count, the amendment does not count as adding a crime. While the amendment adds a *mens rea*, it also drops a *mens rea* requirement from an existing provision. If 18 U.S.C. § 1960 is counted as just one crime or if only the newly added subsection is considered, then the crime carries a *mens rea*. That means, however, that the elimination of the one *mens rea* requirement may escape notice. Once again, what counts as a crime dictates conclusions about what Congress

violations of the Endangered Species Act,<sup>24</sup> to the unauthorized use of a 4-H club logo.<sup>25</sup> Federal criminal statutes with weak or non-existent *mens rea* requirements undermine the rationale for criminalizing conduct. This in turn undermines the seriousness society attaches to a criminal conviction.

## II. The Growth of Federal Criminal Law Fuels the Erosion of *Mens Rea*

*Mens rea* requirements are more important today because the federal government creates so many new crimes. Historically, nearly all crimes – because they were common law crimes – concerned acts that were *malum in se*, or wrong in themselves, such as murder, rape, robbery, burglary, and theft. Virtually all new federal crimes and offenses are *malum prohibitum*, or wrong only because they are prohibited – using a 4-H club logo without authorization is an illustrative example of a *malum prohibitum* offense. For *malum prohibitum* crimes and petty offenses, *mens rea* requirements are needed in order to protect individuals who have accidentally or unknowingly violated the law.

The explosive growth of federal criminal law in recent decades was the concern of a Task Force of the American Bar Association, which calculated that, as of 1998, more than 40% of the federal criminal code since the Civil War has been enacted since 1970 alone.<sup>26</sup> Since then, two follow-up studies have shown the post-1970 pace of creating new federal crimes continues unabated.<sup>27</sup>

The increase in the number of federal criminal laws has been accompanied by a decrease in the concern for the *mens rea* requirement. As Justice Scalia noted in *Sykes v. United States*, “It should be no surprise that as the volume increases, so do the number of

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has done in passing a statute—that is, whether it has or has not eliminated a *mens rea* requirement.

See Baker, Heritage Foundation report *supra* note 1.

<sup>24</sup> See 16 U.S.C. § 1540(b)(1) (providing that a person is guilty if he “knowingly violates any provision of this Act, of any permit or certificate issued hereunder, or of any regulation issued in order to implement [specific subsections] shall, upon conviction, be fined not more than \$50,000 or imprisoned for not more than one year, or both.”). The *mens rea* term “knowingly” is a weak one in that the charged individual need not know he’s endangering one of the species covered by the Act. He only need know that he is endangering something, and what that something is could happen to a covered species as learned after the fact. See *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998) (discussing why Congress amended the *mens rea* of Act from a “willfully” to “knowingly,” in an attempt to make it only a general intent crime.). While general intent crimes have a traceable lineage to the common law, the concept only works when the *actus reus* itself, when done intentionally, is deemed to a morally blameworthy, e.g., battery. Here, unless simple hunting for legitimate prey, for example, is considered an action manifesting a morally blameworthy state of mind, the “knowingly” requirement does not work as a culpable *mens rea*.

<sup>25</sup> See 18 U.S.C. § 707 (providing a criminal penalty of up to six-months imprisonment for the unauthorized use of a 4-H club’s logo. No intent requirement is specified in this separate portion of the statute).

<sup>26</sup> See generally AM. BAR ASS’N TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIME (1998).

<sup>27</sup> See John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, Legal Memorandum No. 26 (June 16, 2008) available at <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>; see also John Baker, *Measuring the Explosive Growth of Federal Crime Legislation*, Federalist Society for Law and Public Policy (2004) available at <http://www.fed-soc.org/publications/detail/measuring-the-explosive-growth-of-federal-crime-legislation>.

imprecise laws. . . . Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem” without dealing “with the nitty-gritty.”<sup>28</sup>

Federal prosecutors will respond that they use only a very few federal criminal statutes and that, therefore, the concern for all these statutes is overblown. The great increase in the number of federal offenses without a *mens rea*, however, means that the concept of strict liability is no longer exceptional. Moreover, even in the frequent fraud prosecutions – which would appear necessarily to involve a *mens rea* – there can be confusion regarding the mental element. Among federal criminal statutes, the mail fraud statute is arguably the federal prosecutors’ “true love.”<sup>29</sup> Altogether, however, there are over three hundred federal offenses criminalizing some sort of fraud or misrepresentation – many do not bother to require the misrepresentation to relate to anything important.<sup>30</sup> The plethora of fraud statutes can erode what should be the critical distinction between a good faith mistake and intentionally misrepresenting a fact or opinion.

The Supreme Court has made some general statements concerning the mental element necessary for fraud. The Court has said that fraudulent intent means “wronging one in his property rights by dishonest methods or schemes” or depriving another “of something of value by trick, deceit, chicane or overreaching.”<sup>31</sup> The mail fraud statute, as amended to include the “honest services” provision, did not require actual reliance or pecuniary harm. Before the Supreme Court weighed in via *Skilling v. United States*,<sup>32</sup> federal prosecutors routinely used the vague language of “scheme or artifice to defraud” from the mail fraud statute to prosecute a variety of actions characterized as “honest services” crimes – regardless of whether the purported victim was actually harmed, or whether the alleged perpetrator intended any harm.<sup>33</sup>

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<sup>28</sup> 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

<sup>29</sup> Judge Jed Rakoff of the U.S. District Court for the Southern District of New York (and a former prosecutor) poetically put the point:

To Federal prosecutors of white-collar crime, the mail fraud statute is our Stradivarius, our Colt .45, our Louisville Slugger, our Cuisinart - and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law ‘darling,’ but we always come home to the virtues of 18 U.S.C. §1341, with its simplicity, adaptability, and comfortable familiarity.

Jed S. Rakoff, *The Federal Mail Fraud Statute* (Part I), 18 DUQ. L. REV. 771, 771-72 (1980); see also Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1, 1 (1998-1999).

<sup>30</sup> See William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1881 (2000).

<sup>31</sup> *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).

<sup>32</sup> 130 S. Ct. 2896 (2010).

<sup>33</sup> The case of *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970) is an example of the courts trying to curb this excess piecemeal. In that case, agents of an office supplies company made false representations as part of their sales pitch to ‘get by’ the secretaries on the telephone and to get to the purchasing agent. There was no fraud regarding pricing or quality, and the customers received exactly what they paid for. The Second Circuit reversed the conviction, relying on the lack of evidence of fraudulent intent. The court held that the defendants intended to deceive their customers, but did not intend to defraud them. Circuit Judge Moore interpreted the mail fraud statute to require “evidence from which it may be inferred that some actual injury to the victim, however slight, is a reasonably probable result of the deceitful representations if they are successful.” *Id.* at 1182.

In *Skilling*, the Court did not really clarify the confusion over the nexus among fraud, harm, and intent – at most, the decision narrowed it. Rather than strike “honest services” fraud as void for vagueness, the Court limited the statute’s application to its “core”: prosecuting “offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes.”<sup>34</sup> The Court acknowledged, however, that such a result did not accommodate the “considerable disarray” over the statute’s application regarding intent and harm related to “honest services” fraud.<sup>35</sup>

A survey of over 600 published decisions involving “honest services” fraud reveals that the vast majority “involved either allegations of a bribe or a kickback,” or traditional mail/wire fraud.<sup>36</sup> This suggests the practical insignificance of *Skilling*’s limiting construction within many fraud cases. *Skilling*’s limiting construction also does nothing to address the other white-collar-crime statutes just as lacking when it comes to clear *mens rea* requirements, and quite capable of filling the void *Skilling* created for “honest services” fraud prosecutions – such as the Hobbs Act<sup>37</sup> or RICO.<sup>38</sup>

### III. Prosecutorial Discretion and *Mens Rea*

Prosecutors, state and federal, understandably prefer the discretion to use criminal statutes lacking a *mens rea* so that they can “get the bad guys.” They justify the lack of *mens rea* by arguing that otherwise they may not be able to convict those “bad guys,” while assuring us they will not use strict liability offenses against the innocent. Of course, under the American system of justice it is the role of the jury or judge to determine who has or has not committed the bad act – with a *mens rea*.

Consider the power of federal prosecutors under the federal Migratory Bird Treaty Act, which textually does not provide a *mens rea*.<sup>39</sup> The statute literally makes almost any contact with a migratory bird unlawful,<sup>40</sup> and lower federal courts disagree as to whether

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<sup>34</sup> *Supra* note 32 at 2930.

<sup>35</sup> *Supra* note 32 at 2929.

<sup>36</sup> Mark J. Stein & Joshua A. Levine, *Skilling: Is It Really a Game-Changer for Mail and Wire Fraud Cases?*, in SECURITIES AND LITIGATION ENFORCEMENT INSTITUTE 2010 at 938-39 (PLI Corp. Law & Practice, Course Handbook Ser. No. 23726, 2010).

<sup>37</sup> 18 U.S.C. § 1951 (no *mens rea* requirement in text).

<sup>38</sup> 18 U.S.C. §§ 1961-68.

<sup>39</sup> 16 U.S.C. §§ 701-12. The criminal prohibition lies in § 703:

Unless and except as permitted by the regulations as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill . . . [or transport] any migratory bird, any part, nest, or egg of any such bird.

*Id.* at § 703.

<sup>40</sup> The U.S. Department of the Interior, through the U.S. Fish and Wildlife Service, possesses implementing authority for the Migratory Bird Act. *See* 16 U.S.C. § 701. The regulations are unhelpful in determining any definition of the Act’s interaction with unintentional conduct. 50 C.F.R. § 10.12 defines the Act’s “take” provision as to “pursue, hunt, shoot, wound, kill, trap, capture, or collect.” Some of these activities clearly require intentional conduct, but some – such as shooting, wounding, or killing – do not.

the Act reaches unintentional conduct.<sup>41</sup> The U.S. District Court for the District of North Dakota has appropriately characterized the literal breadth of the Act:

If the Migratory Bird Treaty Act . . . were read to prohibit any conduct that proximately results in the death of a migratory bird, then many everyday activities become unlawful — and subject to criminal sanctions — when they cause the death of pigeons, starlings and other common birds. For example, ordinary land uses which may cause bird deaths include cutting brush and trees, and planting and harvesting crops. In addition, many ordinary activities such as driving a vehicle, owning a building with windows, or owning a cat, inevitably cause migratory bird deaths.<sup>42</sup>

With such literal breadth and judicial disagreement over the Act's reach, the prospects for selective prosecution become quite serious. Recall the heroic actions of Captain Chesley Sullenberger when he landed his US Airways flight on the Hudson River. A flock of birds caused the aircraft engines to shut down. Yet, literally under the statute, Captain Sullenberger "killed" these migratory birds as he saved the passengers of U.S. Airways flight 1549 with a daring ditch in the Hudson River. Of course, no federal prosecutor would have prosecuted such heroic action. But that sensible outcome will only have the common sense of prosecutors to thank, not a law limited to targeting genuinely-criminal conduct. The prosecutors may intend only to use the Migratory Bird Act against "the bad guys," but how does one identify the "bad guys" under a statute having a criminal penalty, but no *mens rea*? Might some federal prosecutor use the statute against "bad" oil companies, but not against "good" alternative-energy corporations operating windmills?<sup>43</sup> By imposing strict criminal liability on broad swaths of every-day life, liberty's safeguard is left to prosecutorial good graces.

Innocent individuals must rely on Congress to represent and protect them by ensuring that a *mens rea* is required for criminal punishment. Large corporations are sometimes able to protect themselves by lobbying the Department of Justice, as the

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<sup>41</sup> There is no clarity, or consensus, among the circuits on the coverage of the "take" and "kill" prohibitions. The United States Court of Appeals for the Eighth Circuit reasons that "take" and "kill" cannot apply to unwitting conduct toward migratory birds, but refer instead to "physical conduct engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918." See *Newton County Wildlife Ass'n v. U.S. Dep't of Agriculture*, 113 F.3d 110, 115 (8th Cir. 1997). Still other circuits see the Act crafting a "strict liability" offense that criminalizes foreseeable, if unintended, acts against migratory birds. See, e.g., *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010); see also *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (affirming the conviction of a pesticide manufacturer for the death of migratory birds).

<sup>42</sup> *U.S. v. Brigham Oil & Gas*, 840 F. Supp. 2d 1202 (D.N.D. 2012).

<sup>43</sup> See William M. Welch, *Bird Deaths Present Problems at Wind Farms*, USA TODAY Sept. 25, 2009, available at [http://www.usatoday.com/news/nation/environment/2009-09-21-wind-farms\\_N.htm](http://www.usatoday.com/news/nation/environment/2009-09-21-wind-farms_N.htm).

business community has been able to some extent with The Foreign Corrupt Practices Act.<sup>44</sup>

Designed to prohibit bribery to foreign officials for any business advantage, the Act's breadth allows the federal government to hold businesses liable for actions by rogue agents. As former U.S. Attorney General Michael Mukasey and Jones Day partner James Dunlop note, this "adds unnecessary uncertainty and opens businesses to massive, largely unavoidable, liability, with few offsetting benefits."<sup>45</sup> The statute's broad language can transgress the intent of Congress. In discussing the example of Wal-Mart, Professor Mike Koehler has shown that Congress had no desire to apply the Act against "grease payments" to clerical employees, but that the backroom nature of FCPA enforcement makes that intent of questionable relevance.<sup>46</sup>

The reluctance of corporations to go to trial has minimized judicial review of the FCPA's use. As a result, the FCPA investigations have developed a "prosecutorial common law,"<sup>47</sup> allowing the Department of Justice to impose burdensome compliance costs without having to prove in court that criminal activity has actually occurred or is likely to occur. Companies spend millions to "comply" with requirements possessing an unknown reach. In recent remarks on the FCPA, former U.S. Attorney General Mukasey observed that, given how few FCPA cases actually see a court room, "there is a whole body of law being developed" in prosecutor's offices through negotiated FCPA settlements with major companies. Even if the settlements are reasonable, as Mukasey noted, they do not provide any clarity or consistency necessary to "demystify" what a

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<sup>44</sup> The Foreign Corrupt Practices Act of 1977 is codified, as amended, at 15 U.S.C. §§ 78dd-1, *et seq.* For a more extensive discussion on the "understanding" between the Justice Department and the business community over the Act's implementation, *see infra* note 48.

<sup>45</sup> The Hon. Michael B. Mukasey & James C. Dunlop, *Can Someone Please Turn on the Lights? Bringing Transparency to the Foreign Corrupt Practices Act*, 13 ENGAGE 1 (April 3, 2012) available at <http://www.fed-soc.org/publications/detail/can-someone-please-turn-on-the-lights-bringing-transparency-to-the-foreign-corrupt-practices-act>.

<sup>46</sup> *See* Mike Koehler, *Foreign Corrupt Practices Act Enforcement as Seen Through Wal-Mart's Potential Exposure*, 7 WHITE COLLAR CRIM. REP. (Sept. 2012) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2145678](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145678). Koehler explains that "nonprosecution and deferred prosecution agreements are used to resolve nearly every instance of corporate FCPA scrutiny in the absence of meaningful judicial scrutiny," making it unlikely that Congress's intent receives an appreciated incorporation. By reviewing cases where defendants have challenged the DOJ's application of the FCPA's anti-bribery provisions, however, Koehler explains the relevance of Congress's intent in narrowing the FCPA's scope. The theory that would likely be used against Wal-Mart – that the suspected payments were not "grease payments" but those to "obtain or retain business" – likely exceeds the Act's intent because payments outside foreign government procurement are used to increase company profitability, for example, and not to "obtain or retain business." When courts actually reviewed such a prosecutorial theory, as Koehler's findings show, Congress's intent manifested this distinction and vindicated defendants. Koehler's review of the facts underlying the Wal-Mart investigation reveals that the investigation likely revolves around such non-procurement payments, including payments for favorable inspections, permits, and licenses.

<sup>47</sup> *See* Testimony of George J. Terwilliger III, Esq., House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security, *Hearing on the Foreign Corrupt Practices Act*, June 14, 2011, available at <http://judiciary.house.gov/hearings/pdf/Terwilliger06142011.pdf>.

general person's responsibilities under the law are.<sup>48</sup> He noted that DOJ and the business community had reached an understanding on some aspects of the FCPA.<sup>49</sup> Such agreements, however, should not serve as the functional equivalent of legislation. It is the obligation of Congress to establish clear *mens rea* requirements for the FCPA and other statutes.

#### IV. Preserving *Mens Rea* and the Moral Legitimacy of Criminal Law

Given the tremendous number of federal crimes,<sup>50</sup> it is not possible to amend all the statutes lacking an adequate *mens rea*. Protecting the principle of *mens rea* in federal criminal law will require an interpretive rule that, like *Morissette*,<sup>51</sup> reads in a *mens rea* where one is not literally provided in the statutory language. Such an approach is consistent with the approach suggested by the Model Penal Code.<sup>52</sup> One or more proposals have suggested taking an analogous approach to federal criminal law.<sup>53</sup> Given

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<sup>48</sup> See *Remarks of the Hon. Michael Mukasey, The Foreign Corrupt Practices Act panel, the Federalist Society's National Lawyers Convention*, Nov. 20, 2012, video available at <http://www.fed-soc.org/publications/detail/the-foreign-corrupt-practices-act-event-audiovideo>.

<sup>49</sup> See *id.* Specifically, General Mukasey noted:

The private business community, the Chamber, and others were very concerned about some of the general language in the statute, some of the anecdotal evidence from prosecutions that were brought, and, as a result, we had a series of meetings, we sat down, expressed views on both sides, and the very fact, I think, that the Justice Department agreed to come up with a guide that helps people through the statute that indicates what is at the fringe, what is at the center, is enormously useful . . .

*Id.* (beginning General Mukasey's remarks).

<sup>50</sup> See generally AM. BAR ASS'N TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIME (1998) (discussing the remarkable growth of federal criminal law since 1970).

<sup>51</sup> See 342 U.S. 246. 250-52 (1951).

<sup>52</sup> The Model Penal Code's (MPC) default provision desired to ensure a culpability element in all crimes. Many states adopting parts of the MPC did not include its default-*mens rea* provision. In part, this failure may have been due to the MPC's decision to codify particular mental states (purposely, knowingly, recklessly, and negligently) without mentioning the traditional, normative basis of *mens rea*. That is, state legislators may have viewed the default provisions as optional, rather than fundamental—as the drafters intended. The net effect was to caveat the impact the MPC had on preserving the foundations for *mens rea*, making it easier for legislatures to rationalize an offense without it. See John S. Baker, Jr., *Mens Rea and State Crimes: 50 Years Post-Promulgation of the Model Penal Code*, 92 CRIM. L. REP. (BNA) 248 (Nov. 28, 2012).

<sup>53</sup> See, e.g., Brian W. Walsh and Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, *The Heritage Foundation and the National Association of Criminal Defense Lawyers*, 2010, at 27. The report identifies the following recommended initiatives:

Enact default rules of interpretation to ensure that *Mens Rea* requirements are adequate to protect against unjust conviction;  
Codify the common-law rule of lenity, which grants defendants the benefit of the doubt when Congress fails to legislate clearly;  
Require judiciary committee oversight of every bill that includes criminal offenses or penalties;  
Provide detailed written justification for and analysis of all new federal criminalization; and  
Draft every federal criminal offense with clarity and precision.

the differences terminology, the exact default language of the MPC would not work well in federal criminal law.<sup>54</sup>

Federal law could require federal prosecutions to prove a statutorily-specified mental state with respect to the elements of a criminal offense. It could do so without amending every statute carrying a criminal penalty. If a federal statute already contains a clear *mens rea* term, then the specified state of mind of the statute would control. As to other statutes carrying a criminal penalty, Congress could enact an interpretive statute requiring proof of a certain *mens rea*. While its language would have to be carefully crafted, such an interpretive statute would state its purpose is to require proof of a *mens rea* for a conviction.

Rules of construction, like the one suggested, aid operationally in protecting the principle of *mens rea*. Accordingly, as the Supreme Court noted in 2008, the judicial rule of lenity exists because “no citizen should be held accountable [to] a statute whose commands are uncertain, or subjected to punishment that is not clearly proscribed.”<sup>55</sup> By crafting a legislative solution, the Congress would recognize, as James Madison said, that the law’s legitimacy stems from it being “made by men of [the people’s] own choice,” understandably and accessibly, lest “no man, who knows what the law is today, can [only] guess what it will be tomorrow.”<sup>56</sup>

Given the judicial rule of lenity, some may question whether Congress needs to create an interpretive rule for *mens rea* in federal criminal law. They may prefer to leave it to the federal courts to decide which statutes do and do not require a *mens rea*. First of all, federal courts often disagree, with some favoring the principle of *mens rea* and others eroding it. More importantly, separation of powers imposes on Congress not only the power, but also the responsibility to define criminal law. As Chief Justice Marshall wrote regarding the rule of “strict construction” of penal laws, “[the principle] is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department.”<sup>57</sup>

## CONCLUSION

The inclusion of *mens rea* as essential to the meaning of “crime” itself goes to the heart of the moral foundation of criminal law. As Professor John Coffee has explained:

The factor that most distinguishes the criminal law is its operation as a system of moral education and socialization. The criminal law is obeyed not simply because there is a legal threat underlying it, but because the public perceives its norms to be legitimate and deserving of compliance. Far

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<sup>54</sup> See *supra* note 51.

<sup>55</sup> *United States v. Santos*, 533 U.S. 507, 514 (2008).

<sup>56</sup> See THE FEDERALIST NO. 62, at 381 (Clinton Rossiter ed., 1961).

<sup>57</sup> *United States v. Wiltberger*, 18 U.S. 5 Wheat 76, 95 (1820).

more than tort law, the criminal law is a system for public communication of values.<sup>58</sup>

A criminal act is a moral wrong, and, accordingly, conviction of a crime stigmatizes an individual. A system that is respectful of the integrity of criminal convictions is respectful of both victims and individuals suspected of wrongdoing. Just as we are appalled to learn through the work of the Innocence Project that a number of persons have been wrongly convicted and imprisoned when they were in fact innocent,<sup>59</sup> we should be equally appalled to learn that persons have been wrongly convicted because they were not morally guilty of a crime due to their lack of a *mens rea*.

The fundamental principle that ignorance of the law should not excuse a crime rests on the assumption that the law is knowable. For the common law crimes of murder, rape, robbery, and theft, ignorance of the law is not an excuse because these are morally wrong and are known to be wrong regardless of whether any court or legislature declares them to be wrong. Recall that the basis for the post-World War II War Crimes trials was that, despite the laws of Germany, any human being must know that it is wrong to imprison and kill innocent human beings. It is telling that Justice Jackson, who had been the chief prosecutor in the Nuremberg trials and previously the Attorney General, wrote the opinion in *Morissette*, drawing a clear line between guilt and innocence based on the fundamental principle of a *mens rea*. Defendants other than *Morissette* ought not to have to hope that their cases get to the Supreme Court and that the Court reads a *mens rea* into federal statutes not specifying one. It is the responsibility of Congress to provide the *mens rea* in the written law.

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<sup>58</sup> John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193-94 (1991) (citation omitted).

<sup>59</sup> See The Innocence Project, *DNA Exonerations Nationwide*, available at [http://www.innocenceproject.org/Content/DNA\\_Exonerations\\_Nationwide.php](http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php).