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The Supreme Court on *Mens Rea*: 2008–2015

Paul J. Larkin, Jr., Jordan Richardson, and John-Michael Seibler

Abstract

The Supreme Court has recently reinvigorated the importance of mens rea *and has readopted the presumption in favor of construing criminal statutes to require proof of an evil state of mind even when a law is silent or ambiguous on that issue. Since then, it has defended the existence of a* mens rea *requirement as a rule of Anglo–American criminal law, often by clarifying the mental state requirement when a law has an ambiguous element or none at all. The Court has not read every criminal statute to require proof of a scienter element ensuring that only morally blameworthy parties will be convicted, but its performance has generated optimism that it has renewed its interest in this subject. In fact, since the turn of the century, scholars have observed that "the Court has recently created not merely a presumption in favor of* mens rea*, but in favor of a 'heightened' form of* mens rea *with regard to issues of both fact and law."*

Oliver Wendell Holmes, Jr., was on to something when he said that even a dog knows the difference between "being stumbled over and being kicked."[1] Anglo–American criminal law traditionally has marked a person as a criminal only if he or she[2] committed a morally blameworthy act, known as the *actus reus*, along with an "evil" frame of mind, known as *mens rea* or scienter.[3] A *mens rea* requirement distinguished individuals who break the law only accidentally or inadvertently from ones who do so wantonly, with only the latter being held criminally responsible for their actions.[4] Requiring the government to prove that a defendant acted with criminal intent was a hallowed feature of Anglo–American criminal law.[5]

Beginning in the mid-19th century, the state and federal governments began to erode that protection by enacting laws that

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Key Points

- In *Morissette v. United States*, the Supreme Court of the United States reinvigorated the presumption of *mens rea* in the criminal law. Since then, the Court has often reaffirmed the importance of proving some *mens rea* element for a criminal conviction, even when the statute at hand does not expressly have one.
- The Court's revitalized appreciation for the presumption of *mens rea*, its consistent reliance on statutory text, and its awareness of the problems of overcriminalization suggest that it is committed to this position. The Court should continue to require, as a prerequisite of a criminal conviction, that the government prove a guilty mental state proportional to the seriousness of the offense charged and the severity of the punishment risked.
- In addition, Congress should enact default *mens rea* rules for all non-jurisdictional elements of criminal statutes and make its intent to create a strict liability crime explicit in the text of the statute.

weakened or eliminated any *mens rea* requirement for a new category of small-scale crimes known as "public welfare offenses."[6] Those laws sought to use the criminal law not to identify morally blameworthy conduct or parties, but as a regulatory tool to protect the public against developing threats to social welfare in food, drugs, housing, and the like. Over time, however, public welfare offenses grew beyond their original design. For example, Congress eliminated proof of wrongful intent or knowledge for certain offenses involving the interstate distribution of drugs, and the Supreme Court of the United States upheld that statute against a due process challenge in *Dotterweich v. United States*.[7] Modern-day environmental laws also do not uniformly require proof of an "evil meaning mind," a problem aggravated by the use of regulations to fill out regulatory schemes.[8]

In *Dotterweich* and other cases, the Court abandoned the historical presumption that *mens rea* is required for a criminal conviction and interpreted criminal laws to dispense with such proof wherever "the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes."[9] That development struck a nerve with numerous scholars. Recognizing that the Court would construe silence "as a direction to dispense with *mens rea*,"[10] scholars blamed the judiciary's "wooden interpretation of criminal statutes" for "the erosion of *mens rea*."[11] Convinced that subjecting defendants "entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice," they predicted that "no law which violates this fundamental instinct can long endure."[12]

Regrettably, that prediction has not proved true. Legislatures have continued to enact criminal laws with a weak *mens rea* requirement or sometimes with none at all.[13] Moreover, even if a statute does require proof of some mental state, it is often unclear exactly what the defendant must know or intend as to each element of the offense.[14] In some instances, the problem is due to legislative silence,[15] while in others, carelessness in drafting is responsible for any ambiguity.[16] Until recently, Congress has shown little interest in reforming deficient statutes that are already on the books or in preventing this problem from arising in the future.[17]

Fortunately, the Supreme Court has recently reinvigorated the importance of *mens rea* and has readopted the presumption in favor of construing criminal statutes to require proof of an evil state of mind even when a law is silent or ambiguous on that issue. Since then, it has defended the existence of a *mens rea* requirement as a rule of Anglo–American criminal law.[18] The Court has often done so by clarifying the mental state requirement when a law has an ambiguous element or none at all.[19] To be sure, the Court has not read every criminal statute to require proof of a scienter element ensuring that only morally blameworthy parties will be convicted. Nonetheless, the Court's performance has generated optimism that it has renewed its interest in this subject. In fact, since the turn of the century, scholars have observed that "the Court has recently created not merely a presumption in favor of *mens rea*, but in favor of a 'heightened' form of *mens rea* with regard to issues of both fact and law."[20]

The following sections will summarize that trend and discuss its importance.

Dean v. United States (2008)

The first case is *Dean v. United States*.[21] In the course of robbing a bank, Dean was "grabbing bills with his left hand and holding a gun in his right" when the gun went off unintentionally, Dean said.[22] "No one was hurt," and "[w]itnesses later testified that he seemed surprised that the gun had gone off."[23] Convicted of robbery, Dean was sentenced to a mandatory minimum term of 10 years in prison for discharging a firearm during a robbery.[24] No one disputed that Dean had discharged a firearm during the robbery; the question was whether the statute required the government to prove that Dean *intended* to discharge his weapon. Dean argued that Congress had not intended to impose a 10-year mandatory minimum term on someone who did not intend to shoot anyone. The government argued that Dean's intent was irrelevant.

Writing for the Court, Chief Justice John Roberts began his opinion by acknowledging that "[a]ccidents happen," even to "individuals committing crimes with loaded guns."[25] The question was what to do about it. The opposing arguments appeared equally balanced. On the one hand, the relevant portion of the law contained no scienter requirement, and the Court "ordinarily resist[ed] reading words or elements into a statute that do not appear on its face."[26] On the other hand, "criminal statutes are generally interpreted 'to include broadly applicable scienter requirements'" even where the text of the act does not expressly contain any.[27]

What tipped the scales for the Court was the act's use of the passive voice and its overall structure. The Court explained that the passive voice "focuses on an event that occurs"—in this case, the discharge of a firearm—"without respect to a specific actor" and therefore without regard for any actor's intent or culpability.[28] What matters is "whether something happened—not how or why it happened."[29] Moreover, because other provisions in the law required proof of scienter, the Court presumed that Congress intended to omit any such proof in the portion of the law at issue in Dean's case.[30]

The Court buttressed that conclusion by reliance on Blackstone's treatment of liability under the felony murder rule: "[I]f any accidental mischief happens to follow from the performance of a *lawful* act, the party stands excused from all guilt," Blackstone explained.[31]

> [B]ut if a man be doing anything *unlawful,* and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehavior.[32]

Since Dean was in the process of robbing a bank when he discharged the firearm, he would have been responsible under the common law for discharging his firearm whether or not he did so accidentally.

At first blush, it may seem odd to include the *Dean* case in a discussion of Supreme Court decisions requiring proof of scienter, given that the Court agreed with the government that the statute did not demand proof of intent to discharge a firearm. But the Court's opinion suggests that the justices were troubled by the prospect that Dean would receive a 10-year sentence for what might have been only an accident.[33] The Court seemed to reject Dean's interpretation of the statute only because its text and the relevant common law doctrine strongly militated against it.[34] When *Dean* is read in light of the Court's later scienter cases, it indicates concern that parties not be sentenced to long terms of imprisonment unless they intended to engage in wrongdoing.

Flores-Figueroa v. United States (2009)

The next case was *Flores-Figueroa v. United States.*[35] Ignacio Flores-Figueroa, a Mexican citizen, gained employment under a fictitious name, birth date, and Social Security number and a counterfeit alien registration card. Six years later, he presented his employer with new counterfeit Social Security and alien registration cards bearing his real name but with Social Security numbers assigned to others. Flores's employer reported the discrepancies to the federal government, which charged Flores with aggravated identity theft (among other offenses). The aggravated identity theft statute makes it a crime to "knowingly" transfer, possess, or use "a means of identification of another person" without lawful authority in connection with certain specified felonies.[36] The question was whether the statute requires the government to prove that the defendant knew that the identification he unlawfully possessed in fact belonged to "another person" rather than a fictitious individual.[37]

The Court read the statute in accordance with "ordinary English usage."[38] Finding the statute ambiguous on the issue in the case, the Court read the knowledge requirement to apply to elements in the statute relating to blameworthiness: "[W]here a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence."[39] Accordingly, the Court concluded that the identity theft statute "requires the Government to show that the defendant knew that the means of identification at issue belonged to another person."[40] In so doing, the Court explained that its construction of the act was consistent with its practice to "read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element" of the crime.[41]

Global-Tech Appliances, Inc. v. SEB S.A. (2010)

In *Global-Tech Appliances, Inc. v. SEB S.A.*,[42] the Court showed that it can be innovative when it comes to scienter requirements. *Global-Tech Appliances* was a patent case. A Hong Kong home-appliance manufacturer reverse engineered a French company's deep fryer in order to supply its own version to a U.S. competitor of the French company.[43]

The French manufacturer sued the Hong Kong company for inducing patent infringement by the American firm, and the Supreme Court granted review to decide what state of mind is necessary for patent liability under a statute providing that "[w]hoever actively induces infringement of a patent shall be liable as an infringer."

The Court held that a party cannot "actively induce[] infringement" without knowledge that those actions infringe on a patent. The result is to require a plaintiff to prove that the defendant knew that the plaintiff's widget had been patented.[44] But the Court went on to identify a second theory of proof, one based on the "willful blindness" doctrine.[45] Approving the standard adopted by the lower federal courts, the Supreme Court concluded that a defendant is liable if he deliberately avoided "confirming a high probability of wrongdoing" even if he did not in fact "know" that a widget had been patented.[46]

Although *Global-Tech Appliances* was a civil lawsuit, the Court's opinion relies on criminal cases discussing the willful blindness doctrine and therefore suggests that it would permit the government to invoke that theory in a criminal case.[47] That prospect troubled Justice Anthony Kennedy, who dissented. As he explained, the Court's approval of a willful blindness standard was a needless step backwards in the field of *mens rea* jurisprudence. Because circumstantial evidence can be used to prove knowledge and the law permits "probabilistic judgments to count as knowledge,"[48] a willful blindness theory has the effect of lowering the types and amount of proof necessary to establish a violation of the patent or criminal laws.

In that regard, Justice Kennedy was correct. Depending on the facts, a willful blindness theory could allow the government to establish liability based merely on evidence that someone was negligent in learning more about the nature of his business or the challenged transaction. That possibility, as Justice Kennedy noted, raises a "question of morality and of policy" that "is best left to the political branches."[49] While some scienter requirement is better than none at all, here there was a scienter requirement—knowledge—so it would have been preferable for the Court to have quit while it was ahead and simply require actual knowledge for a violation of the patent and criminal laws.

Rosemond v. United States (2013)

The next major *mens rea* case, *Rosemond v. United States*,[50] clarified the scienter requirement for an entire category of criminal offenses: accessorial liability or "aiding and abetting." Justus Rosemond was caught in a "drug deal gone bad."[51] He and two other men sat in a car in a local park, waiting to exchange drugs for cash. Instead, the buyer punched one of them in the face, snatched the drugs, and ran off. One of the sellers—no one can remember who—left the car and shot at the fleeing thief. The police later arrested Rosemond.

Because it could not prove who fired the gun, the federal government charged Rosemond with using a firearm in connection with a drug-trafficking crime or with aiding and abetting that offense in violation of Section 2 of Title 18. Section 2 provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."[52] The Court found it easy to conclude that "Rosemond's participation in the drug deal here satisfies the affirmative-act requirement" for aiding and abetting a crime[53] but found it more difficult to decide whether Rosemond had acted with the requisite intent.[54]

The Court's precedents established that the intent requirement is satisfied "when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense."[55] Applying that principle, the Court reasoned that "[a]n active participant in a drug transaction" has the necessary intent needed to aid and abet a firearms offense "when he knows that one of his confederates will carry a gun."[56] The Court realized that its requirement logically demands proof of some "advance knowledge" on the part of the defendant that one of his confederates would use a gun in the underlying crime because one cannot aid and abet a crime about which he knows nothing.[57] Accordingly, the government cannot convict a defendant for aiding someone else's use of a firearm if the defendant "first learned of the gun as it was discharged."[58] Said differently, a defendant is not liable for aiding and abetting someone else to commit a crime without proof that the defendant had a "realistic opportunity" to become aware of his colleagues' intent and then to abandon the relationship.[59]

Loughrin v. United States (2014)

Posing as a Mormon missionary, Kevin Loughrin went door-to-door in a Salt Lake City neighborhood, stealing checks out of the residents' mailboxes.[60] He then altered the checks, posed as the account holder, and made the checks out to local Target stores to purchase goods in amounts of up to $250. On six occasions, Loughrin left the store with the items he purchased but later returned to exchange the goods for cash. Each of those six checks was drawn on an account at a federally insured bank. The federal government eventually caught up with Loughrin and charged him with six counts of committing bank fraud, one for each of the altered checks.[61]

The bank fraud statute, Section 1344 of Title 18, provides that:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.[62]

Loughrin argued that to prevent the federal bank fraud statute from encroaching on state fraud laws, Section 1344 should be read to require the government to prove that a defendant specifically intended to defraud a federally insured bank. Under that interpretation, Loughrin argued, he was entitled to go free because he intended to defraud Target, not a federally insured bank or the federal government.

The Court rejected Loughrin's argument without much difficulty. The Court reasoned that nothing in the text of Section 1344 demands that a defendant have the specific intent to deceive a bank.[63] Loughrin's reliance on federalism principles was also misplaced, the Court wrote, because the federal government has a strong interest in preventing federal banking institutions from being defrauded.[64]

Interestingly, the Court's opinion at times suggested that the federal law did "require[] a *mens rea* of purpose."[65] Justice Samuel Alito wrote a concurrence for the sole purpose of clarifying the scienter requirement of the act for future cases. Because "Congress expressly denoted [that] the *mens rea* a defendant must have to violate" the statute was "*knowingly*," wrote Justice Alito, "[i]t is hard to imagine how Congress could have been clearer as to the mental state required for liability."[66] Accordingly, Justice Alito urged the reader, "if the issue is presented in a future case, the Court's statements must be regarded as dicta."[67]

Whether that caution will be heeded by future litigants or not, the majority opinion stands for the proposition that the Court may be open to requiring proof of intent if a statute is ambiguous as to its scienter requirement. Loughrin's case was not a good vehicle for the Court to elaborate on that point because the government had to prove that Loughrin acted with the intent to defraud even under his reading of the law. Accordingly, *Loughrin* does not indicate that the Court will not require proof of intent when it is necessary to prevent the conviction of a morally blameless individual.

Elonis v. United States (2015)

A grand jury indicted Anthony D. Elonis for threatening to injure a variety of parties—the customers and employees of the amusement park where he was employed, his estranged wife, police officers, a kindergarten class, and an FBI agent—in violation of the federal threat statute, 18 U.S.C. § 875(c).[68] Elonis wrote and published all of the alleged threats online in the form of rap lyrics about those individuals.[69] He wrote that these lyrics were meant to be a therapeutic way to deal with the pain of separation from his two young children and his wife of seven years.[70]

Section 875(c) makes it a federal crime to transmit in interstate commerce "any communication containing any threat…to injure the person of another." The communication must "contain" a "threat," but the law does not specify whether a speaker must intend his communication to constitute a threat.[71] Elonis denied that he intended to threaten anyone, claiming that "[a]rt is about pushing limits"[72] and that the Free Speech Clause protected his artistic expression. The Supreme Court ruled in Elonis's favor but did not address his First Amendment claim. Instead, the Court concluded that the federal threat statute requires proof of some mental state for a conviction and that the jury was not correctly instructed in Elonis's case.

The district court did not require that the jury make any finding regarding how Elonis intended his communications to be received. The result was, the

Court explained, that the jury could have convicted Elonis simply for negligently failing to realize that his "art" would come across as threatening to a reasonable person. A negligence standard is preferable to a strict liability standard, as professor Herbert Packer explained long ago,[73] but the Supreme Court held that negligence is an inadequate basis for holding someone criminally liable for uttering a threat. The Court left open the issue of whether a person could utter a threat "recklessly" but rejected the argument that negligence was a sufficient basis for imposing criminal liability.

Chief Justice Roberts crafted a narrow opinion, writing that "common definitions of 'threat' speak to what the statement conveys—not to the author's mental state,"[74] and the criminal law does not regard the omission of a scienter enactment from a statute as dispensing with such a requirement.[75] Although the Court sidestepped the First Amendment issue and declined to choose exactly what degree of intent is required under the law, the Chief Justice delivered a resounding defense of "the basic principle that 'wrongdoing must be conscious to be criminal,' and that a defendant must be 'blameworthy in mind' before he can be found guilty."[76] After *Elonis*, it remains "[t]he general rule" that evidence that a defendant acted with "a guilty mind" is "a necessary element in the indictment and proof of every crime"[77] even if a statute omits that element.[78]

Both Justice Samuel Alito and Justice Clarence Thomas "complained" that the Court did not decide "whether recklessness suffices for liability" under the statute, believing that the Court's ruling would not clarify the confusion in the lower courts over the matter.[79] The Chief Justice disagreed, noting: "Our holding makes clear that negligence is not sufficient to support a conviction under Section 875(c), contrary to the view of nine Courts of Appeals." In opting to wait until there is a circuit conflict over "whether recklessness suffices for liability," the Court expressed its willingness to leave to the lower courts the task of addressing the issue.[80]

McFadden v. United States (2015)

In 1970, Congress enacted the Controlled Substances Act to prevent dangerous drugs from entering the marketplace.[81] Congress tasked the Drug Enforcement Administration (DEA) with identifying "controlled substances" as defined in the law,[82] and the DEA Administrator prepared a list of the drugs governed by the 1970 act.[83] A conviction under the Controlled Substances Act is obtained by proving that a defendant "knowingly or intentionally" possessed or distributed one or more listed controlled substances.[84]

Listing controlled substances, however, does not solve that problem. One reason why is that innovative chemists can stay one step ahead of the law by devising new drugs that are "analogues" to the ones on the controlled substances list but not identical to listed drugs. In response, Congress enacted the Controlled Substances Analogue Act. That statute seeks to prohibit any new drug that is "substantially similar" to the ones listed under the Controlled Substances Act, thereby combating the work of "clandestine chemists."[85]

But another problem arose. If Congress did not know precisely what substances would be illegal under the Analogue Act, how could anyone else have that knowledge? Congress's answer was to require that "a controlled substance analogue" be "intended for human consumption."[86] In other words, the Analogue Act applies to substances (1) that are biochemically similar to listed drugs and (2) that a person knowingly manufactured, possessed, or distributed for "human consumption."[87] Yet that formulation of the government's proof could offer little to no protection for parties who possess an analogue drug without knowing its true nature. For example, is the unlisted drug 3.4-methylenedioxy-N-butylamphetamine substantially similar to the listed drug Methamphetamine, 3.4-methylenedioxyamphetamine (MDA)? Guess wrongly, and you could spend the rest of your life in prison.[88]

Meanwhile, the courts faced a conundrum: How should they resolve a case involving a defendant who was not aware of the Analogue Act or did not know that the substance he possessed was an analogue drug? In walks Stephen McFadden.

From 2007 to 2011, McFadden operated an online business retailing overstocked goods including so-called bath salts,[89] which he sold for as much as $450 an ounce, a price tag that led Justice Ruth Bader Ginsburg to note at oral argument that "there's no bath salts in the world that cost" that much.[90] McFadden claimed that he researched the DEA's website[91] to determine whether his bath salts were a "controlled substance" and that he did not see his product identified as one. Accordingly, McFadden said that he concluded that federal law did not prohibit their sale.[92]

As it happens, one of his customers, who worked for the DEA, disagreed and arrested him, which led to the case that wound up in the Supreme Court.[93]

McFadden was convicted for violating the Analogue Act and arrived before the Supreme Court to ask the $450-an-ounce question: To convict a defendant of distributing a controlled substance analogue, does the government need to prove that the defendant knew that the substance was an analogue to a controlled substance? Justice Thomas answered succinctly:

> [T]he Government [must] establish that the defendant knew he was dealing with a controlled substance. When the substance is an analogue, that knowledge requirement is met if the defendant knew that the substance was controlled under the CSA or the Analogue Act, even if he did not know its identity. The knowledge requirement is also met if the defendant knew the specific features of the substance that make it a "controlled substance analogue."[94]

The Court determined that as a textual baseline, the Act requires a defendant to know only that whatever substance he possesses is a federally regulated "controlled substance."[95] The government can prove that baseline with evidence that a defendant knows that the substance he possesses is illegal, even if he does not know exactly what that substance is, or with proof that the defendant knew the features of the substance that make it illegal,[96] even if he does not know its legal status as an analogue.[97] Under that interpretation of the Analogue Act, the clandestine chemists and anyone who has first or secondhand knowledge of a drug's effects are all accounted for.

Chief Justice John Roberts would have ruled in McFadden's favor on a different ground, one that would have imposed an even greater burden on the government. In his view, if the word "knowingly" applies "not just to the statute's verbs"—possession, distribution, manufacture, etc.—"but also to the object of those verbs—'a controlled substance,'"[98] then "a defendant needs to know more than the identity of the substance; he needs to know that the substance is controlled."[99] That interpretation of the act would have required the government to prove that a defendant knew that it is illegal to possess a controlled substance. This establishes a judicial sidestep around the maxim "ignorance of the law is no excuse"—that neither ignorance nor a mistake of law is a defense to a crime.[100] The exception the Chief Justice would have created is a rare but increasingly appropriate defense against the growing number and complexity of federal criminal statutes.[101]

Going forward, the Court left the question of what exact evidence is required to prove knowledge to ad hoc determinations in the lower courts. Justice Clarence Thomas mentioned that, "as with most *mens rea* requirements," prosecutors can use direct or circumstantial evidence to prove that the defendant knew he possessed or distributed a controlled substance analogue.[102]

But the Court carefully distinguished proper proof of scienter under the Analogue Act from that proscribed in the similar case of *Staples v. United States*.[103] That case interpreted a statute that makes it "unlawful for any person...to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record"[104] and requires prosecutors to prove that a defendant "knew of the features of his [firearm] that brought it within the scope of the Act."[105] The statute in *Staples*, however, defined "a firearm" by using readily ascertainable "physical features such as the length of its barrel and its capacity to shoot more than one shot with a single function of the trigger," while "the feature of a substance that brings it within the scope of [the Analogue Act] is the fact that it is 'controlled.'"[106] Although the Court left the manner of proving that knowledge to the lower courts, the Court has clearly required the government to prove it.

What Next for *Mens Rea*?

These cases strengthen the presumption that a guilty mind is "a necessary element in the indictment and proof of every crime."[107] There is little evidence that the Supreme Court will retreat from that doctrine,[108] but there is also nothing stopping the Court, except the Justices themselves, from reverting to its early 20th century aversion to *mens rea*. As Justice Elena Kagan hinted in her dissent in *Yates v. United States*,[109] which the Court also decided during its 2014 October Term, there is plenty of work that Congress could do to ensure that *mens rea* remains a necessary element of all criminal convictions.[110] To ensure that end is met, Congress should enact default *mens rea* rules for all non-jurisdictional elements of criminal statutes and make its intent to create a strict liability crime explicit in the text of the statute.[111]

Conclusion

In *Morissette,* the Supreme Court reinvigorated the presumption of *mens rea* in the criminal law after an era of desuetude. Since then, the Court has often reaffirmed the importance of proving some *mens rea* element for a criminal conviction, even when the statute at hand does not expressly have one. The Court may step backwards or misstep at times—like broadening the willful blindness standard by legislating from the bench in *Global-Tech Appliances, Inc.* Its recent decisions in *McFadden, Elonis,* and *Flores-Figueroa,* however, show that it appreciates the importance of *mens rea* in the criminal law. *Loughrin*, *Dean*, and Justice Kennedy's dissent in *Global-Tech Appliances, Inc.*, show due respect for legislative intent as well as the need for responsibility and accountability for criminal lawmaking. *Elonis* sustained the presumption that a *mens rea* element can be required even where a statute does not include one. *Dean* overcame that presumption only because the terms and text of the statute, as well as the common law, indicated that the omission was intentional.

The Court's revitalized appreciation for the presumption of *mens rea*, its consistent reliance on statutory text, and its awareness of the problems of overcriminalization suggest that the Court is committed to this position. The Court should continue to require, as a prerequisite of a criminal conviction, that the government prove a guilty mental state proportional to the seriousness of the offense charged and the severity of the punishment risked.

*—**Paul J. Larkin, Jr.,** is Senior Legal Research Fellow, **Jordan Richardson** is a former Visiting Legal Fellow, and **John-Michael Seibler** is a Visiting Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.*

Endnotes

1. Oliver Wendell Holmes, Jr., The Common Law 2 (1888).
2. Hereafter, this paper will use "he" to refer to "he or she" unless the context dictates otherwise.
3. *Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law, Testimony Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (testimony of Dr. John S. Baker, Jr., Professor Emeritus, LSU Law School), http://judiciary.house.gov/_files/hearings/113th/07192013/Baker%2007192013.pdf; *see also* William Blackstone, Commentaries *4, 20–21 (reducing criminality to "this single consideration, the want or defect of will"); Holmes, *supra* note 1, at 3.
4. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 149 (2007) (stating that *mens rea* requirements "alleviate vagueness concerns" and "narrow the scope of the prohibition and limit prosecutorial discretion"); United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978) ("Although Blackstone's requisite 'vicious will' has been replaced by more sophisticated and less colorful characterizations of the mental state required to support criminality…intent generally remains an indispensable element of a criminal offense. This is as true in a sophisticated criminal antitrust case as in one involving any other criminal offense."); *see also* Brian W. Walsh & Tiffany M. Joslyn, Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law, The Heritage Foundation Special Report No. 77, at 5 (May 5, 2010), http://www.heritage.org/research/reports/2010/05/without-intent.
5. *See, e.g.*, United States v. Balint, 258 U.S. 250, 251–52 (1922) ("[T]he general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it."). The Supreme Court made that point clear in *Morissette v. United States*, 342 U.S. 246, 250–52 (1952) (footnotes omitted): "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' Common-law commentators of the Nineteenth Century early pronounced the same principle, although a few exceptions not relevant to our present problem came to be recognized. ¶ Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the state codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as 'felonious intent,' 'criminal intent,' 'malice aforethought,' 'guilty knowledge,' 'fraudulent intent,' 'wilfulness,' 'scienter,' to denote guilty knowledge, or '*mens rea*,' to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes."
6. *See* Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 72 (1933).
7. 320 U.S. 277 (1943).
8. *See* Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 Harv. J. L. & Pub. Pol'y 1065, 1091–93 (2014).
9. United States v. Balint, 258 U.S. 250, 252 (1922); *see also* United States v. Behrman, 258 U.S. 280, 288 (1922) ("If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent."); John F. Stinneford, *Punishment Without Culpability,* 102 J. Crim. L. & Criminology 653, 671 (2012).
10. Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 115 n.33 (1962). One general exception was a category of statutes that codified common law crimes; for these, the court was more likely to require proof of *mens rea* for conviction. *Id.* at 120–22.
11. *Id.* at 147.
12. Sayre, *supra* note 6 at 72; *see also* Larkin, *supra* note 8, at 1079 n.46 (collecting authorities).
13. Walsh & Joslyn, *supra* note 4, at 15 ("The Stolen Valor Act of 2005 (S. 1998)…made it a federal crime to, among other things, 'knowingly' buy, sell, mail, ship, barter, 'or exchange[ ] for anything of value' a wide variety of military decorations, badges, and medals…to prevent fraudulent uses of and claims about U.S. military decorations…. But the offense is not limited to fraudulent conduct…. It is written so broadly and with such weak *mens rea* protections that it would reach many acts by perfectly legitimate historians and collectors who deal in these military decorations. Under its terms, even heirs of a soldier who transfer his decorations or medals among themselves in exchange for other property in the soldier's estate would risk imprisonment.").

14. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994) (holding that the term "knowingly" as used in the Protection of Children Against Sexual Exploitation Act applies to certain terms within the statute that constitute an element of the offense, despite the fact that under a natural grammatical reading of that Act, the scienter element would apply only to a more limited set of terms, in order to prevent prosecution of those who violate the statute without a guilty mind.); Morissette v. United States, 342 U.S. 246, 250 (1952) (holding that criminal intent is an essential element of the crime of knowing conversion of government property under 18 U.S.C. § 641, which does not include a *mens rea* requirement).
15. *See, e.g.*, People v. Rathert, 6 P.3d 700, 711 (Cal. 2000) ("[T]he Legislature is often silent as to the mental element of a crime."); Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 Mich. L. Rev. 127, 153 (1997) ("[C]riminal statutes typically emerge from the legislature only half-formed.").
16. *See, e.g.*, Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469, 477 (1996) ("Congress is notoriously careless about defining the mental state element of criminal offenses.").
17. For a discussion of the importance of *mens rea* reform, see John Malcolm, *The Pressing Need for Mens Rea Reform*, The Heritage Foundation Legal Memorandum No. 160 (Sept. 1, 2015), http://thf_media.s3.amazonaws.com/2015/pdf/LM160.pdf.
18. *See, e.g.*, Arthur Andersen LLP v. United States, 544 U.S. 696, 705 (2005); United States v. Aguilar, 515 U.S. 593, 599 (1995); United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); Staples v. United States, 511 U.S. 600 (1994); Ratzlaf v. United States, 510 U.S. 135 (1994); Cheek v. United States, 498 U.S. 192 (1989); Liparota v. United States, 471 U.S. 419 (1985); United States v. U.S. Gypsum Co., 438 U.S. 422, 436 (1978). This general rule does, however, have many limits and exceptions. *See, e.g.*, Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, 75 Law & Contemp. Probs. 109 (2012); William A. Tilleman II, *It's a Crime: Public Interest Laws (Fish and Game Statutes) Ignore Mens Rea Offenses Towards A New Classification Scheme,* 16 Am. J. Crim. L. 279 (1989); Sayre, *supra* note 6, at 68.
19. The cases cited in this paper illustrate that ability, but there are instances when a statute is not made clearer by importing a *mens rea* requirement. *See* Screws v. United States, 325 U.S. 91, 138, 149–57 (1945).
20. Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 Buff. Crim. L. Rev. 859, 859 (1999).
21. 556 U.S. 568 (2009). *See* Eric A. Johnson, *Does Criminal Law Matter? Thoughts on* Dean v. United States *and* Flores-Figueroa v. United States, 8 Ohio St. J. Crim. L. 123 (2010).
22. Dean v. United States, 556 U.S. 568, 570–71 (2009).
23. *Id.*
24. *See* 18 U.S.C. § 924(c)(1)(A)(iii) (2012).
25. *Dean*, 556 U.S. at 568.
26. *Elonis*, 135 S. Ct. at 2003 (citing Bates v. United States, 522 U.S. 23, 29 (1997)).
27. *Id.* (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994)).
28. *Dean*, 556 U.S. at 572.
29. *Id.* (citing Watson v. United States, 552 U.S. 74, 81 (2007) (use of passive voice in statutory phrase "to be used" in 18 U.S.C. § 924(d)(1) reflects "agnosticism…about who" commits the illegal act).
30. *Id.* (citing Russello v. United States, 464 U.S. 16, 23 (1983) (internal quotation marks omitted) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").
31. *Id.* at 575 ("If a defendant commits an unintended homicide while committing another felony, the defendant can be convicted of murder."), 575–76 (citing William Blackstone, Commentaries *4, *26–27).
32. *Id.*
33. *Id.* at 568, 574–77.
34. *Id.* at 573, 575–77.
35. 556 U.S. 646 (2009).
36. *See* 18 U.S.C. § 1028A(a)(1) (2012).
37. *Flores-Figueroa*, 556 U.S. at 647; *see* Johnson, *supra* note 21, at 124
38. *Flores-Figueroa*, 556 U.S. at 651. "The manner in which the courts ordinarily interpret criminal statutes is fully consistent with this ordinary English usage." *Id.* at 652. The Court did delve into abstractions of what knowing can imply to prove up the ambiguity: "Of course, a statement that does not use the word 'knowingly' may be unclear about just what Smith knows…. Similar examples abound. If a child knowingly takes a toy that belongs to his sibling, we assume that the child not only knows that he is taking something, but that he also knows that what he is taking is a toy and that the toy belongs to his sibling. If we say that someone knowingly ate a sandwich with cheese, we normally assume that the person knew both that he was eating a sandwich and that it contained cheese. Or consider the Government's own example, "'John knowingly discarded the homework of his sister.'" The Government rightly points out that this sentence 'does not necessarily' imply that John knew whom the homework belonged to. Ibid. (emphasis added). But that is what the sentence, as ordinarily used, does imply.").

39. *Id.* at 650.
40. *Id.* at 657.
41. *See id.* at 652 (discussing Liparota v. United States, 471 U.S. 419 (1985)); *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 79 (1994) (Stevens, J., concurring).
42. 131 S. Ct. 2060 (2011).
43. *Id.* at 2063–64.
44. *Id.* at 2068.
45. *Id.* at 2068, 2071–72.
46. "While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts. *See* G. Williams, Criminal Law § 57, p. 159 (2d ed. 1961) ('A court can properly find willful blindness only where it can almost be said that the defendant actually knew.'). By contrast, a reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing, see ALI, Model Penal Code § 2.02(2)(c) (1985), and a negligent defendant is one who should have known of a similar risk but, in fact, did not, see § 2.02(2)(d)." *Global-Tech Appliances, Inc.*, 131 S. Ct. at 2070–71.
47. Justice Kennedy certainly thought so. *See Global-Tech Appliances, Inc.*, 131 S. Ct. at 2073 (Kennedy, J., dissenting) (noting that "the Court appears to endorse the willful blindness doctrine here for all federal criminal cases involving knowledge. It does so in a civil case where it has received no briefing or argument from the criminal defense bar, which might have provided important counsel on this difficult issue."); *see also* Brian W. Walsh, *The Supreme Court's Willful Blindness Doctrine Opens the Door to More Wrongful Criminal Convictions*, The Heritage Foundation Web Memorandum No. 3304 (June 30, 2011), http://www.heritage.org/research/reports/2011/06/the-supreme-courts-willful-blindness-doctrine-opens-the-door-to-more-wrongful-criminal-convictions#_edn19.
48. *Global-Tech Appliances, Inc.*, 131 S. Ct. at 2073 (Kennedy, J., dissenting).
49. *Id.* at 2072–73. In part because "the retributive purposes of the criminal law…have no force in the domain of patent law…. The Constitution confirms that the purpose of the patent law is a utilitarian one, to 'promote the Progress of Science and useful Arts.'" *Id.* (quoting U.S. Const. art. I, § 8, cl. 8).
50. 134 S. Ct. 1240 (2014).
51. *Id.* at 1243.
52. *Id.* (citing 18 U.S.C. § 2 (2012)).
53. *Id.* at 1246–47 (2014) (citing Reeves v. Ernst & Young, 507 U.S. 170, 178 (1993), United States v. Johnson, 319 U.S. 503, 515 (1943), and Pereira v. United States, 347 U.S. 1, 8–11 (1954)).
54. *Id.* at 1248.
55. *Id.* at 1248–49.
56. *Id.* at 1249.
57. Justice Alito disagreed with the majority over the issue of whether requiring proof of advance knowledge conflates an element of the offense with a traditional affirmative defense and exactly when this "advance knowledge" must permissibly originate—whether before or during the primary criminal offense. *See id.* at 1253 (Alito, J., concurring in part and dissenting in part) ("I reject the Court's conclusion that a conviction for aiding and abetting a violation of 18 U.S.C. § 924(c) demands proof that the alleged aider and abettor had what the Court terms 'a realistic opportunity' to refrain from engaging in the conduct at issue.").
58. *Id.* at 1252.
59. *Id.* at 1249.
60. 134 S. Ct. 2384 (2014).
61. *See* 18 U.S.C. § 1344.
62. 134 S. Ct. at 2387–88.
63. *Id.* at 2389.
64. *Id.* at 2395 (citing S. Rep. No. 98–225, at 378 (1983) (internal quotation omitted)).
65. *Id.* at 2397 (Alito, J., concurring).
66. *Id.* (emphasis in original).
67. *Id.* at 2398.
68. 135 S. Ct. 2001, 2007 (2015).

69. *Id.* at 2007. Most of the lyrics are not very subtle. For example: "Did you know that it's illegal for me to say I want to kill my wife? …It's one of the only sentences that I'm not allowed to say…. Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife…. Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife…. But not illegal to say with a mortar launcher…. I also found out that it's incredibly illegal, extremely illegal to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room…. Yet even more illegal to show an illustrated diagram…." Elonis attached an accurate diagram of the house to these words. *Id.* at 2005.
70. *See Id.* at 2004. As Elonis told another Facebook user: "[F]or me, this is therapeutic. It help[ed] me deal with the pain." Brief for Petitioner at 6–7, Elonis v. United States of America, 135 S. Ct. 2001 (2015) (No. 13–983), 2014 WL 4101234, at *6–7.
71. "The parties [to this case could] show no indication of a particular mental state requirement in the statute's text." *Id.* at 2003.
72. *Id.* at 2006.
73. Packer, *supra* note 10, at 110.
74. *Elonis*, 135 S. Ct. at 2003; Lyle Denniston, *Opinion Analysis: Internet Threats Still in Legal Limbo?*, SCOTUSBlog (June 1, 2015, 1:49 PM), http://www.scotusblog.com/2015/06/opinion-analysis-internet-threats-still-in-legal-limbo/20 ("The ruling overturning his conviction was based solely on the premise that he was convicted without proof that he knew what he was writing and that the ordinary meaning of his words would be a threat.").
75. *Elonis,* 135 S. Ct. at 2003 (citing Morissette v. United States, 342 U.S. 246, 250 (1952)).
76. *Id.* (citing Morissette v. United States, 342 U.S. 246, 252 (1952)).
77. *Id.* (citing United States v. Balint*,* 258 U.S. 250, 251 (1922)).
78. *Id.* ("Thus, criminal statutes are generally interpreted 'to include broadly applicable scienter requirements, even where the statute…does not contain them.' United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994). This does not mean that a defendant must know that his conduct is illegal, but a defendant must have knowledge of 'the facts that make his conduct fit the definition of the offense.' Staples v. United States, 511 U.S. 600, 608, n.3.").
79. *Id.* at 2013 ("We may be 'capable of deciding the recklessness issue,'…but following our usual practice of awaiting a decision below and hearing from the parties would help ensure that we decide it correctly.").
80. *Id*.
81. Pub. L. No. 91-513, Tits. II & III, 84 Stat. 1236 (1970) (codified at 21 U.S.C. § 801 *et seq*. (2012)).
82. *See* 21 U.S.C. § 821 (2012).
83. *See* 28 C.F.R. § 0.100 (2014).
84. *See* United States v. López-López, 282 F.3d 1, 19 (1st Cir. 2002) ("In order to prove possession with intent to distribute, the government must show that the defendants knowingly and intentionally possessed, either actually or constructively, a controlled substance with the specific intent to distribute.").
85. *See* United States v. Forbes, 806 F. Supp. 232, 238 (D. Colo. 1992) ("Congress declared that the purpose of the statute is to attack underground chemists who tinker with the molecules of controlled substances to create new drugs that are not yet illegal."). The Analogue Act defines a "controlled substance analogue" as a substance "(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II; (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II." [21 U.S.C.] § 802(32)(A). "A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." 21 U.S.C. § 813.
86. § 1201, 100 Stat. 3207–13 (codified at 21 U.S.C. § 813 (2012)); McFadden v. United States, 135 S. Ct. 2298, 2303 (2015).
87. 21 U.S.C. § 802(32)(A)–(C)(iv).
88. *See* Gregory Kau, *Flashback to the Federal Analog Act of 1986: Mixing Rules and Standards in the Cauldron*, 156 U. Pa. L. Rev. 1077, 1090 (2008) ("When asked about whether MDBU and methamphetamine are substantially similar, an individual might draw the line; the fact that MDBU adds two additional functional groups to methamphetamine—one of them a longer alkane—might be the straw that breaks the camel's back. However, an individual would never know whether he or she was right until the particular matter was litigated in criminal court.").
89. The term "bath salts" is intentionally misleading. They are also marketed as "plant food" to avoid detection, but they mimic the effects of amphetamine, ecstasy, and cocaine. *See* Joseph A. Cohen*, The Highs of Tomorrow: Why New Laws and Policies Are Needed to Meet the Unique Challenges of Synthetic Drugs,* 27 J.L. & Health 164, 168 (2014); *Dangerous Synthetic Drugs: Hearing Before the S. Caucus on Int'l Narcotics Control*, 113th Cong. 12 (2013) (statement of Joseph T. Rannazzisi, Deputy Assistant Adm'r, Drug Enforcement Admin., U.S. Dep't of Justice).
90. Oral Argument at 10:57, McFadden v. United States, 135 S. Ct. 2298 (2015), http://www.oyez.org/cases/2010-2019/2014/2014_14_378.

91. *See* 21 C.F.R. §§ 1308.11–1308.15; Office of Diversion Control, Drug Enforcement Admin., Lists of: Scheduling Actions[,] Controlled Substances[,] Regulated Chemicals [(Nov. 2015)], http://www.deadiversion.usdoj.gov/ schedules/orangebook/orangebook.pdf.
92. United States v. McFadden, No. 3:12CR00009, 2013 WL 8339005 (W.D. Va. May 10, 2013).
93. *Id.*
94. McFadden v. United States, 135 S. Ct. 2298, 2302 (2015).
95. *Id.* at 2304 ("The Courts of Appeals have recognized as much. *See, e.g.,* United States v. Andino, 627 F.3d 41, 45–46 (C.A.2 2010); United States v. Gamez-Gonzalez, 319 F.3d 695, 699 (C.A.5 2003); United States v. Martinez, 301 F.3d 860, 865 (C.A.7 2002).").
96. Those features are defined in the Analogue Act as (1) a substance "the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II"; (2) a substance "which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than" the effect of a controlled substance in schedule I or II; or (3) a substance "which is represented or intended to have that effect with respect to a particular person." *McFadden*, 135 S. Ct. at 2305; 21 U.S.C. § 802(32)(A).
97. *McFadden*, 135 S. Ct. at 2305.
98. *Id.* at 2307.
99. *Id.* (citing United States v. Howard, 773 F.3d 519, 526 (4th Cir. 2014); United States v. Washington, 596 F.3d 926, 944 (8th Cir. 2010); United States v. Rogers, 387 F.3d 925, 935 (7th Cir. 2004)).
100. Bryan v. United States, 524 U.S. 184, 193 (1998); Reynolds v. United States, 98 U.S. 145, 167 (1878) ("Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law."); Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833) ("It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally."); Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 Harv. L. Rev. 75 (1908); Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. Pa. L. Rev. 35 (1939).
101. There are exceptions to the ancient maxim *ignorantia legis neminem excusat* and counter-maxim *ignorantia facti excusat*, as these cases illustrate. The growing morass of obscure strict liability crimes justifies a more common application of a "mistake" or "ignorance of law" defense. *See*, *e.g.*, Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminology 725 (2012); Paul J. Larkin, Jr., *Fighting Back Against Overcriminalization: The Elements of a Mistake of Law Defense*, The Heritage Foundation Legal Memorandum No. 92 (June 12, 2013), http://thf_media.s3.amazonaws.com/2013/pdf/lm92.pdf; Paul J. Larkin, Jr., *The Need for a Mistake of Law Defense as a Response to Overcriminalization*, Heritage Foundation Legal Memorandum No. 91 (Apr. 11, 2013), http://www.heritage.org/research/reports/2013/04/the-need-for-a-mistake-of-law-defense-as-a-response-to-overcriminalization. Paul Rosenzweig, *Ignorance of the Law Is No Excuse, But It Is Reality*, Heritage Foundation Backgrounder No 2812 (June 17, 2013), http://www.heritage.org/research/reports/2013/06/ignorance-of-the-law-is-no-excuse-but-it-is-reality ("The traditional legal maxim is that 'ignorance of the law is no excuse.' Today, however, even the Congressional Research Service can't count the federal criminal laws.").
102. "Direct evidence could include, for example, past arrests that put a defendant on notice of the controlled status of a substance. United States v. Abdulle, 564 F.3d 119, 127 (C.A.2 2009). Circumstantial evidence could include, for example, a defendant's concealment of his activities, evasive behavior with respect to law enforcement, knowledge that a particular substance produces a "high" similar to that produced by controlled substances, and knowledge that a particular substance is subject to seizure at customs. United States v. Ali, 735 F.3d 176, 188–189 (C.A.4 2013). The Government presented such circumstantial evidence in this case, and neither party disputes that this was proper." *McFadden*, 135 S. Ct. at 2304 n.1.
103. 511 U.S. 600 (1994).
104. *Id.* at 605 (quoting 26 U.S.C. § 5861(d)).
105. *Id.* at 619.
106. *McFadden*, 135 S. Ct. at 2306 (referring to § 802(6)) ("Knowledge of that fact can be established in the two ways previously discussed: either by knowledge that a substance is listed or treated as listed by operation of the Analogue Act, §§ 802(6), 813, or by knowledge of the physical characteristics that give rise to that treatment.").
107. *Elonis*, 135 S. Ct. at 2003; *see also X-Citement Video*, 513 U.S. at 70; *Balint,* 258 U.S. at 251.
108. "Over the last generation, the Supreme Court has dramatically revitalized the mens rea requirement for federal crimes. The 'guilty mind' requirement now aspires to exempt all 'innocent' (or morally blameless) conduct from punishment and restrict criminal statutes to conduct that is 'inevitably nefarious.'" Stephen F. Smith, *Proportional Mens Rea*, 46 Am. Crim. L. Rev. 127, 127 (2009). Some scholars are more critical of the Supreme Court's treatment of *mens rea* generally. *See*, *e.g.*, Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 Wake Forest L. Rev. 769 (2012) (arguing that the Supreme Court is often wrong about the elements of a crime to which a mens rea should apply); Dannye Holley, *Mens Rea Evaluations by the United States Supreme Court: It Does Not Have the Tools and Only Occasionally Displays the Talent—A Sixty-Year Report Card—1950–2009*, 35 Okla. City U. L. Rev. 401 (2010) (criticizing the Supreme Court's *mens rea* opinions as needlessly ambiguous and complex).
109. Yates v. United States, 135 S. Ct. 1074, 1100–01 (2015) (Kagan, J., dissenting).
110. Others have pointed out that need too. *See* Walsh & Joslyn, *supra* note 4, at 26–32.
111. That result can be accomplished with simple provisions such as "This section shall not be construed to require the Government to prove a state of mind with respect to any element of the offense defined in this section." John Malcolm, *The Pressing Need for Mens Rea Reform*, The Heritage Foundation Legal Memorandum No. 160 (Sept. 1, 2015), http://www.heritage.org/research/reports/2015/09/the-pressing-need-for-mens-rea-reform.