

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

*Michael Serota\**

### INTRODUCTION

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, is its general mens rea provisions, which define and more generally explicate the culpability requirement governing the individual offenses contained in the Code's Special Part.<sup>1</sup> The drafters of the Model Penal Code intended the element analysis reflected in these general provisions to remedy the "variety, disparity and confusion"<sup>2</sup> 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 Model Penal Code's general mens rea provisions.

In recent years, the flow of Code-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

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\* J.D., University of California, Berkeley, School of Law. This Article was written for the Theorizing Criminal Law Reform conference hosted by Rutgers Law School, in conjunction with the London School of Economics Department of Law and the Rutgers Institute for Law and Philosophy. The author would like to thank those institutions and the conference's organizers—Stuart Green, Alec Walen, Antony Duff, and Jeremy Horder—for their support and guidance as well as Paul Robinson for his illuminating commentary at the conference. For additional insightful feedback on this Article, the author would like to thank the conference's other participants—including Vera Bergelson, Darryl Brown, Michael Cahill, Luis Chiesa, Roger Clark, Pamela Ferguson, Adil Haque, Tatjana Hörnle, Douglas Husak, Margo Kaplan, John Kleinig, Youngjae Lee, Erin Murphy, Bryson Nitta, Hadassa Noorda, Jessica Roth, Richard Schmechel, and Gideon Yaffe—as well as Jennifer Chang, Kenneth Simons, and Michelle Singer. A Chinese translation of this Article will be published in *STUDIES ON SENTENCING* (Law Press China 2018), which is edited by the Sentencing Research Center of Southwest University of Political Science and Law. Special thanks to Marcus Kao and Dr. Gan Tan for their work on the translation.

1. See, e.g., MODEL PENAL CODE §§ 2.02, .04, .08 (AM. LAW INST., Proposed Official Draft 1962).

2. *Morissette v. United States*, 342 U.S. 246, 252 (1952).

on mens rea issues. For the most part, the reforms proposed in this area are either relatively modest, emphasizing minor adjustments to the Model Penal Code's general mens rea provisions, or, alternatively, quite controversial, comprising material changes to the threshold mens rea requirements dividing criminal from non-criminal conduct in many criminal codes. 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 those who act with a more blameworthy state of mind should receive more punishment, while those who act with a less blameworthy state of mind should receive less punishment.

This Article argues that this widespread oversight—the failure to codify legislative sentencing policies that account for key distinctions in mens rea—is normatively problematic from a variety of perspectives, providing a key justification and source of guidance for future criminal code reform efforts. Part I sets forth the theory of proportional mens rea and criminal legislation animating the Article. Part II next 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 this Article refers 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.

#### 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,<sup>3</sup> or what Anglo-American legal systems refer to as mens rea.<sup>4</sup> Normative theorizing about mens rea has been a mainstay

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3. See, e.g., P.F. STRAWSON, *Freedom and Resentment*, in FREEDOM AND RESENTMENT AND OTHER ESSAYS 1, 1–2 (2008); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 329–31 (1985).

4. The term mens rea is “chameleon-like” in nature. Francis Bowes Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in HARVARD LEGAL ESSAYS 399, 402 (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 recent) conception, mens rea is understood to comprise 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

of Anglo-American legal scholarship and case law for more than a century.<sup>5</sup> 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.<sup>6</sup> Underlying these wide-ranging debates over matters of criminal responsibility, however, is an overarching commitment to a basic idea: all else being equal, those who act with a more blameworthy state of mind should receive more punishment, while those who act with a less blameworthy state of mind should receive less punishment.

This principle of proportional mens rea is “[d]eeply ingrained” in the Anglo-American “legal tradition.”<sup>7</sup> Most obviously, it is at the heart of all classical theories of retributivism,<sup>8</sup> which is still “the majority view” on the justification for punishment held by penal theorists.<sup>9</sup> Yet many of those who subscribe to utilitarian theories of punishment also champion the principle based upon its purported

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OHIO ST. J. CRIM. L. 449, 454–60 (2012); Sanford Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 274–75 (1968). Unless otherwise noted, this Article's use 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 influence an actor's blameworthiness, but which are not centrally related to commission of the crime itself.

5. See, e.g., LARRY ALEXANDER & KIMBERLY FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* (2009); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (2000); JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (2d ed. 1960); H.L.A. HART, *PUNISHMENT & RESPONSIBILITY* (2d ed. 2008); DOUGLAS HUSAK, *THE PHILOSOPHY OF CRIMINAL LAW* (2010); MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* (1997); Francis E. Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992).

6. To take just one example: theorists dispute whether and to what extent negligent inadvertence provides an appropriate basis for criminal liability and punishment. See, e.g., 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); Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365 (1994).

7. *Tison v. Arizona*, 481 U.S. 137, 156 (1987).

8. Husak, *supra* note 4, 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).

benefits of deterrence,<sup>10</sup> incapacitation,<sup>11</sup> and expressive condemnation.<sup>12</sup> 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.’”<sup>13</sup> And most recently, a growing area of research on lay intuitions of justice (“justice intuitions”) strongly indicates that the public similarly supports it.<sup>14</sup>

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,<sup>15</sup>

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10. See, e.g., MORRIS B. HOFFMAN, *THE PUNISHER’S BRAIN: THE EVOLUTION OF JUDGE AND JURY* 66 (2014); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1221–25 (1985); Ernest Van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 RUTGERS U. 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., Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 1047 (2008); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 352–54 (1996). 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 & JOHN M. DARLEY, *JUSTICE, LIABILITY, & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995); Norman J. Finkel, *Commonsense Justice, Culpability, and Punishment*, 28 HOFSTRA L. REV. 669 (2000); Norman J. Finkel et al., *Equal or Proportionate Justice for Accessories? Children’s Pearls of Proportionate Wisdom*, 18 J. APPLIED DEVELOPMENTAL PSYCHOL. 229 (1997); Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829 (2007).

15. In the eyes of many 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 blameworthiness assessments. See, e.g., Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CALIF. L. REV. 931, 938–39 (2000); Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 409 (2011); Kimberly Kessler Ferzan, *Holistic Culpability*, 28 CARDOZO L. REV. 2523, 2533–34 (2007). For empirical work suggesting that the public holds similar views, see ROBINSON & DARLEY, *supra* note 14, at 54–72, 84–105, 169–81 (Studies 5, 6, 8, 9,

normative competence,<sup>16</sup> and situational control.<sup>17</sup> Not only that, 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.<sup>18</sup>

Which raises the following question: what impact, if any, should these findings have on the distribution of punishment actually meted

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16); Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255 (2012); Paul H. Robinson & John M. Darley, *Testing Competing Theories of Justification*, 76 N.C. L. REV. 1095 (1998). Note, however, that two recent studies call into question (1) whether lay jurors can reliably make fine-grained distinctions as to the extent of an actor's conscious risk awareness and (2) whether material variances in conscious risk awareness, even when accurately identified by lay jurors, are viewed as increasing an actor's blameworthiness. Matthew R. Ginther et al., *The Language of Mens Rea*, 67 VAND. L. REV. 1327, 1339–61 (2014); Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1326–54 (2011); see also Francis X. Shen, *Minority Mens Rea: Racial Bias and Criminal Mental States*, 68 HASTINGS L.J. 1007, 1017–42 (2017) (conducting a study reaffirming that lay jurors struggle to distinguish between material variances in an actor's conscious risk awareness but also finding that culpable mental state evaluations of this nature may be resistant to implicit racial bias). For a fascinating study employing neuroimaging and machine-learning techniques to explore the neural correlates of variances in conscious risk awareness, see Iris Vilares et al., *Predicting the Knowledge-Recklessness Distinction in the Human Brain*, 114 PROCEEDINGS NAT'L ACAD. SCI. 3222 (2017).

16. Many theorists emphasize the relationship between blameworthiness and the extent to which an agent possesses the cognitive and volitional capacities necessary to distinguish right from wrong and to conform one's conduct to that normative knowledge. See, e.g., ANTONY DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 39–40 (2007); 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). For empirical work suggesting that the public holds similar views, see ROBINSON & DARLEY, *supra* note 14, at 128–47 (Studies 12, 13).

17. Theorists generally agree that where an agent's ability to distinguish right from wrong or to conform his or her conduct to that normative assessment is overridden by a "hard choice"—or any other situational factor beyond the control of the actor—his or her blameworthiness is diminished accordingly. See, e.g., Brink & Nelkin, *supra* note 16; Morse, *supra* note 16. For empirical work suggesting that the public holds similar views, see ROBINSON & DARLEY, *supra* note 14, at 139–55 (Studies 13, 14).

18. This is not to say, of course, that community sentiment converges on particular sentences in individual cases; as is well known, people vary widely with respect to their overall harshness and leniency. And yet,

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 1854–55.

out by 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.<sup>19</sup> Insofar as the moral 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.<sup>20</sup> 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 claim to recognition by a criminal justice system.<sup>21</sup> 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.<sup>22</sup> Rather, these “public fiduciaries” should be understood to function in a relational context comprised of a constellation of cross-cutting duties and obligations, which affords public opinion a privileged place in the policymaking calculus.<sup>23</sup>

Viewing the debate over justice intuitions through the lens of political representation in this way yields two important insights for the principle of proportional mens rea. The first, and less controversial, is this: public support for the principle of proportional mens rea provides political representatives with a greater imperative

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19. See, e.g., Adam J. Kolber, *How to Improve Empirical Desert*, 75 BROOK. L. REV. 433, 448–51 (2009); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 456 (1997); Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77, 79–82 (2013). For insightful criticism of the label “empirical desert,” see Youngjae Lee, *Desert, Deontology, and Vengeance*, 42 ARIZ. ST. L.J. 1141, 1142–44 (2011).

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). For a nuanced take on the ultimate inseparability of any “theory of desert” and “ordinary moral intuitions,” see Youngjae Lee, *Desert and the Eighth Amendment*, 11 U. PA. J. CONST. L. 101, 105–10 (2008).

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., Bernard Manin et al., *Introduction to DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* (Adam Przeworski et al. eds., 1999); Vincent Price, *The Public and Public Opinion in Political Theories*, in THE SAGE HANDBOOK OF PUBLIC OPINION RESEARCH 11, 12–13 (Michael Traugott et al. eds., 2007). For two recent reconceptualizations 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, 1120–23 (2014); Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 708–13 (2013).

to ensure that the principle is recognized by the criminal justice system. That the concepts of choice and rationality upon which our 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.<sup>24</sup> Which is not to say, of course, that legitimate political representation demands a one-to-one correspondence between policy and community sentiment on any issue.<sup>25</sup> Where, however, both expert and public opinion align on a single fundamental principle—as is the case with the principle of proportional mens rea—there is more of an imperative for a political representative to give voice to it.<sup>26</sup>

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 sentencing policies. Viewed in light of this kind of dissensus, the existence of justice intuitions on matters of mens rea presents itself as a democratically legitimate tiebreaker.<sup>27</sup> Here is the

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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); Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL'Y 51 (2003). For recognition of the inherent democratic value of recognizing justice intuitions, see Matthew Lister, *Desert: Empirical Not Metaphysical*, in CRIMINAL LAW CONVERSATIONS 51 (Paul H. Robinson et al. eds., 2009); Andrew E. Taslitz, *Empirical Desert: The Yin and Yang of Criminal Justice*, in CRIMINAL LAW CONVERSATIONS 56 (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. For a set of constitutional arguments in support of proportionate crime legislation that is broadly consistent with community sentiment, see Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835, 1836 (2012).

27. This argument is rooted in a deontological conception of political morality, not a consequentialist one. See generally Michael Serota & Ethan J. Leib, *The Political Morality of Voting in Direct Democracy*, 97 MINN. L. REV. 1596 (2013) (exploring a deontological conception of political morality in the context of direct democracy elections). Therefore, it is not contingent upon whether “a

overarching theory of political representation one might envision: 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.<sup>28</sup>

Assuming that political representatives are indeed obligated to align the distribution of punishment in a penal system with the principle of proportional mens rea, as just laid out, raises a host of difficult questions concerning how this is to be achieved. 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

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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, *supra* note 19. 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, 1130–42 (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 public'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. 323, 326 (2004), our current grasp of empirical methodology 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 public's views on mens rea outweigh the costs imposed by doing so. *See generally* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014) (exploring the empirical challenges confronting evidence-based sentencing); Sonja B. Starr, Response, *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) (highlighting the practical difficulties of using cost-benefit analysis in criminal justice policymaking).

28. 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 meaningful public 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, *supra* note 14, at 181–89 (Study 17); David Pizarro et al., *Causal Deviance and the Attribution of Moral Responsibility*, 39 J. EXP. SOC. PSYC. 653 (2003). However, I am less certain about, and this Article takes no position on, the moral 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.



those matters of mens rea that the legislature opts to address itself, what should the exercise of that policy discretion look like?<sup>29</sup>

The resolution of these questions is complicated by the wide array of potential political arrangements that exist in the context of criminal justice policymaking.<sup>30</sup> Theoretically, a legislature is free to statutorily resolve as many (or as few) criminal justice policy issues as it pleases. In practice, however, political representatives possess neither the resources nor incentives to legislate away the entirety of the substantive criminal law.<sup>31</sup>

Given these basic political realities, legislators must self-consciously decide which issues of substantive criminal law merit their time and attention and which are appropriately submitted to the policy discretion of other institutions—for example, the judiciary and the sentencing commission. Furthermore, many of the issues a legislature opts to address on its own will entail difficult codification decisions concerning the legal architecture it employs to articulate them—for example, whether a hard-and-fast rule or a flexible standard (potentially comprised of varying levels of specificity) is better suited to the statutory disposition of a given issue of substantive criminal law.<sup>32</sup>

There are, then, multifarious institutional and structural alternatives available to any legislator seeking to implement the principle of proportional mens rea. At the same time, 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.<sup>33</sup> In the face of

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29. 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).

30. 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, 1132–51 (2005).

31. 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).

32. For insightful meditations on the employment of rules and standards in the context of criminal justice policymaking, see Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CALIF. L. REV. 447 (2016); Alan C. Michaels, “Rationales” of Criminal Law Then and Now: For A Judgmental Descriptivism, 100 COLUM. L. REV. 54 (2000). For more general contributions to the rules versus standards debate, see Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010).

33. For utilitarian analyses relevant to identifying the “optimal” set of political arrangements, see Robinson & Spellman, *supra* note 30; Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 596–620

this kind of uncertainty, the legality principle—as well as the “central values of liberal societies”<sup>34</sup> that it rests upon—provides a useful normative compass.<sup>35</sup>

Among other manifestations, the legality principle is understood to compel the direct legislative resolution of the most significant issues of penal policy by statute.<sup>36</sup> 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—namely, democracy, fairness, liberty, and equality—across a range of contexts.<sup>37</sup> Although (with a few notable exceptions<sup>38</sup>) the codification of mens rea policy 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. A criminal code should clearly express the broad contours of the threshold mens rea—that is, the culpable mental state, if any, governing each objective element 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. A criminal code should 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 those deviations.

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(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).

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

35. See, e.g., HERBERT L. 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).

36. See, e.g., John 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, 362–66 (2005).

37. MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 239–40 (1993).

38. See, e.g., Husak & Callender, *supra* note 35, at 33–35; Robinson, *supra* note 36, 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.”<sup>39</sup> 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.<sup>40</sup>

Perhaps less obvious, but ultimately no less important, is the extent to which the same democratic interests are served by Criterion Two.<sup>41</sup> 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.”<sup>42</sup> 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 by a criminal justice system reflects the community’s norms (as articulated through its elected representatives).<sup>43</sup>

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.<sup>44</sup> Where this “procedural differential”<sup>45</sup> operates, mens rea-based grading schemes have the dual effect of ensuring that: (1) the “*fair* arbiter of a criminal

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39. MOORE, *supra* note 37, at 240.

40. 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).

41. See, e.g., Gerard E. Lynch, *The Sentencing Guidelines as a Not-so-Model Penal Code*, 7 FED. SENT. R. 112, 114 (1994).

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

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

44. Kevin R. Reitz, *Proof of Aggravating and Mitigating Facts at Sentencing*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 228, 231–34 (Julian V. Roberts ed., 2011). 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 88.

45. Reitz, *supra* note 44, at 231.

defendant's moral blameworthiness,"<sup>46</sup> the jury, has an opportunity to assess the relevant distinctions; and (2) these distinctions are afforded the appropriate liberty-maximizing standard, proof beyond a reasonable doubt.<sup>47</sup>

Perhaps most important 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”<sup>48</sup> criminal statutes silent on the role 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.<sup>49</sup> 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,<sup>50</sup> 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.<sup>51</sup>

It is worth noting that the inequalities associated with neglect of Criterion Two are particularly pronounced. Whereas the disparate judicial resolution of threshold mens rea issues left unaddressed by a criminal code is likely to dissipate once hierarchically superior courts have had an opportunity to weigh in on them, legislative silence on distributional mens rea issues presents the specter of perennial sentencing inequalities. The reason? Neither the contours of the relevant mens rea distinctions nor the relative weight of those

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

47. See, e.g., ANDREW ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE* 375–76 (5th ed. 2010);

48. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 354 (1994).

49. 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.

50. For illustrations of the characteristic disarray reflected in judge-made mens rea policy, see Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 343–414 (2001); Michael Serota, *Mens Rea, Criminal Responsibility, and the Death of Freddie Gray*, 114 MICH. L. REV. FIRST IMPRESSIONS 31, 35–40 (2015).

51. See, e.g., *United States v. Harriss*, 347 U.S. 612, 635 (1954); Kahan, *supra* note 31, at 470, 495; Michael Serota, *Stare Decisis and the Brady Doctrine*, 5 HARV. L. & POL'Y REV. 415, 422 (2011).

distinctions is likely to be subject to hierarchical judicial resolution.<sup>52</sup> In practice, 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 basis.<sup>53</sup> This type of decision making regime invites the kind of “carelessness, subjectivity, inconsistency, and explicit and implicit bias” that is anathema to the legality principle.<sup>54</sup>

Fortunately, there is an obvious mechanism for substantially mitigating these kinds of sentencing inequalities while simultaneously bolstering the other legality-related values of democracy, fairness, and liberty: drafting criminal statutes that are consistent with the two basic criteria proposed above. 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 them.

## 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 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 Model Penal Code project is a thoroughgoing commitment to ensuring legislative primacy in the realm of mens rea policy.<sup>55</sup> As the Code’s drafters undertook their work of both codifying

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52. See, e.g., Anders Kaye, *Excuses in Exile*, 48 U. MICH. J.L. REFORM 437, 452–57 (2015); Allan Manson, *The Search for Principles of Mitigation: Integrating Cultural Demands*, in MITIGATION AND AGGRAVATION AT SENTENCING, *supra* note 44, at 40, 40–42.

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

54. Kaye, *supra* note 52, 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.

55. 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); Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1436 (1968); David Wolitz, *Herbert Wechsler, Legal*

and rationalizing American criminal law, they were confronted with a broad-based regime of judicial policymaking that had been created by the era's characteristically sparse legislative treatment of mens rea issues.<sup>56</sup> The 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 critical moral decisions about the contours 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."<sup>57</sup>

To remedy these problems, the drafters devised a statutory framework, often called element analysis, that provides legislatures with generally applicable tools for clearly and comprehensively communicating the culpability requirement applicable to each offense in a criminal code. This framework has 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 they apply;<sup>58</sup> (2) rules of interpretation for distributing—and, where necessary, implying—those culpable mental states;<sup>59</sup> (3) general culpability principles clarifying the interaction between those culpable mental states and a host of issues related to criminal responsibility;<sup>60</sup> and (4) general defense provisions, which rely on those culpable mental states to articulate the contours of justifications and excuses.<sup>61</sup>

These four components went a long way toward facilitating legislative primacy in the realm of mens rea policy, providing states with a sound—if imperfect—basis for clarifying the threshold mens rea governing a criminal offense.<sup>62</sup> The problem, however, is that the

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*Process, and the Jurisprudential Roots of the Model Penal Code*, 51 TULSA L. REV. 633, 637 (2016).

56. See, e.g., Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 668–83 (1993); Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 339, 340–73 (1989).

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

58. See, e.g., MODEL PENAL CODE § 2.02(2) (AM. LAW INST., Proposed Official Draft 1962).

59. See, e.g., *id.* § 2.02(3), (4).

60. See, e.g., *id.* §§ 2.04(1), 2.08(2).

61. See, e.g., *id.* § 2.09.

62. Generally speaking, the Model Penal Code'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 1316. Even the Model Penal Code'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, 682 (1983).

Model Penal Code's promotion of legislative primacy in the realm of mens rea policy is incomplete; the Code's grading scheme mostly ignores the principle of proportional mens rea. Moreover, it does so notwithstanding a clear recognition that mens rea-based grading is both valuable and achievable. A comparison of the Model Penal Code's approach to grading homicide offenses and its approach to grading nearly every other offense is illustrative.

The Code'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.<sup>63</sup> From there, a person who commits homicide recklessly is subject to elevated liability for manslaughter,<sup>64</sup> while a person who commits homicide purposely, knowingly, or with extreme recklessness is subject to even greater liability for murder.<sup>65</sup>

These culpable mental state-based grading distinctions are complemented by the Code's nuanced treatment of "partial defenses,"<sup>66</sup> 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."<sup>67</sup> 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"<sup>68</sup> approach wherein the appropriate grade of homicide tracks the person's culpable mental state in making the relevant mistake or causal contribution.<sup>69</sup>

The relatively nuanced treatment of mens rea reflected in the Model Penal Code's grading of homicide offenses is in stark contrast

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For a recent attempt at ameliorating them, see D.C. CRIMINAL CODE REFORM COMM'N, FIRST DRAFT OF REPORT NO. 2, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—BASIC REQUIREMENTS OF OFFENSE LIABILITY (Dec. 22, 2016), <https://ccrc.dc.gov/node/1208152>.

63. MODEL PENAL CODE § 210.4.

64. *Id.* § 210.3.

65. *Id.* § 210.2.

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

67. MODEL PENAL CODE § 210.3.

68. Paul H. Robinson et al., *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37, 72 (2015); see PAUL H. ROBINSON, 1 CRIM. L. DEF. § 102.1 (Westlaw 2017).

69. See MODEL PENAL CODE §§ 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).

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 put into creating the Model Penal Code's culpable mental state hierarchy, the Code's Special Part rarely recognizes a grading distinction based solely on whether an objective element of an offense is committed with a culpable mental state beyond the threshold for liability.<sup>70</sup> Nor, for that matter, does any other offense in the Code's Special Part recognize the mitigating impact of the extreme mental or emotional disturbance grading distinction reflected in 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.<sup>71</sup>

Now, to be fair to the drafters of the Model Penal Code, 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.<sup>72</sup> This is reflected in the fact that the Code defines only five offense grades: first-degree felony, second-degree felony, third-degree felony, misdemeanor, and petty misdemeanor.<sup>73</sup> Today, however, this position has largely been rejected by American legislatures—at least in theory. The predominant view of sentencing is currently one of limited judicial discretion subject to enforceable legal constraints, which include, among other mechanisms, more refined grading categories<sup>74</sup> accompanied by sentencing guidelines promulgated by legislatively created sentencing commissions.<sup>75</sup>

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70. *But see* MODEL PENAL CODE §§ 220.1(1)–(2), 220.2(1).

71. This is because these rules generally depend upon preexisting distinctions between culpable mental states—otherwise absent from the Code's Special Part—in order to serve a grading function. *See, e.g.*, ROBINSON, *supra* note 68, § 102.1(a); Robinson et al., *supra* note 68. Absent culpable mental state-based grading distinctions, the rules merely clarify the threshold for liability.

72. Paul W. Tappan, *Sentencing Under the Model Penal Code*, 23 L. & CONTEMP. PROBS. 528, 529–38 (1958).

73. 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).

74. For example, many jurisdictions have nearly doubled the number of grading categories originally recognized by the Model Penal Code. *See* Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 52–53 (2000).

75. *See* Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1206 (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



Surprisingly, this modern legislative shift toward curtailing judicial sentencing discretion has not brought American criminal codes meaningfully closer to realizing the principle of proportional mens rea. In a few areas of criminal law, a handful of state legislatures have modestly improved upon the Model Penal Code's overarching failure to recognize mens rea-based grading distinctions outside the homicide context.<sup>76</sup> On the whole, however, even the American criminal codes that most closely track the Model Penal Code ultimately disregard the principle of proportional mens rea to an even greater extent than the Code.<sup>77</sup>

This is a product of two phenomena. First, many of these criminal codes water down—through a mix of legislative revision and judicial mismanagement—the relatively robust threshold mens rea requirements proposed by the Model Penal Code.<sup>78</sup> This is reflected in, among other trends, rejection of the “principle of correspondence,”<sup>79</sup> the more frequent utilization of negligence as the basis for liability,<sup>80</sup> and the circumscription of complete defenses.<sup>81</sup> And second, many of these criminal codes have, over the years,

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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).

76. 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 (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. Other exceptions worth highlighting include: (1) at least one state recognizes grading distinctions based purely on culpable mental states in the context of assault offenses, *see* OR. REV. STAT. §§ 163.165–.185 (2017), 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 (2017).

77. This is to say nothing of the sizable minority of American criminal codes that have never been subject to a comprehensive reform project based upon the Model Penal Code 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, Cahill & Mohammad, *supra* note 74, at 25–63.

78. Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 317–18 (2012).

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

80. This includes the use of negligence in the context of felony murder liability, the natural and probable consequences rule, and the *Pinkerton* doctrine. *See generally* Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 BUFF. CRIM. L. REV. 399 (2000) (felony murder); Kimberly R. Bird, *The Natural and Probable Consequences Doctrine: “Your Acts Are My Acts!”*, 34 W. ST. U. L. REV. 43 (2006) (natural and probable consequences rule); Matthew A. Pauley, *The Pinkerton Doctrine and Murder*, 4 PIERCE L. REV. 1 (2005) (*Pinkerton* doctrine).

81. *See* Robinson et al., *supra* note 68, at 49–50.

incorporated numerous overlapping offenses above and beyond those contained in the Code's Special Part.<sup>82</sup>

The lowering of threshold mens rea requirements 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<sup>83</sup>—multiplies the number of statutory maxima to which a single class of offenders is subject.<sup>84</sup> Collectively, these phenomena significantly increase trial court discretion over the recognition of (and assignment of weight to) mens rea distinctions at sentencing.<sup>85</sup>

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 Model Penal Code.<sup>86</sup> In practice, however, American sentencing guidelines do little to meaningfully align penal policy with the principle of proportional mens rea.<sup>87</sup>

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.<sup>88</sup> Given these

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82. See, e.g., Paul H. Robinson, *The Rise and Fall and Resurrection of American Criminal Codes*, 53 U. LOUISVILLE L. REV. 173, 178 (2015); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001). 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).

83. See Cahill, *supra* note 73, at 605–07.

84. 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.

85. 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).

86. See Frase, *supra* note 75, at 1191.

87. 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, *supra* note 44, at 21, 21–23.

88. See Frase, *supra* note 75, at 1195–1206. The exception is 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 in *Blakely v. Washington*, 542 U.S. 296 (2004). Reitz, *supra* note 44, at 231. These kinds of

features, the utilization of sentencing guidelines to address the principle of proportional mens rea necessarily conflicts with the legality-related values of democracy,<sup>89</sup> fairness,<sup>90</sup> and liberty.<sup>91</sup>

And yet, the manner in which American sentencing guidelines typically treat mens rea distinctions—as departure factors<sup>92</sup>—disserves the single legality-related value of equality that they could potentially address.<sup>93</sup> This is because broadly directing judges to address a variance in mens rea by departing from the standard sentencing guideline range fails to provide trial courts with guidance on the relative weight that should be afforded to that variance.<sup>94</sup> And given the general paucity of appellate review of sentencing decisions, American sentencing guidelines also frequently leave trial courts with unchecked discretion over whether to give effect to mens rea-related aggravating or mitigating facts at all.<sup>95</sup>

When viewed as a whole, then, post-Model Penal Code 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, 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

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sentencing facts must be tried before a jury and proven beyond a reasonable doubt.

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

90. See Morse, *supra* note 46, at 298–99.

91. See Robinson, Cahill & Mohammad, *supra* note 74, at 19.

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

93. Note, for example, that sentencing guidelines could be constructed to make the same kinds of characteristic-specific sentencing range determinations that a criminal code's grading scheme effectively makes. See Lynch, *supra* note 41, at 112–15 (describing how the federal sentencing guidelines operate as a quasi-criminal code).

94. That is, the extent to which a defendant's sentence should be modified to reflect a mens rea-based variance captured by a departure factor. Kaye, *supra* note 52, at 456. 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, *supra* note 44, at 1, 3.

95. Kaye, *supra* note 52, at 454. For discussion of appellate review of sentences imposed by trial judges under American sentencing guidelines, see Frase, *supra* note 75, at 1198–99, and Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 161–69 (2005).

consequences and social stigma associated with the former—could hardly be more significant.

At the same time, the amount of punishment imposed by the state, no less than whether any punishment is imposed at all, 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.<sup>96</sup> Consistent with these insights, there appears to be a growing trend, reflected in more recent scholarship, toward emphasizing the distributive role that mens rea plays in a just penal system.<sup>97</sup> With that in mind, the third and final Part of this Article 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 Model Penal Code 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 model<sup>98</sup>—through which such efforts might proceed while also considering 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 polity's substantive criminal laws. A revision of this nature entails a holistic rethinking of a jurisdiction's existing criminal code, including a consideration of the basic values (both first and second order) that ought to animate it. Thereafter, these values must be translated into

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96. See Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 146–48 (2009).

97. Contemporary contributions include: Bergelson, *supra* note 25; Husak, *supra* note 4; Kaye, *supra* note 52; Kolber, *supra* note 85; Morse, *supra* note 46; Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857 (1994); Paul H. Robinson, *A Sentencing System for the 21st Century?* 66 TEX. L. REV. 1 (1987); Smith, *supra* note 96. For a notable early discussion of relevant issues, see George 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).

98. For a comparable distinction between “thick” and “thin” criminal codes on which this terminology is based, see Cahill, *supra* note 29, at 938–56.

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.<sup>99</sup> An illustrative example of the thick model of reform would be the Model Penal Code and the many state criminal code reform projects based upon it.<sup>100</sup>

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 both most problematic and 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. As a result, thin model reforms can be developed and driven by nonprofits, think tanks, and the like—or perhaps a coalition of them, as reflected in the bipartisan coalition of organizations that make up the Smart on Crime movement.<sup>101</sup> An illustrative example of the thin model is the federal sentencing reform legislation that was considered by the United States Senate and the United States House of Representatives during the 114th Congress.<sup>102</sup>

What 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

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99. See, e.g., Robinson & Dubber, *supra* note 55, at 326–27.

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

101. 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, 609–15 (2011).

102. For a helpful overview of this legislation, see JARED P. COLE & CHARLES DOYLE, CONG. RESEARCH SERV., R44246, SENTENCING REFORM: COMPARISON OF SELECTED PROPOSALS (2015).

level of nuance comparable to that reflected in the Model Penal Code's homicide provisions.<sup>103</sup>

At the same time, a cross-cutting evaluation of expert and public opinion—required by the theory of political representation developed in Part I—seems likely to necessitate some material departures from the mens rea-based grading determinations reflected in (or, in some instances, absent from) these provisions. For example, this kind of evaluation might illuminate a need to rework the Model Penal Code's treatment of partial defenses, broadly applicable both inside and outside the homicide context,<sup>104</sup> in a manner that renders the Code's overall approach to grading more consistent, comprehensive, and proportionate.<sup>105</sup> And it could also support replacing the Code's dichotomous, all-or-nothing approach to general inchoate liability<sup>106</sup> and accomplice liability<sup>107</sup> with a more nuanced grading scheme that better reflects the continuous, graduated judgments of relative blameworthiness expressed in both public opinion surveys and scholarly literature.<sup>108</sup> Finally, an evaluation of this nature might

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103. 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.

104. For an overview of the Model Penal Code's approach to partial defenses, see *supra* notes 66–69 and accompanying text.

105. For analysis of various ways in which the Model Penal Code's treatment of partial defenses—including both the contours of and weight it affords to pertinent mens rea distinctions—may depart from community sentiment, see ROBINSON & DARLEY, *supra* note 14, at 54–71, 128–55 (Studies 5, 6, 12–14). For evidence suggesting the possibility of broad convergence between expert and public opinion over mens rea issues related to partial defenses, see Hessick & Berman, *supra* note 92, at 177–97. And for a wide-ranging exploration of particular statutory reforms with the potential to ameliorate the relevant areas of misalignment, see Robinson, et al., *supra* note 69, at 317–32.

106. See MODEL PENAL CODE § 5.05(1) (AM. LAW INST., Proposed Official Draft 1962).

107. See *id.* § 2.06(3).

108. ROBINSON & DARLEY, *supra* note 14, at 208–10. For one example of how the Model Penal Code's monolithic treatment of general inchoate liability might be revised to better reflect those differentiated judgments, consider the following disjunction. Whereas the Code subjects all who meet the minimum requirements of attempt liability to the same statutorily authorized punishment, both public opinion surveys and some scholarly work reflect the existence of a meaningful distinction in relative blameworthiness between the mens rea of a complete attempter, who has released the risk of harm implicated by her criminal scheme, and that of an incomplete attempter, who has not (and therefore may ultimately refrain from completing the offense). See, e.g., ROBINSON & DARLEY, *supra* note 14, at 14–28 (Study 1); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 389 (2004). For a comparable example drawn from the complicity context, compare the Model Penal Code's all-or-nothing (and derivative) approach to accomplice liability, which generally subjects aiders and abettors to the same statutorily authorized punishment applicable to the perpetrator, with the multifarious mens rea-based distinctions in relative blameworthiness—broadly contingent upon the intentionality of the

provide the basis for scaling back some of the Code's broader rules of mental state substitution—reflected in, for example, the Code's general provisions on culpable mistakes,<sup>109</sup> divergence,<sup>110</sup> and voluntary intoxication<sup>111</sup>—given the disproportionate grading consequences that follow from application of the relevant imputation policies.<sup>112</sup>

Whichever 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 Model Penal Code, lacks the basic conceptual hardware necessary to statutorily recognize multiple mens rea-based grading factors across offenses.<sup>113</sup> Absent the creation of a Model Penal Code Second,<sup>114</sup> this effectively places the burden of developing a sufficiently nuanced grading architecture on any particular jurisdiction seeking to undertake thick model reforms.<sup>115</sup> And apart from this challenge of code design is the

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aid or encouragement rendered—reflected in both public opinion surveys and some scholarly work. See, e.g., ROBINSON & DARLEY, *supra* note 14, at 96–105 (Study 9); Morse, *supra* note 108, at 399. One other point worth noting: both public opinion surveys and some scholarly work on accomplice liability similarly provide support for recognizing key actus reus-based grading distinctions, broadly contingent upon the degree of assistance actually rendered to the principle. See, e.g., ROBINSON & DARLEY, *supra* note 14, at 33–48 (Study 3); Joshua Dressler, *Reforming Complicity Law: Trivial Assistance As A Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427 (2008).

109. See MODEL PENAL CODE § 2.04(2).

110. See *id.* § 2.03(2).

111. See *id.* § 2.08(2).

112. For analysis of, and potential statutory solutions to, the proportionality problems created by the Model Penal Code's overbroad approach to substituting mental elements, see, for example, Douglas N. Husak, *Transferred Intent*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 65 (1996) (divergence); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984) (mistakes); Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. L. 545 (2012) (voluntary intoxication).

113. See Cahill, *supra* note 73, at 601–05.

114. 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). Note, too, that the ALI's ongoing rewrite of the Model Penal Code's sex offenses does not appear to place much of an emphasis on considerations of mens rea in its grading scheme. See generally MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. LAW INST., Tentative Draft No. 3, 2017).

115. At least one example of a pared down criminal code with the capacity to accommodate such distinctions already exists. See Robinson et al., *supra* note 69, at 332–65. 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. See Cahill, *supra* note 29, at 945–47. For a

challenge of 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 concrete reforms.<sup>116</sup>

Given the breadth and diversity of these challenges, a legislature could not overcome 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. And, 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.<sup>117</sup>

Finally, it is 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”<sup>118</sup> in the short term, though such costs are heavily outweighed by the long-term administrative benefits promised by thick model reforms.<sup>119</sup>

Another relevant long-term challenge worth considering is political: both the preservation of these administrative benefits as well as the more fundamental first and second-order values promoted by the thick model will require legislators to forego the short-term political gain promised by passing crime legislation in response to the news cycle rather than actual shortcomings.<sup>120</sup> Fortunately, a potentially durable mechanism for safeguarding the integrity of a

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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).

116. See, e.g., Deborah W. Denno, *The Perils of Public Opinion*, 28 HOFSTRA L. REV. 741, 757–758 (2000); Kelman, *supra* note 21, at 1318–20.

117. See, e.g., Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 79–83 (1998); Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. CRIM. L. REV. 195, 201–03 (1997).

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

119. See, e.g., Gainer, *supra* note 117, at 83–87; 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).

120. See 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, 64–66 (1997); Philip Pettit, *Is Criminal Justice Politically Feasible?*, 5 BUFF. CRIM. L. REV. 427, 440–41 (2002).



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comprehensive criminal code from the “pathological politics of criminal law”<sup>121</sup> already exists in various commonwealth countries<sup>122</sup>; creation of a standing Criminal Law Commission tasked with overseeing and reviewing all criminal law reforms on an ongoing basis.<sup>123</sup> But again, the material and political resources necessary to establish a new technocratic government institution devoted to criminal law reform—let alone a permanent one—are likely to be substantial.<sup>124</sup>

Given the significant costs associated with the thick model, it is 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 diverse problems affecting American criminal codes. For purposes of this Article, then, I will focus on what the thin model might have to say about reforming the federal criminal “code,”<sup>125</sup> a uniquely large and disorganized body of criminal statutes characterized by four basic attributes: (1) broad and overlapping offense definitions; (2) ambiguous (or nonexistent) 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).<sup>126</sup>

When viewed collectively, these attributes indicate that the United States 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

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121. Stuntz, *supra* note 82, at 505.

122. See, e.g., AUSTRALIAN L. REFORM COMMISSION, <http://www.alrc.gov.au> (last visited Dec. 13, 2017); L. COMMISSION, <http://www.lawcom.gov.uk> (last visited Dec. 13, 2017) (Law Commission for England and Wales).

123. See, e.g., Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971, 979–81 (2010); Pettit, *supra* note 120, at 441–49; Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 653–54 (2005). For relevant insights concerning the institutional design of these commissions, see generally Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005).

124. One potential way of limiting those costs in jurisdictions that already have a sentencing commission is to expand the commission’s mandate (and staff) to include work on criminal code reform.

125. Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 643 (2006).

126. For descriptions along these lines, see, for example, Cahill, *supra* note 46; Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225 (1997); 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.

pervasive congressional 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 federal offenses in a manner that explicitly accounts for threshold and distributive mens rea considerations to the extent feasible without reliance on general provisions.<sup>127</sup> For a broader approach, Congress might (re)consider one or more generally applicable default rules governing culpable mental states,<sup>128</sup> which could 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.”<sup>129</sup> Yet another avenue worthy of congressional exploration is the development of a complicity-based sentencing statute that “differentiate[s] according to the individual mens rea of the accomplice and the perpetrator, as it now is for homicide.”<sup>130</sup>

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127. 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* Dean v. United States, 556 U.S. 568, 580 (2009) (Stevens, J., dissenting); Kolber, *supra* note 85, at 878–80.

128. 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). For a summary of the 114th Congress's effort at developing such a provision, see RICHARD M. THOMPSON II, MENS REA REFORM: A BRIEF OVERVIEW, CONGRESSIONAL RESEARCH SERVICE REPORT (2016). And for discussion of a corollary “insufficient culpability” defence that would provide the jury with “the power to reject a criminal prosecution” if, after considering “relevant [*mens rea*] factors, the defendant is insufficiently culpable to deserve punishment,” see Kenneth W. Simons, *Understanding the Topography of Moral and Criminal Law Norms*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 228, 250–51 (R.A. Duff & Stuart P. Green eds., 2011).

129. Morse, *supra* note 46, at 289.

130. Morse, *supra* note 108, at 399. Note that recognition of those kinds of mens rea-based gradations in the sentencing of accomplices is significantly more important for the federal system than it otherwise would be under the Model Penal Code since the federal system still recognizes both the natural and probable consequences rule and the *Pinkerton* doctrine—whereas the Model Penal Code does not. *See, e.g.*, *Pinkerton v. United States*, 328 U.S. 640, 646–47 (1946); *United States v. Walker*, 99 F.3d 439, 443 (D.C. Cir. 1996). In many instances, these two doctrines have the practical effect of holding a negligent coparticipant fully responsible for the intentional crimes perpetrated by another. Dressler, *supra* note 108, at 428 n.4; *see, e.g.*, Michael Heyman, *Losing All Sense*

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 merit consideration.

One concrete possibility would be the adoption of a federal sentencing statute that supplants the formalistic merger doctrine applied by federal courts with a proportionality-based approach authorizing trial judges to vacate one or more multiple convictions in the interests of justice.<sup>131</sup> An even broader path worth exploring is the development of general statutory guidance directing either (or both) of the primary delegates of discretion over federal sentencing policy, the United States Sentencing Commission and federal district court judges, to afford mens rea a more prominent role at sentencing.<sup>132</sup>

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 concrete pieces of legislation consistent with the theory of political representation presented in Part I.

For example, any attempt at giving 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*

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*of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN'S L. REV. 129, 130 (2013).

131. 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, *supra* note 73, 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) are 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 (2d ed., 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 *New Jersey v. Tate*, 216 N.J. 300, 307 (2013).

132. For discussion of the shortcomings of the U.S. Sentencing Commission's and federal judiciary's treatment of mens rea, see Carrie Legus, *Quantitative Justice: Have the Federal Sentencing Guidelines Forsaken Quality?*, 21 VT. L. REV. 1145 (1997); Dan Honold, *Quantity, Role, and Culpability in the Federal Sentencing Guidelines*, 51 HARV. J. ON LEGIS. 389 (2014). And for an analysis of the relationship between federal sentencing practice and the (revisable) general federal sentencing statute, 18 U.S.C. § 3553 (2012), see William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 after Booker and Its Progeny*, 40 CONN. L. REV. 631 (2008).

blameworthiness.<sup>133</sup> To the extent that thin model reforms leave many—indeed, most—areas of penal policy untouched, it becomes harder to make the case that any particular set of reforms truly reflects these judgments when viewed in broader context.<sup>134</sup>

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.<sup>135</sup> This means that reliance on thin model reforms (particularly those of general application) to the federal criminal code brings with it an exceedingly high risk of unintended consequences. Developing piecemeal federal legislation that is appropriately sensitive to these complexities will therefore require the investment of a substantial amount of thought and care.

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?<sup>136</sup> Disregard of the principle of proportional mens rea is not the only—or even the most significant—problem confronting the federal criminal justice system.<sup>137</sup> Nor is it one that has intuitive appeal from a political

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133. It's also an open question for thin model reforms whether and to what extent any nongovernmental organization is suited to accurately and credibly assess justice intuitions.

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

135. For analysis of recent legislative proposals along these lines, see Orin Kerr, *A Confusing Proposal to Reform the 'Mens Rea' of Federal Criminal Law*, WASH. POST: VOLOKH CONSPIRACY (Nov. 25, 2015), [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](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: AGENDA (May 16, 2016), <http://www.politico.com/agenda/story/2016/05/criminal-justice-reform-mens-rea-middle-ground-000120>.

136. For a proposal to create a federal version of a standing Criminal Law Commission that would be well-equipped to take on this task, see *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 62–65 (2010) (statement of Stephen F. Smith, Professor of Law, Univ. of Notre Dame Law Sch.); Brown, *supra* note 128, at 657–58.

137. 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, 559–64 (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

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messaging standpoint, even if the underlying issues are themselves intuitive. Worst of all, any solutions to this problem may—as the recent federal experience with threshold mens rea reform illustrates—engender partisan rancor, thereby precluding the kind of bipartisan support that would bolster its chances of enactment.<sup>138</sup>

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.<sup>139</sup> Nevertheless, they are also challenges that are worthy of confrontation.

## CONCLUSION

This Article has argued that legislative neglect of the principle of proportional mens rea is a significant and underappreciated problem around which future criminal code reform efforts might be structured. It has also provided a rough sketch of what those efforts might look like, as well as the principles that ought to animate them. This preliminary exploration raised, but did not ultimately resolve, a range of normative, conceptual, and empirical 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.

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identifying those classes of actors who are most deserving of sentencing reductions.

138. See Gideon Yaffe, *A Republican Crime Proposal That Democrats Should Back*, N.Y. TIMES (Feb. 12, 2016), <https://nyti.ms/1mw9zFK>.

139. Four decades ago, Louis Schwartz elegantly described federal criminal code reform as “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 L. & CONTEMP. PROBS. 1, 1 (1977). No doubt the same remains true of criminal code reform today, both at the state and federal level.