Without Intent

How Congress Is Eroding the Criminal Intent Requirement in Federal Law

Brian W. Walsh and Tiffany M. Joslyn

Foreword by Edwin Meese III and Norman L. Reimer

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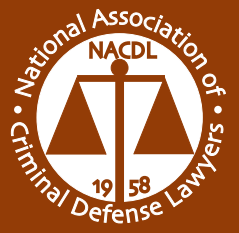

Edwin J. Feulner
President
The Heritage Foundation
Washington, D.C.

Edwin Meese III
Chairman
Center for Legal & Judicial Studies
The Heritage Foundation
Washington, D.C.

Todd F. Gaziano
Director
Center for Legal & Judicial Studies
The Heritage Foundation
Washington, D.C.

Robert Alt
Senior Legal Fellow & Deputy Director
Center for Legal & Judicial Studies
The Heritage Foundation
Washington, D.C.

Brian W. Walsh
Senior Legal Research Fellow
Center for Legal & Judicial Studies
The Heritage Foundation
Washington, D.C.

Cynthia Hujar Orr
President
National Association of
Criminal Defense Lawyers
San Antonio, Texas

Norman L. Reimer
Executive Director
National Association of
Criminal Defense Lawyers
Washington, D.C.

Kyle O'Dowd
Associate Executive Director for Policy
National Association of
Criminal Defense Lawyers
Washington, D.C.

Shana-Tara Regon
White Collar Crime Policy Director
National Association of
Criminal Defense Lawyers
Washington, D.C.

Tiffany M. Joslyn
White Collar Crime Policy Counsel
National Association of
Criminal Defense Lawyers
Washington, D.C.

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214 Massachusetts Avenue, NE
Washington, D.C. 20002
(800) 546-2843
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Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, *amicus* advocacy, and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's 11,000 direct members—and more than 90 state, local and international affiliates with an additional 40,000 members—include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America's criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

National Association of Criminal Defense Lawyers
1660 L Street, NW, 12th Floor
Washington, D.C. 20036
(202) 872-8600
nacdl.org

Foreword

A core principle of the American system of justice is that individuals should not be subjected to criminal prosecution and conviction unless they intentionally engage in inherently wrongful conduct or conduct that they know to be unlawful. Only in such circumstances is a person truly blameworthy and thus deserving of criminal punishment. This is not just a legal concept; it is the fundamental anchor of the criminal justice system. The Heritage Foundation and the National Association of Criminal Defense Lawyers (NACDL) share a common concern that expansive and ill-considered criminalization has cast the nation's criminal law enforcement adrift from this anchor. In the absence of a clearly articulated nexus between a person's conduct and his mental culpability, criminal laws subject the innocent to unjust prosecution and punishment for honest mistakes or actions that they had no reason to know are illegal.

In recent decades, the federal government has increasingly employed criminal statutes to regulate behavior. Congress has invoked this most awesome power of government—the power to prosecute and imprison—as a regulatory mechanism, something never contemplated by the nation's founders. By the end of 2007, the United States Code included over 4,450 federal crimes; an estimated tens of thousands more are located in the federal regulatory code. But something fundamental is often lacking from this tidal wave of penal provisions: meaningful *mens rea* requirements. *Mens rea* is a Latin term describing a culpable mental state, without which there can be no crime. Lamentably, Congress has enacted scores of laws with weak or no *mens rea* requirements, the result of a legislative process that is haphazard at best and arbitrary at worst. In doing so, it has eroded the principle of fair notice beyond recognition and dangerously impaired the justification for criminal punishment that has for centuries been based on an individual's intent to commit a wrongful act. This trend undermines confidence in government and risks pervasive injustice.

The Heritage Foundation is a research and educational institution whose mission is to formulate and promote conservative public policies based upon the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense. NACDL is the preeminent organization in the United States advancing the goals of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing and to seek a rational and humane criminal justice system. While Heritage and NACDL by no means share a common overall agenda, the two organizations are united in the belief that criminal lawmaking must return to its fundamental roots by requiring true blameworthiness and providing fair notice of potential criminal liability. Penal statutes that do not provide for a clear and meaningful *mens rea* requirement are unacceptable. This report is an effort to demonstrate the depth and breadth of this problem.

Through an analysis of legislation introduced in the 109th Congress, this report shows just how far federal criminal lawmaking has drifted from its doctrinal anchor. It establishes that the legislative process regularly results in the passage of laws that lack adequate *mens rea* requirements. Further, it shows that the legislative process itself is flawed and disjointed. The absence of any uniform or consistent process to calibrate the intent requirements in penal provisions virtually guarantees the enactment of laws that lack meaningful or consistent *mens rea* components. Finally, this report proposes commonsense, workable solutions that can stem, and possibly reverse, this troubling trend.

Heritage and NACDL are proud to have collaborated on this project. We are confident that it will heighten awareness concerning a burgeoning problem that transcends political affiliation or ideology. We are equally confident that fostering that awareness will promote principled reform.

Edwin Meese III
The Heritage Foundation

Norman L. Reimer
National Association of
Criminal Defense Lawyers

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Despite these acknowledgements, any errors or omissions in the study or report are solely the responsibility of the authors.

Fact Sheet

Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law

- A core principle of the American system of justice is that no one should be subjected to criminal punishment for conduct that he did not know was illegal or otherwise wrongful.
- This principle of fair notice, which has been a cornerstone of our criminal justice system since the nation's founding, is embodied in the requirement that, with rare exceptions, the government must prove the defendant acted with *mens rea*—a "guilty mind"—before subjecting him to criminal punishment.
- Members of the 109th Congress (2005–2006) proposed 446 criminal offenses that did not involve violence, firearms, drugs and drug trafficking, pornography, or immigration violations.
- Of these 446 proposed non-violent criminal offenses, 57 percent lacked an adequate *mens rea* requirement. Worse, during the 109th Congress, 23 new criminal offenses that lack an adequate *mens rea* requirement were enacted into law.
- Congress's expertise for crafting criminal offenses resides in the House and Senate Judiciary Committees. Only these committees have express jurisdiction over federal criminal law, yet of the 446 criminal offenses studied, over one-half were not sent to the House or Senate Judiciary Committees for review and deliberation.
- By consistently neglecting the special expertise of the two judiciary committees when drafting criminal offenses, Congress is endangering civil liberties.
- Without reforms like those recommended in this report, innocent individuals are at risk of unjust conviction under federal criminal offenses that have inadequate *mens rea* requirements.

Recommendations

Congress should:

- Enact default rules of interpretation ensuring that guilty-mind requirements are adequate to protect against unjust conviction.
- Codify the rule of lenity, which grants defendants the benefit of the doubt when Congress fails to legislate clearly.
- Require adequate judiciary committee oversight of every bill proposing criminal offenses or penalties.
- Provide detailed written justification for and analysis of all new federal criminalization.
- Redouble efforts to draft every federal criminal offense clearly and precisely.

Executive Summary

For centuries, "guilty mind," or *mens rea*, requirements restricted criminal punishment to those who were truly blameworthy and gave individuals fair notice of the law. No person should be convicted of a crime without the government having proved that he acted with a guilty mind—that is, that he intended to violate a law or knew that his conduct was unlawful or sufficiently wrongful so as to put him on notice of possible criminal liability. In a sharp break with this tradition, the recent proliferation of federal criminal laws has produced scores of criminal offenses that lack adequate *mens rea* requirements and are vague in defining the conduct that they criminalize.

The National Association of Criminal Defense Lawyers and The Heritage Foundation jointly undertook an unprecedented look at the federal legislative process for all studied non-violent criminal offenses introduced in the 109th Congress in 2005 and 2006. This study revealed that offenses with inadequate *mens rea* requirements are ubiquitous at all stages of the legislative process: Over 57 percent of the offenses introduced, and 64 percent of those enacted into law, contained inadequate *mens rea* requirements, putting the innocent at risk of criminal punishment. Compounding the problem, this study also found consistently poor legislative drafting and broad delegation of Congress's authority to make criminal law to unaccountable regulators.

According to several scholars and legal researchers, Congress is criminalizing everyday conduct at a reckless pace. This study provides further evidence in support of that finding. Members of the 109th Congress proposed 446 non-violent criminal offenses and Congress enacted 36 of them. These totals do not include the many offenses concerning firearms, possession or trafficking of drugs or pornography, immigration violations, or intentional violence. The sheer number of criminal offenses proposed demonstrates why so many of them were poorly drafted and never subjected to adequate deliberation and oversight.

Even more troubling is the study's finding that many of the criminal offenses Congress is enacting are fundamentally flawed. Not only do a majority of enacted offenses fail to protect the innocent with adequate *mens rea* requirements, many of them are so vague, far-reaching, and imprecise that few lawyers, much less non-lawyers, could determine what specific conduct they prohibit and punish.

These failings appear to be related to the reckless pace of criminalization. Congress is awash with criminal legislation, and the House and Senate Judiciary Committees lack the time and opportunity to review each criminal offense and correct weak *mens rea* requirements. Over half (52 percent) of the offenses in the study were never referred to either judiciary committee. This is despite these committees' special expertise in crafting criminal offenses, knowledge of the priorities and resources of federal law enforcement, and express jurisdiction over federal criminal law.

One encouraging finding is that oversight by the House Judiciary Committee does improve the quality of *mens rea* requirements. Oversight includes marking up a bill or reporting it out of committee for

consideration by the full House of Representatives. Based upon this analysis, and upon the specific criminal law jurisdiction and expertise of the House and Senate Judiciary Committees, automatic referral of all bills adding or modifying criminal offenses to these two committees is likely to improve *mens rea* requirements. More importantly, automatic referral could stem the tide of criminalization by forcing Congress to adopt a measured and prioritized approach to criminal lawmaking. By neglecting the expertise of the judiciary committees, Congress endangers civil liberties.

The study also revealed that Congress frequently delegates its criminal lawmaking authority to other bodies, typically executive branch agencies. Delegation empowers unelected regulators to decide what conduct will be punished criminally, rather than requiring Congress to make that determination itself. This "regulatory criminalization" significantly increases the scope and complexity of federal criminal law, prevents systematic congressional oversight of the criminal law, and lacks the public accountability provided by the normal legislative process.

To begin to solve the problems identified in the study, this report offers five specific recommendations for reform. Congress should:

1. Enact default rules of interpretation to ensure that *mens rea* requirements are adequate to protect against unjust conviction.

Congress should enact statutory law that directs federal courts to grant a criminal defendant the benefit of the doubt when Congress has failed to adequately and clearly define the *mens rea* requirements for criminal offenses and penalties. First, this reform would address the unintentional omission of *mens rea* terminology by directing federal courts to read a protective, default *mens rea* requirement into any criminal offense that lacks one. Second, it would direct courts to apply any introductory or blanket *mens rea* terms in a criminal offense to each element of the offense. In this way, it would improve the *mens rea* protections throughout federal criminal law, provide needed clarity, force Congress to give careful consideration to *mens rea* requirements when adding or modifying criminal offenses, and help ensure that fewer individuals are unjustly prosecuted and punished.

2. Codify the common-law rule of lenity, which grants defendants the benefit of doubt when Congress fails to legislate clearly.

The rule of lenity directs a court, when construing an ambiguous criminal law, to resolve the ambiguity in favor of the defendant. In a recent U.S. Supreme Court decision, *United States v. Santos*, Justice Antonin Scalia explained that this "venerable rule vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." Giving the benefit of the doubt to the defendant is consistent with the traditional rules that all defendants are presumed innocent and that the government bears the burden of

proving every element of a crime beyond a reasonable doubt. Codifying this venerable common-law rule would serve the rights of all defendants at every stage of the criminal process. This reform would also protect Congress's lawmaking authority because it would restrict the ability of federal courts to legislate from the bench and reduce the frequency with which those courts must speak because Congress has failed to legislate clearly.

3. Require judiciary committee oversight of every bill that includes criminal offenses or penalties.

Congressional rules should require every bill that would add or modify criminal offenses or penalties to be subject to automatic referral to the relevant judiciary committee. A "sequential" referral requirement would give the House or Senate Judiciary Committee exclusive control over a bill until it reports the bill out or the time limit for its consideration expires, and only at that point could the bill move to another committee. The judiciary committees have special expertise in crafting criminal offenses, knowledge of the priorities and resources of federal law enforcement, and express jurisdiction over federal criminal law. While automatic referral may not produce stronger, more protective *mens rea* requirements, it should result in clearer, more specific, and higher quality criminal offenses. More importantly, this rule could help stem the tide of criminalization by forcing Congress to adopt a measured and prioritized approach to criminal lawmaking. Further, it would increase congressional accountability for new criminalization and ultimately reduce overcriminalization.

4. Require detailed written justification for and analysis of all new federal criminalization.

This reform would require the federal government to produce a standard public report assessing the purported justification, costs, and benefits of all new criminalization. This report must include:

- A description of the problem that the criminal offense or penalty is intended to redress, including an account of the perceived gaps in existing law, the wrongful conduct that is currently unpunished or under-punished, and any specific cases or concerns motivating the legislation;
- A direct statement of the express constitutional authority under which the federal government purports to act;
- An analysis of whether the criminal offenses or penalties are consistent with constitutional and prudential considerations of federalism;
- A discussion of any overlap between the conduct to be criminalized and conduct already criminalized by existing federal and state law;
- A comparison of the new law's penalties with the penalties under existing federal and state laws for comparable conduct;
- A summary of the impact on the federal budget and federal resources, including the judiciary, of enforcing the new offense and penalties to the degree required to solve the problem that the new criminalization purports to address;
- A review of the resources that federal public defenders have available and need in order to adequately defend indigent defendants charged under the new law; and

- An explanation of how the *mens rea* requirement of each criminal offense should be interpreted and applied to each element of the offense.

This reform would also require Congress to collect information on regulatory criminalization, including an enumeration of all new criminal offenses and penalties that federal agencies have added to federal regulations, as well as the specific statutory authority supporting these regulations.

Mandatory reporting would increase accountability by requiring the federal government to perform basic analysis of the grounds and justification for all new and modified criminal offenses and penalties.

5. Draft every criminal offense with clarity and precision.

One overarching reform recommendation is a slower, more focused, and deliberative approach to the creation and modification of federal criminal offenses. When drafting criminal offenses, Members of Congress should always:

- Include an adequate *mens rea* requirement;
- Define both the *actus reus* (guilty act) and the *mens rea* (guilty mind) of the offense in specific and unambiguous terms;
- Provide a clear statement of whether the *mens rea* requirement applies to all the elements of the offense or, if not, which *mens rea* terms apply to which elements of the offense; and
- Avoid delegating criminal lawmaking authority to regulators.

The importance of sound legislative drafting cannot be overstated, for it is the drafting of a criminal offense that frequently determines whether a person acting without intent to violate the law and lacking knowledge that his conduct was unlawful or sufficiently wrongful to put him on notice of possible criminal liability will endure a life-altering prosecution and conviction—and lose his freedom.

It is equally important that Members of Congress resist the temptation to bypass the arduous task of drafting criminal legislation by delegating it to unelected regulators. It is the legislative branch's responsibility to ensure that no individual is punished if Congress itself did not devote the time and resources necessary to clearly and precisely articulate the law giving rise to that punishment.

These five reforms would help ensure that every proposed criminal offense receives the attention due whenever Congress determines how to focus the greatest power government routinely uses against its own citizens: the criminal law. Coupled with increased public awareness and scrutiny of the criminal offenses Congress enacts, these reforms would strengthen the protections against unjust conviction and prevent the dangerous proliferation of federal criminal law. With their most basic liberties at stake, Americans are entitled to no less.

Without Intent

How Congress Is Eroding the Criminal Intent Requirement in Federal Law

Few protections against unjust criminal conviction and punishment are as essential as ensuring that every criminal offense includes a meaningful *mens rea,* or "guilty mind," requirement.[1] With rare exception, no person should be convicted of a crime without the government having proved that he acted with a guilty mind—that is, that he intended to violate a law or knew that his conduct was unlawful or sufficiently wrongful so as to put him on notice of possible criminal liability. Absent a meaningful *mens rea* requirement, a defendant's other legal and constitutional rights cannot protect him from unjust punishment for making honest mistakes or engaging in conduct that he had no reason to know was illegal.

For crimes involving inherently wrongful conduct—such as murder, arson, rape, theft, and robbery—the law properly allows the inference of a guilty mind if the government proves that the conduct was committed voluntarily. With such crimes, the law properly assumes that inherent wrongfulness forecloses the possibility of punishing individuals who are not truly culpable.

Many criminal offenses, however, lack that kind of protection. Hundreds of federal statutory offenses, and an estimated tens of thousands of federal regulatory offenses, criminalize conduct that is *not* inherently wrongful. Rather, such conduct is wrongful only because it is prohibited by law, or *malum prohibitum*. *Malum prohibitum* offenses cover a broad range of conduct, such as failure to comply with specific regulatory or reporting requirements. Unlike with crimes involving inherently wrongful conduct, the conduct itself usually does not justify the inference that a criminal defendant knew that his acts were prohibited, that he intended to violate the law, or that he had any knowledge that his conduct was wrongful in any way. Therefore, to ensure that only persons who are truly culpable can be convicted and punished, the definitions of *malum prohibitum* offenses must include protective *mens rea* requirements. Unfortunately, many of the thousands of *malum prohibitum* offenses in federal law do not.

With rare exception, no person should be convicted of a crime without the government having proved that he acted with a guilty mind—that is, that he intended to violate a law or knew that his conduct was unlawful or sufficiently wrongful so as to put him on notice of possible criminal liability.

This report presents the results of a study of legislation containing criminal offenses introduced in a recent Congress. The study asked whether Members of Congress included meaningful *mens rea* requirements in the scores of non-violent and non-drug criminal offenses[2] (hereinafter "non-violent offenses") that Congress considered. Its results are striking: Over 57 percent of the offenses considered by the 109th Congress contained inadequate

mens rea requirements, putting the innocent at risk of criminal punishment.[3] Compounding the problem, this study also found consistently poor legislative drafting and broad delegation of Congress's authority to make criminal laws to unelected officials in administrative agencies—that is, criminalization by regulation.

The study asked whether Members of Congress included meaningful* mens rea *requirements in the scores of non-violent and non-drug criminal offenses that Congress considered. Its results are striking: Over 57 percent of the offenses considered by the 109th Congress contained inadequate* mens rea *requirements, putting the innocent at risk of criminal punishment.

The study identified three main causes of Congress's failure to include meaningful *mens rea* requirements in criminal offenses. First, there is the fragmented and disjointed process for creating and modifying criminal offenses. Despite the House and Senate Judiciary Committees' expertise and subject-matter jurisdiction, over half (52 percent) of the offenses in the study were not referred to either committee for oversight.

Second is the flood of proposed criminal offenses. Crafting offenses that properly channel government's power to impose criminal punishment demands substantial debate and deliberation. Yet in the 109th Congress, so many bills (203) were proposed containing so many non-violent offenses (446) that it is unreasonable to expect that any substantial proportion of these offenses could have received adequate legislative oversight and scrutiny. These numbers would rise even higher if they included the enormous number of bills containing criminal offenses that concern firearms, possession or trafficking of drugs or pornography, immigration violations, and intentional violence. The sheer number of criminal offenses proposed demonstrates why so many of them were poorly drafted and were never the subject of adequate deliberation and oversight.

Third, Congress's choice to delegate its criminal lawmaking authority to executive agencies has grown more common. This study identified at least 63 offenses that, if enacted, would hand over this authority to unelected agency officials. That constitutes 14 percent of the offenses included in the study. The study's totals and percentages do not account for the many additional criminal offenses that federal agencies would be authorized to create in this manner.

One encouraging finding is that oversight by the House Judiciary Committee does improve the quality of *mens rea* requirements. Oversight includes the committee marking up a bill or reporting it out of committee for consideration by the full House of Representatives. Based upon this analysis, and upon the specific criminal law jurisdiction and expertise of the House and Senate Judiciary Committees, automatic sequential referral[4] of all bills adding or modifying criminal offenses to these two committees is likely to improve *mens rea* requirements.

The number of new criminal offenses proposed and enacted in the 109th Congress was by no means exceptional.[5] The recent proliferation of federal criminal law has produced scores of criminal offenses that lack adequate *mens rea* requirements and are vague in defining the conduct that they criminalize. The study reported here supports the conclusion of a growing number of commentators and experts that the time has come for Congress to stop this dangerous trend, to acknowledge the threat represented to individual and business civil liberties by this unprincipled form of criminalization, and to carry out critical reforms to federal criminal law that will protect individuals and businesses from the risk of unjust prosecution and conviction.

I. Criminal Punishment Requires Culpability and Fair Notice

The greatest power that any civilized government routinely uses against its own citizens is the power to prosecute and punish under criminal law. As Columbia law professor Herbert Wechsler famously put it, criminal law "governs the strongest force that we permit official agencies to bring to bear on individuals."[6] This necessarily distinguishes the criminal law from all other areas of law and makes it uniquely susceptible to abuse and injustice. More than any other area of law, the criminal law, in its prohibitions and commands, as well as its power to punish, must be firmly grounded in fundamental principles of justice. Such principles are expressed in both substantive and procedural protections.

One fundamental principle is embodied in the doctrine of fair notice. The fair notice doctrine requires that, in order for a person to be punished criminally, the offense with which she is charged must provide adequate notice that the conduct in which she engaged was prohibited. The Supreme Court has recognized that fair notice is a component of the Constitution's due process protections. For example, in the course of reversing the convictions of civil rights protestors because the law under which they were convicted was "void for vagueness" (a species of the fair notice doctrine), the Supreme Court stated: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[7] It is thus a fundamental principle of due process that "a criminal law must give fair warning of the conduct it makes a crime."[8]

Related to fair notice is the principle that the government must prove both "an evil-meaning mind" and "an evil-doing hand" before criminal punishment may justly be imposed.[9] This dual requirement is typically referred to by the Latin terms *mens rea* and *actus reus*, which translate to "guilty mind" and "guilty act." Whereas the *actus reus* is generally objective and physical in nature, the *mens rea* is generally subjective and psychological.[10] Both are necessary in order to impose criminal punishment; neither alone is sufficient. The *mens rea* requirement has been a part of Anglo-American law for over six centuries,[11] and requiring the government to prove that a defendant had a guilty mind at the time she committed a guilty act "is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[12] The Supreme Court has described this principle as being "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."[13] Because the federal criminal justice system does not permit courts to define criminal offenses under common law, defining the conduct and mental state constituting a federal crime is the responsibility of Congress.[14]

The traditional distinction between *malum in se* conduct and *malum prohibitum* conduct is essential to a clear understanding of the modern role of *mens rea* requirements. Conduct that is inherently evil or wrongful is *malum in se*, or "evil in itself." Historically, *malum in se* offenses comprised the bulk of all criminal offenses, such as murder, arson, theft, robbery, and rape. By their very nature, these acts are wrongful, independent of their status under law. Therefore, fair notice of illegality can reasonably be imputed to the average person. Clearly, no person who kills another intentionally, rather than by accident or inadvertence, should be able to claim ignorance of the law as a defense. With few exceptions, the average person can be presumed to know that inherently wrongful acts are also unlawful.

The fair notice doctrine requires that, in order for a person to be punished criminally, the offense with which she is charged must provide adequate notice that the conduct in which she engaged was prohibited.

Conversely, *malum prohibitum* conduct is not inherently evil or necessarily wrongful, but rather "prohibited evil." *Malum prohibitum* offenses include jaywalking, fishing without a permit, or

shipping products safely but in a manner inconsistent with federal or state regulations. Although there may be legitimate reasons for prohibiting such conduct, the acts themselves, independent of the prohibition, are not inherently wrongful.[15]

Historically, it was presumed that the law, and especially the criminal law, was "definite and knowable,"[16] even by the average person. Ignorance of the law was therefore no defense to criminal punishment. The small number of criminal offenses, and the fact that the majority of offenses criminalized *malum in se* conduct, made this presumption both reasonable and just.

With over 4,450 federal statutory crimes and an estimated tens of thousands more in federal regulations, neither criminal law professors nor lawyers who specialize in criminal law can know all of the conduct that is criminalized. Ordinary individuals are at an even greater disadvantage.

With the enormous growth in *malum prohibitum* offenses, however, this presumption has become a trap for the unwary. As criminal law professor Joshua Dressler has stated:

> Whatever its plausibility centuries ago, the "definite and knowable" claim cannot withstand modern analysis. There has been a "profusion of legislation making otherwise lawful conduct criminal (*malum prohibitum*)." Therefore, *even a person with a clear moral compass is frequently unable to determine accurately whether particular conduct is prohibited*. Furthermore, many modern criminal statutes are exceedingly intricate. In today's complex society, therefore, a person can reasonably be mistaken about the law.[17]

Indeed, with over 4,450 federal statutory crimes and an estimated tens of thousands more in federal regulations,[18] neither criminal law professors nor lawyers who specialize in criminal law can know all of the conduct that is criminalized. Ordinary individuals are at an even greater disadvantage.

Accordingly, one of the critical functions served by an adequate *mens rea* requirement is to protect those who are reasonably mistaken about or unaware of the law. As one travels along the continuum from pure *malum in se* conduct, such as murder, towards entirely *malum prohibitum* conduct, such as fishing without a permit, the fair notice provided by the conduct itself diminishes to the point of vanishing. It is an obvious injustice to punish an individual for conduct that is not inherently wrongful if she did not know, and had no reasonable prospect of knowing, that her conduct was prohibited by law. This is why the principle that finding a person criminally responsible requires a *mens rea*, or guilty mind, and not just an *actus reus*, or guilty act, is essential to a just system of criminal law. When the *actus reus* is one that is *malum prohibitum*, fair notice is diminished or eliminated, and the burden to compensate for that deficiency falls squarely upon the *mens rea* requirement.

When society, through its elected representatives, specifies the particular conduct and mental state that constitute a crime, "it makes a critical moral judgment about the wrongfulness of such conduct, the resulting harm caused or threatened to others, and the culpability of the perpetrators."[19] Therefore, a proper and adequate *mens rea* requirement should reflect the differences in culpability that result when individuals with different mental states engage in the same prohibited conduct. This point is well illustrated by the differing *mens rea* requirements that apply to homicide, or the killing of a human being. Even with the same bad act—a killing—different levels of *mens rea* define different offenses, which carry different punishments. Thus, in federal law, manslaughter is the unlawful killing of a human being "without malice" and carries a maximum sentence of 15 years in prison.[20] Murder in the second degree requires "malice aforethought"[21] and carries a maximum sentence of life imprisonment.[22] Murder in the first degree requires both "malice aforethought" and that the killing be "willful, deliberate, malicious, and premeditated"; it carries a maximum sentence of death.[23] *Mens rea* requirements such as these not only help to assign appropriate levels of punishment, but also to protect from unjust

Homicide Offense	Mens Rea Requirement	Maximum Penalty
Murder in the first degree (18 U.S.C. § 1111(a))	"malice aforethought" and "willful, deliberate, malicious, and premeditated"	Death
Murder in the second degree (18 U.S.C. § 1111(a))	"malice aforethought"	Life imprisonment
Manslaughter (18 U.S.C. § 1112)	"without malice"	15 years

criminal punishment those who committed prohibited conduct accidentally or inadvertently.

Homicide presents a relatively straightforward example because the killing of a human being is so grievous an act. Lesser wrongs may require even more attention to the *mens rea* requirements associated with them. The wrongful conduct at the heart of many *malum prohibitum* offenses is falsehood or deceit. Such conduct generally carries with it some degree of culpability, but not everything that is a "sin" is necessarily punishable as a crime.[24] If all "immoral" behavior were subject to criminal punishment, the only things protecting any individual from criminal conviction and punishment would be chance and the whims of prosecutors. A criminal offense should require more than a mere act of falsehood to ensure that only those who act with the degree of culpability meriting criminal punishment can be convicted.

As the Supreme Court has recognized, "All are entitled to be informed as to what the State commands or forbids."[25] By its own terms, a criminal offense should prevent conviction of an individual acting without intent to violate the law and lacking knowledge that her conduct was unlawful or sufficiently wrongful so as to put her on notice of possible criminal liability. A person who acts without such intent and knowledge does not deserve government's greatest punishment or the extreme moral and societal censure such punishment carries. Especially today, when the number of *malum prohibitum* offenses in federal law has surged, careful consideration must be given to the fundamental principles of culpability and fair notice when defining the *mens rea* and *actus reus* that constitute a federal crime. In the federal system, this critical responsibility falls on the shoulders of Congress, which must therefore engage in careful drafting, deliberation, and debate before creating or modifying federal criminal offenses.

Mens rea requirements not only help to assign appropriate levels of punishment, but also to protect from unjust criminal punishment those who committed prohibited conduct accidentally or inadvertently.

II. The Proliferation of Criminal Offenses with Inadequate *Mens Rea* Requirements Undermines Federal Criminal Law

Congress routinely creates and amends federal criminal offenses. Federal statutes alone include over 4,450 criminal offenses, a number that does not take into account the thousands of criminal offenses dispersed throughout federal regulations.[26] The almost inevitable response to any newsworthy problem is the introduction of federal legislation containing new criminal provisions or increased criminal penalties.[27] This knee-jerk tendency, and the resulting over-federalization of criminal law, is frequently a product of political considerations.[28] As a result, practitioners, academics, and even the Department of Justice itself have struggled to document the actual number of federal statutory offenses.[29]

The sheer size of the federal criminal law is so great that no one has even been able to find and provide a definitive count of the thousands of statutory criminal offenses in federal law. Several researchers, however, have made estimates of the number of criminal offenses in federal statutes and reached general conclusions about the nature of those offenses. In 1998, the American Bar Association's Task Force on the Federalization of Crime published a report finding that federal criminalization had proceeded at a rapid pace since the Department of Justice had estimated, over 10 years earlier, that there were more than 3,000 crimes in the U.S. Code.[30] It found that, of the federal criminal provisions passed into law during the 132-year period from the end of the Civil War to 1996, fully 40 percent were enacted in the 26 years from 1970 to 1996.[31] The ABA Task Force explained, however, that

The sheer size of the federal criminal law is so great that no one has even been able to find and provide a definitive count of the thousands of statutory criminal offenses in federal law.

> an exact count of the present "number" of federal crimes contained in the statutes (let alone those contained in administrative regulations) is difficult to achieve and the count [is] subject to varying interpretations. In part, the reason is not only that the criminal provisions are now so numerous and their location in the books so scattered, but also that federal criminal statutes are often complex. One statutory section can comprehend a variety of actions, potentially multiplying the number of federal "crimes" that could be enumerated. (For example, the language of 18 U.S.C. § 2113 encompasses bank robbery, extortion, theft, assaults, killing hostages, and storing or selling anything of value knowing it to have been taken from a bank, etc.) Depending on how all this subdivisible and dispersed law is counted, the true number of federal crimes multiplies.[32]

Further complicating an accurate count, the ABA Task Force said, are the "large number of sanctions…dispersed throughout the thousands of administrative 'regulations' promulgated by various governmental agencies under congressional statutory authorization. Nearly 10,000 regulations mention some sort of sanction, many clearly criminal in nature, while many others are designated 'civil.'"[33] Demonstrating the diffused and confusing nature of federal criminal law, a "handful of regulations purport to criminalize conduct without connecting the prohibition to a congressional statute."[34]

Ten years after the ABA Task Force report, a study by Professor John S. Baker estimated that the United States Code included at least 4,450 federal crimes at the end of 2007.[35] Of these, 452 had been added in the eight years from 2000 through 2007, an average rate of 56.5 new crimes per year. This rate, observed Baker, is

> roughly the same rate at which Congress created new crimes in the 1980s and 1990s…. So for the past twenty-five years, a period over which the growth of the federal criminal law has come under increasing scrutiny, Congress has been creating over 500 new crimes per decade.[36]

The rate at which Congress creates criminal offenses increases during election years, Baker found.[37] Although Baker's study acknowledges the same difficulties cited by the ABA Task Force in obtaining an accurate count, the data demonstrate that, from 2000 through 2007, Congress created, on average, one new crime a week for every week of every year.[38]

Beyond the rate at which new criminal offenses are being enacted, three additional concerns quickly emerge when studying the legislative process for criminal offenses:

1) Lack of attention paid to and erosion of *mens rea* requirements;

2) Poor legislative drafting; and

3) Delegation of criminal lawmaking authority through regulatory criminalization.

All three of these practices contribute to the problems of overbroad criminal liability and the lack of fair notice that the law is supposed to provide.

The first, the erosion of *mens rea* requirements, has serious implications. As previously discussed, it is a fundamental principle of criminal law that, before criminal punishment can be imposed, the government must prove both a guilty act (*actus reus*) and a guilty mind (*mens rea*). Despite this rule, omission of *mens rea* requirements has become commonplace in federal criminal statutes. Where Congress does include a *mens rea* requirement, it is often so weak that it does not protect defendants from punishment for making honest mistakes or engaging in conduct that was not sufficiently wrongful to give notice of possible criminal responsibility. The resulting criminal offenses fail to satisfy the necessary and well-established principle that criminal liability rests upon an "evil-meaning mind" and an "evil-doing hand."[39]

If the erosion of *mens rea* requirements in federal criminal statutes were not sufficiently problematic in its own right, its harms are compounded by poor legislative draftsmanship and regulatory criminalization. A *mens rea* requirement cannot serve its purpose when its meaning or application is not clear on the face of the statute. Worse, *malum prohibitum* offenses, which constitute many of the criminal offenses in the federal code and almost all offenses created through regulation, often contain weak *mens rea* requirements or none at all. Absent a meaningful *mens rea* requirement, the principle of fair notice is lost when criminal punishment is imposed for conduct that does not conform to what reason or experience would suggest may be illegal.[40]

Second, federal criminal offenses are frequently drafted without the clarity and specificity that have traditionally been required for the imposition of criminal liability. As the ABA Task Force found, federal criminal statutes often prohibit such exceedingly broad ranges of conduct, in language that is vague and imprecise, that few lawyers, much less non-lawyers, could determine what specific conduct they prohibit and punish. And even when the *actus reus* is described with clarity, the *mens rea* requirement may be imprecise. A common result of poor legislative drafting is uncertainty as to whether a *mens rea* term in a criminal offense applies to all of the elements of the offense or, if not, to which elements it does apply.

Consider, for example, 18 U.S.C. § 1346, commonly referred to as the "honest services fraud" statute, which defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." This definition applies to all the forms of fraud proscribed by Chapter 63 of the United States Code, including mail and wire fraud. The honest services fraud statute, if inserted into the definition of federal wire fraud, results in the following criminal offense:

> Whoever, having devised or intending to devise any scheme or artifice [to deprive another of the intangible right of honest services]…, transmits or causes to be transmitted by means of wire, radio, or television communication interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.[41]

Many legal experts have criticized this resulting offense as being vague and overbroad. It fails to define or limit the phrase "intangible right of honest services," and more than 20 years after the statute's enactment, the federal courts of appeals are hopelessly divided on how to interpret this phrase. The only hope for resolution comes from the Supreme Court's recent decision to hear three cases challenging charges brought and convictions obtained under the honest services fraud statute.[42]

A common result of poor legislative drafting is uncertainty as to whether a* mens rea *term in a criminal offense applies to all of the elements of the offense or, if not, to which elements it does apply.

One example of poor draftsmanship found during this study is an offense in S. 2509, the National Insurance Act of 2006. Section 1713(b) of this

legislation would create several new criminal offenses relating to "insurance fraud." One of these offenses reads:

> Any insurance person who is engaged in the business of insurance who knowingly and intentionally permits the participation described in paragraph (1) shall be fined as provided in this title or imprisoned not more than 5 years, or both.[43]

The referenced paragraph, in turn, states:

> [A]ny individual who has been convicted of any criminal felony involving dishonesty or breach of trust, and who participates in the business of insurance shall be fined…or imprisoned not more than 5 years, or both.[44]

The phrase "business of insurance" is given a broad definition by existing law.[45] The term "participate," however, is not defined by statute and could be read to include the work or involvement of employees who have incidental contact with the "business of insurance." The phrase "dishonesty or breach of trust" is also undefined and potentially very broad. From the text of this offense, it seems likely that an insurance agent who hires either a messenger to deliver insurance documents to a client or a surveyor who assists in evaluating real property would be at risk of criminal punishment if the messenger or surveyor had been convicted of a felony for lying under oath in a domestic matter 20 years earlier. No one, however, could say for sure with any degree of certainty, and even venturing an opinion would, at a minimum, require significant research and analysis by a lawyer. Under the plain text of the offense, it appears that the insurer need not have knowledge of this prohibition—much less understand it—in order to be convicted and punished for violating it.

Remarkably, it is only after years of litigation and the opinions of three different courts, including the highest court in the land, that individuals, lawyers, and judges finally have a clear determination of what the government is required to prove in order to impose criminal liability under this one-sentence criminal provision.

In a recent case, *Flores-Figueroa v. United States*, the Supreme Court considered the difficulties of interpretation caused by a poorly drafted *mens rea* requirement in the federal aggravated identity theft statute.[46] The contested offense provides an additional two years of imprisonment for any individual who, in the course of or in relation to certain other felonies, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person."[47] The offense's title, "Aggravated identity theft," indicates that it is targeted at theft, which the law typically defines as an act by which a person obtains property belonging to another *with intent to deprive the owner* of the value of the property and to appropriate it to his own use. The defendant in this case admitted that he intended to obtain identification numbers that were phony, and pled guilty to crimes related to that intent, but he asserted that he had no knowledge that the numbers on the identification cards actually belonged to another person. The government never contested that point. Instead, it argued that it need not prove "that the defendant *knew* that the 'means of identification' he or she unlawfully transferred, possessed, or used, in fact, belonged to 'another person.'"[48]

The Supreme Court rejected that argument, holding that the statute requires the government "to show that the defendant knew that the means of identification at issue belonged to another person."[49] The Court reached this conclusion based on its view of the basic rules of grammar and the most natural meaning of the statute's plain language.[50]

Citing Justice Alito's concurring opinion, the majority acknowledged, however, that "the inquiry into a sentence's meaning is a contextual one."[51] Justice Alito's opinion explained that when interpreting a criminal statute such as this, "it is fair to begin with a general presumption that the specified *mens rea* applies to all the elements of an offense, but it must be recognized that there are instances in which context may well rebut that presumption."[52]

In support of this point, he cited two examples in which the contextual features of particular statutes suggest that the defendant need not *know* particular elements of the crimes.[53] Conversely, Justice Alito observed that "the Government has not pointed to contextual features that warrant interpreting [the aggravated identity theft statute] in a similar way."[54] The majority agreed.[55] Remarkably, it is only after years of litigation and the opinions of three different courts, including the highest court in the land, that individuals, lawyers, and judges finally have a clear determination of what the government is required to prove in order to impose criminal liability under this one-sentence criminal provision.

The third problem, regulatory criminalization, occurs when Congress delegates its legislative authority to define criminal offenses to another body, typically an executive branch agency. Delegation empowers the unelected officials who direct that agency, such as the Department of the Treasury or the Environmental Protection Agency, to decide what conduct will be punished criminally, rather than requiring Congress to make that determination itself. In this way, the executive branch of the federal government plays a substantial role in causing overcriminalization, far beyond the President's constitutional authority to veto or sign legislation.

In the usual case of regulatory criminalization, Congress delegates its criminal lawmaking authority by passing a statute that establishes a criminal penalty for the violation of any regulation, rule, or order promulgated by the agency or an official acting on behalf of that agency. Some of these provisions include *mens rea* terminology; for example, criminal responsibility might extend to "anyone who *knowingly* violates any regulation."[56] However, statutes authorizing regulatory criminalization often fail to include any *mens rea* terminology, and nothing guarantees that the resulting criminal regulations will themselves include a *mens rea* requirement, let alone adequate ones.

Beyond the constitutional concerns inherent in this delegation of criminal lawmaking authority, the actual practice of regulatory criminalization significantly increases the scope and the complexity of federal criminal law. In addition to the thousands of criminal offenses spread through the 49 titles of the United States Code, according to estimates tens of thousands of criminal offenses are similarly scattered throughout the over 200 volumes of federal regulations.[57] These regulations almost always proscribe conduct that is, at least in part, *malum prohibitum*. As a result, vast expanses of conduct are criminalized without any systematic congressional oversight and without providing any form of notice to the ordinary person that his everyday activities may be subject to criminal punishment.

Congress delegates its criminal lawmaking authority by passing a statute that establishes a criminal penalty for the violation of any regulation, rule, or order promulgated by an agency or an official acting on behalf of an agency.

The practice of regulatory criminalization compounds the problems created by unclear, imprecise legislative drafting. Some or all of the elements of a particular criminal offense may be codified in regulations far removed from the actual statute that contains the *mens rea* requirement. Further, the elements that make up the complete offense can be spread across numerous regulations. For example, section 506(g)(2) of H.R. 3968 would impose a criminal penalty on any person "who knowingly…violates any other environmental protection requirement set forth in title III or any regulation issued by the Secretaries to implement this Act, any provision of a permit issued under this Act (including any exploration or operations plan on which such permit is based), or any condition or limitation thereof."[58] While the *mens rea* requirement, "knowingly," is located in the statutory provision, all of the prohibited conduct would be defined in any number of regulations and even individual permits issued as part of the regulatory and statutory scheme.

A similar example can be found in the Lacey Act,[59] which imposes civil and criminal penalties for violations of any law, treaty, or regulation of the United States or Indian tribal law concerning the taking of fish, wildlife, or plants. A sample of the statutory language establishing these criminal

offenses can be found in 16 U.S.C. § 3373(d)(1)(A), which provides a criminal penalty for any person who "knowingly imports or exports any fish or wildlife or plants in violation of any provision of this chapter," and in 16 U.S.C. § 3372(a)(1), which states that "[i]t is unlawful for any person…to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law." Again, *mens rea* terminology is included in the original statutory provision, but the specific prohibited conduct is spread across numerous laws, regulations, and even treaties.

As these examples demonstrate, even when Congress includes a *mens rea* requirement in a statute, that language, located in the federal code, can be so far removed from the language in federal regulations defining the prohibited conduct that it is difficult to determine what *mens rea* requirement, if any, applies to each element of the criminal offense.

The explosive growth that federal criminal law has undergone in recent decades should alone be sufficiently troubling to anyone in a free society. When coupled with the disappearance of adequate *mens rea* requirements, the proliferation of poorly drafted criminal offenses that are vague and overbroad, and the widespread delegation to unelected officials of Congress's authority to criminalize, the expanded federal criminal law becomes a broad template for the misuse and abuse of governmental power.

III. Rationale and Summary of Methodology

A. Rationale for the Study of the Legislative Process

This study fills a quantitative gap, addressing the increasing concern on the part of many academics and experts[60] over the number and scope of federal criminal offenses that lack adequate *mens rea* requirements. The study pursued two primary objectives:

1) To determine whether the *mens rea* requirements of non-violent criminal offenses in bills enacted into law differ in quality and protectiveness from the *mens rea* requirements of non-violent criminal offenses in the entire set of bills introduced; and
2) To determine whether any routine action or stage in the federal legislative process results in *mens rea* requirements that are more or less protective of individuals who act without a sufficiently culpable mental state to warrant criminal punishment.

This study fills a quantitative gap, addressing the increasing concern on the part of many academics and experts over the number and scope of federal criminal offenses that lack adequate* mens rea *requirements.

This study began with the working hypothesis that debate and oversight of proposed legislation in the House and Senate Judiciary Committees might improve the clarity of criminal offenses in bills moving through Congress and strengthen their *mens rea* requirements. The judiciary committees have special expertise in criminal law, criminal justice legislation, and related matters, and according to House and Senate rules, only the judiciary committees have express jurisdiction over criminal law and punishment.

In order to test this hypothesis, the study considered two questions:

1) How well do the *mens rea* requirements in each offense studied protect innocent actors, defined as those acting without

intent to violate the law and lacking the knowledge that their conduct is unlawful or sufficiently wrongful to put them on notice of possible criminal liability?

2) Is there a correlation between the protection afforded by a bill's *mens rea* requirements and its enactment, passage by a chamber, or consideration by a judiciary committee?

This study considers a *mens rea* requirement to be adequate if it is more likely than not to prevent the government from punishing a person who did not have a sufficiently culpable mental state to justify such punishment—that is, if the person did not know that her conduct was unlawful, did not intend to violate a law, and did not engage in conduct that was sufficiently wrongful to put her on notice of possible criminal liability. As used in this report, the term "unlawful" means prohibited by any law, whether that law is criminal, civil, or administrative in nature. The analysis does not assume that for criminal punishment to be imposed a person must know that she violated a law that carries a criminal penalty.

B. Summary of Methodology

The authors and their researchers analyzed the non-violent criminal offenses in 203 bills (128 from the House and 75 from the Senate) introduced during the course of the 109th Congress. Because many of the bills included more than one criminal offense meeting the study's criteria, the number of criminal offenses included in the study (446) is greater than the number of bills. Each offense's *mens rea* requirement was analyzed and graded as Strong, Moderate, Weak, or None. If a *mens rea* requirement fell between two categories, it was assigned an intermediate grade, for example, None-to-Weak. However, in order to give the benefit of the doubt to congressional drafting, these offenses were considered as having the higher, more protective grade for the purposes of this study's data reporting and statistical analyses. For example, an offense having a *mens rea* requirement falling between Weak and Moderate is categorized in the online appendix as Weak-to-Moderate but is treated as Moderate for all other purposes.

The analysis and grading were based on the level of protection provided by the actual language of the offense and were guided by Supreme Court decisions that set forth (relatively) clear statements defining or interpreting the* mens rea *terminology most commonly used in federal statutes.

The analysis and grading were based on the level of protection provided by the actual language of the offense and were guided by Supreme Court decisions that set forth (relatively) clear statements defining or interpreting the *mens rea* terminology most commonly used in federal statutes. When assessing each offense, the study did not adopt the perspective of how an ideal prosecutor would (or would not) charge the offense and did not consider whether prosecutorial discretion might protect potential defendants from unjust conviction. Similarly, the study did not consider how an ideal court would rule on a motion to dismiss or whether a court would apply a limiting construction to an offense (for example, the common-law rule of lenity) to aid a particular defendant.[61]

The researchers also collected data on several of the major actions that can be taken on legislation by Congress (referral to a judiciary committee, passage by a chamber, and enactment into law) and by a judiciary committee (hearing, markup, amendment, and reporting). The Heritage Foundation's Center for Data Analysis (CDA) then analyzed whether statistical, and possibly causal, correlations exist between these actions and the protectiveness of *mens rea* requirements.

The Methodological Appendix included at the end of this report provides a more complete description of the study's methodology.

IV. *Mens Rea* Data Analysis, Calculations, and Findings

This section presents a detailed explanation of the study's analysis, including examples of offenses from each category, a description of the resulting data, and the results of the statistical analyses.

A. *Mens Rea* Category Totals

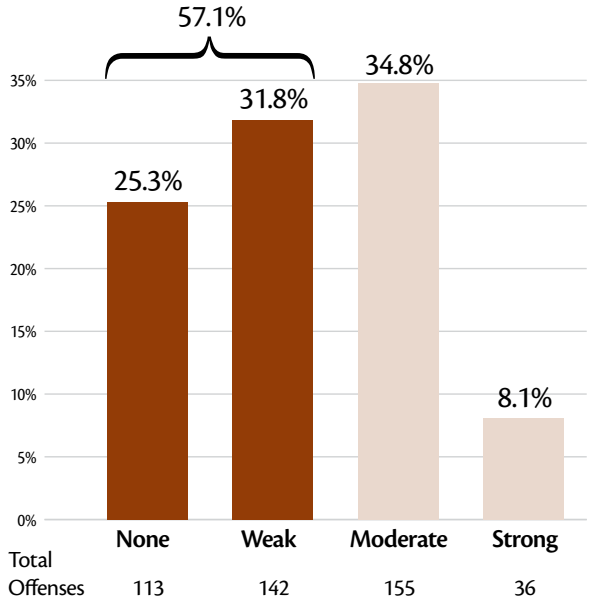
The total numbers of offenses in each of the four *mens rea* categories are summarized in Charts 1 and 2 below.

Chart 1

Majority of Offenses Had Inadequate *Mens Rea* Requirements

Of the 446 studied offenses, 255 (57 percent) were categorized as having either None or Weak *mens rea* requirements.

Studied Offenses, by *Mens Rea* Grade



***Mens Rea* Grade, by Congressional Chamber**

	None	Weak	Moderate	Strong	Total
House	82	90	83	22	277
Senate	31	52	72	14	169
Total	113	142	155	36	446

Source: Calculations by The Heritage Foundation and the National Association of Criminal Defense Lawyers.

Chart 1 reports the number and proportion of offenses in each *mens rea* category.

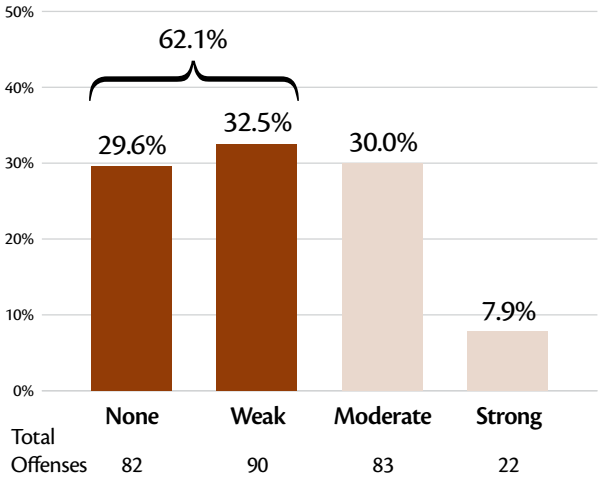
Chart 2 presents the data from Chart 1 broken down by chamber.

Chart 2

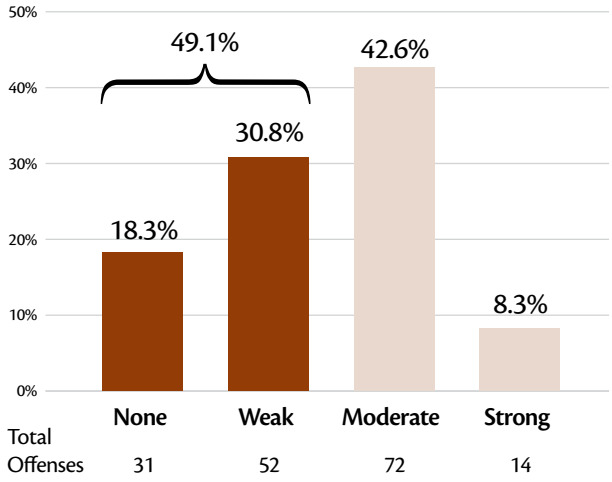
Inadequate *Mens Rea* Requirements More Likely in House Bills

Sixty-two percent of offenses in House bills contained inadequate *mens rea* requirements (None or Weak), compared to 49 percent of offenses in Senate bills.

Studied Offenses in the House (277 Total)



Studied Offenses in the Senate (169 Total)



Source: Calculations by The Heritage Foundation and the National Association of Criminal Defense Lawyers.

Almost three-fifths (57 percent) of all offenses studied had inadequate (None or Weak) *mens rea* requirements. By chamber, 62 percent of the House offenses and 49 percent of the Senate offenses had inadequate *mens rea* requirements. Just slightly more than 8 percent of all offenses studied had protective, properly drafted *mens rea* requirements (Strong). The remainder of the offenses fell into the Moderate category, meaning that they provide an intermediate level of protectiveness against unjust criminal punishment.

As discussed above, this study analyzed the entire sample of proposed offenses in order to determine whether specific legislative actions might improve or undermine *mens rea* requirements. Although enactment may seem the most important part of the process, Congress typically enacts only a small percentage of all bills introduced. For example, in the 110th Congress, 11,081 bills were introduced, of which only 442 (4.0 percent) were enacted into law. In the 109th Congress, 10,537 bills were introduced, of which 464 (4.4 percent) were enacted into law.[62]

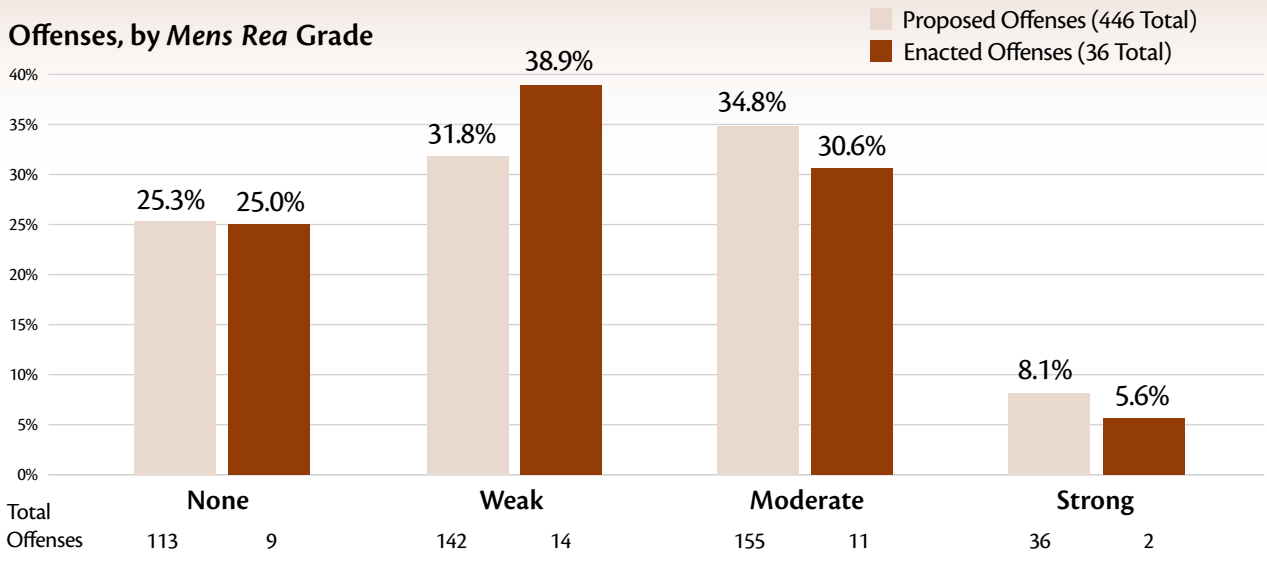
Of the 203 bills studied, 13 (6.4 percent) were enacted into law, an enactment rate that is 45 percent higher than the rate for all bills introduced in the 109th Congress. In light of Congress's documented propensity for enacting criminal offenses, this may suggest that Congress is more likely to pass a bill if it contains non-violent offenses or, conversely, that Members of Congress are more likely to add non-violent offenses to bills that Congress is likely to pass. This study did not attempt to substantiate either of these hypotheses.

The data may suggest that Congress is more likely to pass a bill if it contains non-violent offenses or, conversely, that Members of Congress are more likely to add non-violent offenses to bills that Congress is likely to pass.

Chart 3 illustrates the substantial consistency of the strength of *mens rea* requirements through the legislative process, from initial proposal to enactment into law. This answers in the affirmative two of the study's questions: (1) an analysis of the *mens rea* requirements in all non-violent offenses introduced in a single Congress is a sound basis for studying the entire legislative process for such offenses; and (2) each stage of the congressional process warrants review and re-evaluation

Chart 3

Mens Rea Requirements: Proposed vs. Enacted Offenses



Source: Calculations by The Heritage Foundation and the National Association of Criminal Defense Lawyers.

to ensure that Congress does not continue to create offenses that put innocent actors at risk of criminal punishment.

B. A Study of Each *Mens Rea* Category Through Example Offenses

To provide further insight into the meaning of the data presented above, this section provides examples of offenses typical of each category. While the numbers alone make a powerful statement, they take on even greater significance in the context of typical offenses.

1. Offenses in the None *Mens Rea* Category

The 113 non-violent offenses in the None category, which represent 25 percent of the 446 non-violent offenses introduced in the 109th Congress, do not require a prosecutor, court, or jury to engage in a meaningful consideration of a criminal defendant's mental state. The defendant's knowledge, intent, misperceptions, mistakes, or accidents are essentially irrelevant to his innocence or guilt. In the online appendix to this report, many of these offenses are referred to as "strict liability" offenses because they do not include any *mens rea* terminology or requirements. Although some of the offenses in the None category omit all traditional criminal law *mens rea* terminology and instead rely on tort-law terminology, such as "should have known," "reasonably should have known," or "negligently," for imposing criminal punishment, these terms provide little or no protection to the unwary. Nothing in the language of an offense categorized as None prevents conviction of a defendant who did not intend to violate a law and who did not know that his conduct was unlawful or sufficiently wrongful so as to put him on notice of possible exposure to criminal responsibility.

The 113 non-violent offenses in the None category, which represent 25 percent of the 446 non-violent offenses introduced in the 109th Congress, do not require a prosecutor, court, or jury to engage in a meaningful consideration of a criminal defendant's mental state.

An example of an offense in the None category is found in H.R. 3192, the Paid Family and Medical Leave Act of 2005.[63] Section 107(1) of that bill states that whoever "makes or causes to be made any false statement in support of an application for benefits" under the federal Family Medical Insurance Program is guilty of a felony. On its face, the use of the phrase "false statement" in the offense suggests that the government must prove that the defendant acted with *mens rea* before criminal liability can be imposed. That would indeed be the case if this offense were rewritten to include, for example, a blanket or introductory *mens rea* term—i.e., "whoever *knowingly* makes or causes to be made any false statement in support of an application for benefits." So drafted, the offense would require the government to prove that the defendant knew that the statement was false (and possibly also that it was made in connection with an application for benefits).

The actual offense defined by section 107(1), however, includes no *mens rea* requirement and is, in fact, a strict liability offense. The government need prove only that a defendant made or "caused to be made" a statement, that the statement was made "in support of" a Family Medical Insurance Program application, and that the statement was in fact false. If, for example, a man listed an incorrect date of birth for one of his stepchildren, or a woman entered the wrong year when asked for her date of hire, these "false statements" would put them at risk of conviction. According to the express terms of this offense, the government need not prove that an applicant's false statement was material to eligibility for benefits, that the applicant intended to defraud anyone, or even that the applicant knew the statement to be false. As with all strict liability offenses, the government need not prove that the defendant knew *anything* at all. For these reasons, this offense is categorized as None.

A second example of an offense in the None category is found in section 2(c) of S. 3506, the Data Theft Protection Act.[64] That provision states: "It shall be unlawful for any person to use a means

of identification or individually identifiable health information obtained directly or indirectly from a Federal database in furtherance of a violation of any Federal or State criminal law." It might appear that the final clause, requiring the conduct to be carried out "in furtherance of a violation of" another criminal law, provides the protection of a *mens rea* requirement. However, nothing in the statute requires the defendant to know that the conduct prohibited was in fact "in furtherance of [another] violation" of Federal or State criminal law.

Similarly, while it might appear that the defendant is protected by the offense's requirement that there was in fact another "violation…of Federal or State criminal law," nothing in this offense requires that the other violation of federal or state law be committed by the person who "uses" the personally identifiable health information. Thus, a healthcare provider who uses personally identifiable information obtained indirectly from a federal database to answer questions by a person impersonating an employer or another health-care provider could, under the language of this offense, be subjected to criminal punishment. Though this offense may appear, at first glance, to provide a *mens rea* requirement or at least some protection for those who act without *mens rea*, it in fact provides neither.

2. Offenses in the Weak *Mens Rea* Category

An offense is categorized as Weak if its language is reasonably likely to protect from conviction at least some defendants who did not intend to violate a law and did not have knowledge that their conduct was unlawful or sufficiently wrongful to put them on notice of possible criminal responsibility. The offenses in this category cannot be characterized as strict liability because they include some *mens rea* requirement and, therefore, proof of a defendant's culpable mental state before criminal punishment can be imposed. Unlike those offenses in the None category that have express *mens rea* requirements but use tort-law terminology, the offenses in the Weak category mostly employ traditional criminal-law *mens rea* terminology. This study determined that 142 of the 446 offenses (just under 32 percent) had Weak *mens rea* requirements.

The Stolen Valor Act of 2005 (S. 1998), which was enacted into law in December 2006, includes a typical Weak offense. The act amended existing law such that it is now 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.[65] The bill's findings indicate that its purpose is to prevent fraudulent uses of and claims about U.S. military decorations—for example, falsely claiming

This study determined that 142 of the 446 offenses (just under 32 percent) had Weak mens rea *requirements.*

to be the recipient of the Congressional Medal of Honor or Purple Heart—thereby preserving the "reputation and meaning of such decorations and medals."[66] 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.[67] Under its terms, even heirs of a solider who transfer his decorations or medals among themselves in exchange for other property in the soldier's estate would risk imprisonment.

The Stolen Valor Act's only *mens rea* requirement is that the person charged must have "knowingly" engaged in the prohibited conduct. As the U.S. Supreme Court has recognized, "'[U]nless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense.'"[68] "The term 'knowingly,'" the Court stated in *Bryan v. United States*, "does not necessarily have any reference to a culpable state of mind or to knowledge of the law."[69] Consequently, the offense created by the Stolen Valor Act provides inadequate protection against criminal conviction and punishment for those who buy, sell, exchange, or ship a military decoration, badge, or medal without any intention of making or furthering a fraudulent claim of valor. Although the offense's *mens rea* requirement provides some protection, that protection is inadequate. Accordingly, this offense is categorized as Weak.

Another example of a Weak *mens rea* provision is found in H.R. 3968, the Federal Mineral Development and Land Protection Equity Act of 2005. Section 506(g)(2) of the bill states that whoever "knowingly…violates any other environmental protection requirement set forth in title III [of this Act] or any regulation issued by the Secretaries to implement this Act, any provision of a permit issued under this Act (including any exploration or operations plan on which such permit is based), or any condition or limitation thereof, shall" be criminally punished.[70] The offense's *mens rea* element, "knowingly," requires the government to prove that the conduct constituting the violation was not accidental or inadvertent. However, "knowingly" does not necessarily require "a culpable state of mind or…knowledge of the law,"[71] nor does it require a showing that the violation resulted in any harm. Accordingly, this offense is graded as Weak because it offers little or no protection to those who are unaware of the law or those who, in good faith, attempt to comply with it but are unable to do so.

Offenses in the None category combined with offenses in the Weak category comprise more than half of all the offenses in this study. Such offenses are wholly inadequate to prevent unjust prosecutions and convictions.

Whereas this offense is graded as Weak for the purposes of this study's data and statistical analyses, it is described in the report's online appendix as None-to-Weak. This is because the offense authorizes executive branch officials to engage in regulatory criminalization.[72] Though its text contains a *mens rea* requirement, most of the prohibited conduct would be defined by unelected officials in regulations and even individualized mining permits.[73] Blanket criminalization of all regulatory and permit violations effectively diminishes the protectiveness of the statute's *mens rea* requirement and reduces the likelihood that potential defendants will be on notice of the requirements and prohibitions that they must observe. Therefore, despite the presence of a *mens rea* term, the broad and indeterminate class of conduct that would be criminalized by this offense makes it more like the offenses that are typical of the None category than those of the Weak category.

As illustrated by these examples, the great majority of offenses that fall into the Weak category rely exclusively on the term "knowingly" as a blanket or introductory *mens rea* requirement. In recent years, the Supreme Court has stated that the term "knowingly" requires the government to prove only that the defendant had knowledge of the facts constituting the offense,[74] thus excluding only accidental or inadvertent conduct. This is insufficient, however, to protect those lacking knowledge of wrongdoing and acting without intent to do anything unlawful or even wrongful in part. Weak *mens rea* requirements allow for, and inevitably result in, unjust prosecutions and convictions.

For that reason, it is disturbing that offenses with Weak *mens rea* requirements are the second most common choice of federal legislators proposing non-violent criminal offenses. Even more disconcerting is the fact that the number of offenses in the None category combined with the number of offenses in the Weak category comprise more than half of all the offenses in this study. Offenses in the Weak or None categories are wholly inadequate to prevent unjust prosecutions and convictions.

3. Offenses in the Moderate *Mens Rea* Category

The number of offenses in the Moderate category is slightly greater than the number of Weak offenses. Approximately one-third of the studied offenses, 155 of 446, have *mens rea* requirements that place them in the Moderate category. The language of an offense categorized as Moderate is more likely than not to prevent an individual from being found guilty if he did not intend to violate a law and did not know that his conduct was unlawful or sufficiently wrongful so as to put him on notice of possible criminal responsibility. Nevertheless, such an individual could be convicted under an offense categorized as Moderate because of, for example, inconsistent judicial interpretation and application of the *mens rea* terms it uses.

One example of a Moderate offense is in section 2(a) of H.R. 4148, the Federal Disaster Profiteering Prevention Act of 2005. This section provides criminal penalties for "[w]hoever, in a matter involving a contract with the Federal Government for the provision of goods or services, directly or indirectly, in connection with relief or reconstruction efforts provided in response to a presidentially declared major disaster or emergency, knowingly and willfully…falsifies, conceals, or covers up by any trick, scheme, or device a material fact."[75] Based on Supreme Court precedent, this "willfully" requirement should prevent the conviction of many or most defendants who did not know that their conduct was unlawful or sufficiently wrongful.[76] But as the Court itself has observed, "willful" is a word of many meanings, and its construction is often influenced by its context.[77] Federal courts therefore do not apply a standard meaning to "willfully." It is primarily for this reason that offenses using "willfully" as a blanket or introductory *mens rea* requirement, with nothing more, are categorized as Moderate rather than Strong.

Another example of a Moderate offense is in section 5 of H.R. 4572, the Export Administration Renewal Act of 2005. This offense provides that "[a]ny individual…who willfully violates, conspires to violate, or attempts to violate any provision of this Act or any regulation, license, or order issued under this Act shall be fined up to 10 times the value of the exports involved or $1,000,000, whichever is greater, imprisoned for not more than 10 years, or both, for each violation."[78] This offense is graded Moderate because, as in the preceding example, the blanket or introductory usage of the "willfully" requirement should prevent the conviction of most defendants who did not intend to violate the law and did not know their conduct was unlawful or sufficiently wrongful so as to put them on notice of criminal responsibility. But this *mens rea* requirement cannot be relied upon to provide adequate protection for all such defendants because federal courts do not apply a standard meaning to "willfully."

This offense is not, however, strictly Moderate. Rather, the strength of the *mens rea* requirement in H.R. 4572 falls between Weak and Moderate because it incorporates a large, open-ended set of regulatory violations. Thus, even experts in export law would have a difficult time being aware of all of the regulations under which criminal punishment might be imposed. Yet some courts might conclude that individuals performing actions covered by the Export Administration Act have a duty to know all Export Administration Act regulations and therefore impute constructive knowledge of any unlawfulness to the individual because he knew that the field is heavily regulated. Wholesale incorporation of regulations into criminal offenses thereby undermines the protectiveness of *mens rea* requirements. For this reason, H.R. 4572 is categorized in the online appendix as Weak-to-Moderate, not simply Moderate.

Approximately one-third of the studied offenses, 155 of 446, have* mens rea *requirements that place them in the Moderate category.

Blanket or introductory uses of the *mens rea* term "willfully" make up the great majority of the offenses categorized as Moderate. The offenses in this category would provide an uncertain amount of protection for defendants charged under them because of the inconsistency with which courts interpret and apply the term "willfully."

4. Offenses in the Strong *Mens Rea* Category

The language of an offense categorized as Strong is highly unlikely, absent substantial misinterpretation, to permit the conviction of a person who did not intend to violate a law and did not have knowledge that his conduct was unlawful or sufficiently wrongful to put him on notice of possible criminal responsibility. Virtually every criminal offense that Congress passes or even considers should include *mens rea* requirements that are this protective. It is therefore of significant concern that only a small percentage of the studied offenses fall into this category.

One example of an offense in the Strong category is in H.R. 5188, Jane's Law, which criminalizes evasion of court-ordered child support payments. The offense in section 2(a) states:

> Whoever knowingly, travels in interstate or foreign commerce, with the intent to evade compliance with a court ordered property distribution as part of a separation or divorce settlement involving more than $5000, with respect to a spouse or former spouse, shall be fined under this title or imprisoned for not more than two years or both.[79]

The introductory *mens rea* term, "knowingly," can be relied upon to provide protection against conviction for inadvertences. But the key to the strength of the overall *mens rea* requirement is the phrase "with the intent to evade compliance with a court ordered property distribution." It is difficult to imagine a scenario in which a person could, without knowledge that such action is unlawful, act with intent to evade an order from the court. The court order referenced in this offense is a directive of law handed down from the court to the defendant, and thus the inclusion of this phrase in this offense requires the person to act with a specific intent to violate the law. For this reason, the offense in H.R. 5188 is categorized as Strong.

Virtually every criminal offense that Congress passes or even considers should include* mens rea *requirements that would be categorized as Strong, but fewer than one out of every 12 of the offenses in this study was so categorized.

S. 414, the Voter Protection Act of 2005, contains another example of an offense categorized as Strong. Section 303 states that whoever "destroys or damages any property with the intent to prevent or impede an individual from voting in an election for" federal office is guilty of a federal crime.[80] Properly applied, the *mens rea* phrase "with the intent to" should protect from conviction anyone who accidentally damages voting equipment without the intent of preventing or impeding an individual from voting. If an inattentive truck driver, for example, crashes while delivering voting machines and destroys them, he might be charged under state law for reckless driving, depending on the circumstances. But unless evidence shows that the truck driver's actual intent was to prevent voting, it would be a misapplication of the plain language of this offense for him to be convicted under it. This is because the *mens rea* requirement in the offense properly restricts its application to the behavior it is intended to punish: intentionally preventing citizens from voting. Absent that specific intent, criminal punishment is unlikely to be imposed.

A final example illustrating one "best practice" approach to fashioning strong *mens rea* requirements is in section 515(b) of H.R. 1295, the Responsible Lending Act. This offense includes both a blanket or introductory "willfully" *mens rea* term and a specific requirement that, for culpability to attach, an individual must know that he is acting in violation of the law: "It shall be unlawful to willfully disclose to any person any information concerning any person who is a mortgage broker or is applying for licensing as a mortgage broker knowing the disclosure to be in violation of any provision of this title (a) requiring the confidentiality of such information; or (b) establishing a privilege from disclosure…." Because of the proper use of the "willfully" and "knowing" terms, this offense is categorized as Strong.

Despite these salutary examples, fewer than one out of every 12 of the offenses in this study contained *mens rea* requirements protective enough to be categorized as Strong. This may be due to the difficulty and occasional linguistic awkwardness involved in drafting a protective *mens rea* requirement. It might also be caused by Members of Congress (and the public) overlooking the possible injustices resulting from criminal laws that are vague and overbroad, that fall short of providing fair notice, and that fail to require a level of culpability sufficient to justify criminal punishment. Nevertheless, fundamental principles of justice mandate that nearly all of the non-violent criminal offenses

in this study should have included a Strong *mens rea* requirement.

In summary, the study's categorization analysis found that:

- Almost three-fifths of all non-violent offenses proposed had inadequate (Weak or None) *mens rea* protections;
- Fewer than one out of every 12 offenses contained protections that are fully adequate to protect against unjust conviction (Strong); and
- One out of every three offenses had *mens rea* requirements inhabiting a middle ground (Moderate), leaving open the possibility of conviction of those whose level of culpability does not warrant criminal punishment.

C. The Reliance on Judiciary Committee Oversight

Despite the special expertise and jurisdiction of the House and Senate Judiciary Committees over matters of criminal law and criminal justice, Chart 4 demonstrates that more than half of the studied offenses were not referred to either committee for oversight.

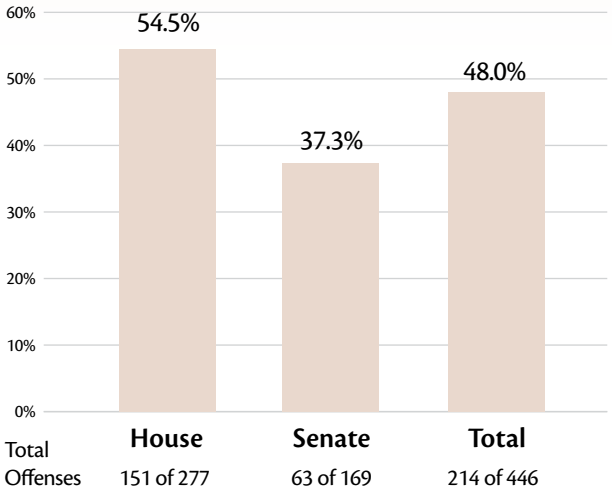
As Chart 4 shows, only 214 (48.0 percent) of the 446 offenses studied were in bills that were referred to the respective judiciary committee. While nearly 55 percent of the 277 House offenses were referred to the House Judiciary Committee, only 37 percent of the 169 Senate offenses were referred to the Senate Judiciary Committee. This is despite these committees' special expertise in crafting criminal offenses, knowledge of the priorities and resources of federal law enforcement, and express jurisdiction over federal criminal law.

For example, since its creation in 1816, the Senate Judiciary Committee has had jurisdiction over

Chart 4

Less than Half of Offenses Were Referred to Judiciary Committees

Percentage of Offenses in Study Referred to Respective Judiciary Committee



Source: Calculations by The Heritage Foundation and the National Association of Criminal Defense Lawyers.

"legislation related to criminal justice."[81] Further, the Rules of the Senate provide that to the Senate Judiciary Committee "shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to…[j]udicial proceedings, civil and criminal, generally."[82] The rules grant express authority over criminal justice matters to no other Senate committee. Nevertheless, over 62 percent of the studied offenses that were introduced in the Senate received little or no oversight from the Senate Judiciary Committee and did not benefit from its special expertise.

As discussed above, this study sought to determine whether oversight by the judiciary committees correlated with stronger *mens rea* requirements in the studied offenses.[83] Thus, in addition to passage and enactment, five different congressional actions (judiciary committee referrals, hearings, markups, amendments, and reports) were tested to determine whether such correlations existed. These calculations and their results are discussed further below.

D. Identifying the Effect of Congressional Actions on *Mens Rea* Requirements

The Heritage Foundation's CDA analyzed the study's data to determine whether a statistically significant correlation existed between the strength of *mens rea* requirements in offenses and congressional actions taken on the bills containing those offenses. If a statistically significant correlation exists between the strength of *mens rea* requirements and a congressional action, it could be positive or negative. If, for example, there were a negative correlation between the strength of *mens rea* requirements and enactment into law, that would suggest that a criminal offense's *mens rea* requirement is likely to be weaker if the bill of which it is a part is passed by both chambers and signed into law by the president. Conversely, a positive correlation between the strength of *mens rea* requirements and some congressional action might suggest that that action serves to strengthen *mens rea* protections or that bills containing stronger *mens rea* protections are more likely to be subject to that action.

The CDA conducted several types of statistical calculations to look for such correlations. The first two variables it tested for possible correlations were whether a bill was (1) passed by its respective congressional chamber and (2) enacted into law. The data on these two actions are presented in Table 1.

If a bill was marked up by the House Judiciary Committee or one of its subcommittees, reported by the House Judiciary Committee for consideration by the full House of Representatives, or both, the bill's non-violent criminal offenses tended to have stronger, more protective* mens rea *requirements.

The CDA found no statistically significant correlation between whether a bill was passed by its originating chamber or enacted into law and the strength of the *mens rea* requirements in the bill's offenses. In other words, this study's data provide no statistical evidence that the *mens rea* provisions in non-violent offenses passed by one chamber or enacted in the 109th Congress were weaker or stronger than the *mens rea* provisions in all proposed non-violent offenses.

Table 1

Studied Offenses Passed and Enacted

Originating Chamber	Offenses Passed by Originating Chamber	Offenses Enacted into Law
House	49	28
Senate	21	8
Total	70	36
% of All Studied Offenses	15.7%	8.1%

Source: Calculations by The Heritage Foundation and the National Association of Criminal Defense Lawyers.

Other tests did, however, reveal statistically significant correlations. The CDA found that the strength of the *mens rea* requirements in a bill introduced in the House has a weak, positive correlation with that bill's being (a) marked up by the House Judiciary Committee or one of its subcommittees and (b) reported out of the House Judiciary Committee for consideration by the full House of Representatives. Put differently, if a bill was marked up by the House Judiciary Committee or one of its subcommittees, reported by the House Judiciary Committee for consideration by the full House of Representatives, or both, the bill's non-violent criminal offenses tended to have stronger, more protective *mens rea* requirements.

On the Senate side, however, no statistically significant correlations were found between the strength of *mens rea* requirements and any action taken by the Senate Judiciary Committee or its subcommittees.

When the data for the House and Senate bills are aggregated and analyzed together, a weak but statistically significant positive correlation appears between the strength of the studied offenses' *mens rea* requirements and their bills being marked up by or reported out of either the House Judiciary Committee or the Senate Judiciary Committee. In other words, legislation that was marked up or reported out by either judiciary committee tended to contain

stronger *mens rea* requirements than bills not subject to these actions. This finding, however, appears to reflect the correlation identified above involving actions taken by the House Judiciary Committee, and so does not contradict the failure to find any correlations involving actions taken by the Senate Judiciary Committee.

Finally, Heritage's CDA tested whether each of the other three judiciary committee actions recorded (referral to a judiciary committee, hearing, and amendment) was correlated with the strength of *mens rea* requirements. It found no statistically significant relationships.[84]

E. The Regulatory Criminalization Problem

As part of the individual assessment of the studied offenses, the authors determined whether Congress itself articulated the *actus reus* and *mens rea* of the offense or if Congress sought, in the statutory language of "the offense,"[85] to delegate that responsibility to an unelected agency, body, or individual acting on behalf of such an agency or body. The authors endeavored to make note of every offense that included regulatory criminalization in order to determine the frequency with which Congress attempts to delegate its criminal lawmaking authority. The resulting data underscore concerns that have been raised about regulatory criminalization.[86]

Table 2 presents this data, broken down by chamber and by three legislative actions (introduction, passage, enactment). Of the 446 studied offenses, 63 (14 percent) authorized regulatory criminalization. The percentage of offenses authorizing regulatory criminalization is even greater among those offenses passed by one chamber (17 percent) or enacted into law (22 percent). Nearly one-quarter of the enacted offenses allow additional criminal offenses to be created, not by Congress, but by unelected and less accountable agency officials.

Table 2

Regulatory Criminalization by Chamber

Of the 36 studied offenses that were enacted into law, eight (22 percent) delegated criminal lawmaking authority to unelected regulators.

	Introduced	Passed	Enacted
House	41 of 277 (14.8%)	9 of 49 (18.4%)	5 of 28 (17.9%)
Senate	22 of 169 (13.0%)	3 of 21 (14.3%)	3 of 8 (37.5%)
Total	63 of 446 (14.1%)	12 of 70 (17.1%)	8 of 36 (22.2%)

Source: Calculations by The Heritage Foundation and the National Association of Criminal Defense Lawyers.

This result has significant ramifications. When Congress enacts a single offense authorizing regulatory criminalization, it effectively attaches criminal penalties to regulations, rules, and orders that may not yet have been contemplated, let alone drafted and made into law. A single criminal offense may serve as the authority for any number of additional, regulatory criminal offenses. Whereas the ABA Task Force in 1998 and Professor John Baker in 2008 reported scholarly estimates of the number of criminal offenses in federal statutes, both acknowledged that, at a minimum, there are tens of thousands of additional criminal offenses in federal regulations.[87] Regulatory criminalization thus has profound implications for the problem of how to ensure individuals and businesses receive fair notice of what conduct can be punished criminally.

Nearly one-quarter of the enacted offenses allow additional criminal offenses to be created, not by Congress, but by unelected and less accountable agency officials.

V. Conclusions on the Legislative Process

The primary conclusion of this report is that non-violent criminal offenses lacking adequate *mens rea* requirements are ubiquitous at every stage of the federal legislative process. Although two steps in the legislative process appear to improve the quality of *mens rea* requirements, a majority of the non-violent offenses Members of Congress introduce have flawed *mens rea* requirements, and this percentage does not improve through the process. Further, the majority of non-violent criminal offenses introduced in the 109th Congress were drafted with language that is ambiguous and has uncertain legal effect, to the greatest detriment of the average layperson with no legal training. In addition, a sizeable percentage of proposed criminal offenses, and a larger percentage of those passed by a chamber or enacted, would have delegated Congress's criminal lawmaking authority to regulators.

The primary conclusion of this report is that non-violent criminal offenses lacking adequate* mens rea *requirements are ubiquitous at every stage of the federal legislative process.

Further, the neglect of the special expertise of the House and Senate Judiciary Committees is profound; less than one-half of the studied offenses were referred to either committee. This study, as well as the experience of its authors, strongly suggests that Members of Congress propose so many new criminal offenses and modifications to existing offenses that only a small percentage of these proposals could possibly receive meaningful oversight by the judiciary committees or benefit from their special expertise. In the past, the judiciary committees performed a vital gate-keeping function in preserving the consistency and integrity of federal criminal law, but today they are overrun. Increasingly, new and modified criminal offenses are proposed, shepherded through Congress by their sponsors, and even enacted without affording deference to the committees, their expertise, or their unique jurisdiction over the federal criminal justice system.

A. *Mens Rea* Requirements Are Inadequate at Every Step of the Legislative Process

As shown in the following tables, 44 of the 70 offenses passed in either chamber and 23 of the 36 offenses enacted into law were categorized as None or Weak. In other words, 63 percent of the offenses passed by a chamber of Congress and 64 percent of the offenses actually enacted into law had wholly inadequate *mens rea* requirements.

As shown in Table 3 and Chart 5 below, the *mens rea* requirements of non-violent offenses in bills that were passed by their originating chamber are, on average, actually weaker than those in all proposed non-violent offenses. Though this difference may not be statistically significant, it does demonstrate that the *mens rea* requirements in bills that pass a chamber are not of higher quality than those in bills that do not.

Chart 5 demonstrates a similar consistency between the percentage of non-violent offenses enacted into law that have inadequate *mens rea* requirements (Weak or None) and the percentage of all proposed non-violent offenses that have inadequate *mens rea* requirements. The percentage of enacted offenses that fall into the Strong category is somewhat lower than the percentage for the total sample. Moreover, a larger percentage of enacted offenses fall into the Weak category. The percentage of offenses that are categorized as None is approximately the same for enacted offenses and all proposed offenses, while the percentage of offenses in the Moderate category is slightly lower for those offenses that were enacted into law than for all the proposed offenses. In sum, the composite profile of the strength or weakness of *mens rea* requirements for all proposed non-violent offenses is consistent with that of those offenses that were enacted into law.

The data show that, at all stages of the legislative process, the majority of offenses lack adequate *mens rea* requirements. This problem is not unique

Table 3

Mens Rea Requirements Throughout the Legislative Process

Offenses, by *Mens Rea* Grade

	Studied (446 Total)				Passed (70 Total)				Enacted (36 Total)			
	None	Weak	Moderate	Strong	None	Weak	Moderate	Strong	None	Weak	Moderate	Strong
House	82	90	83	22	12	18	14	5	7	11	8	2
Senate	31	52	72	14	4	10	6	1	2	3	3	0
Total	113	142	155	36	16	28	20	6	9	14	11	2
%	25.3%	31.8%	34.8%	8.1%	22.9%	40.0%	28.6%	8.6%	25.0%	38.9%	30.6%	5.6%

Source: Calculations by The Heritage Foundation and the National Association of Criminal Defense Lawyers.

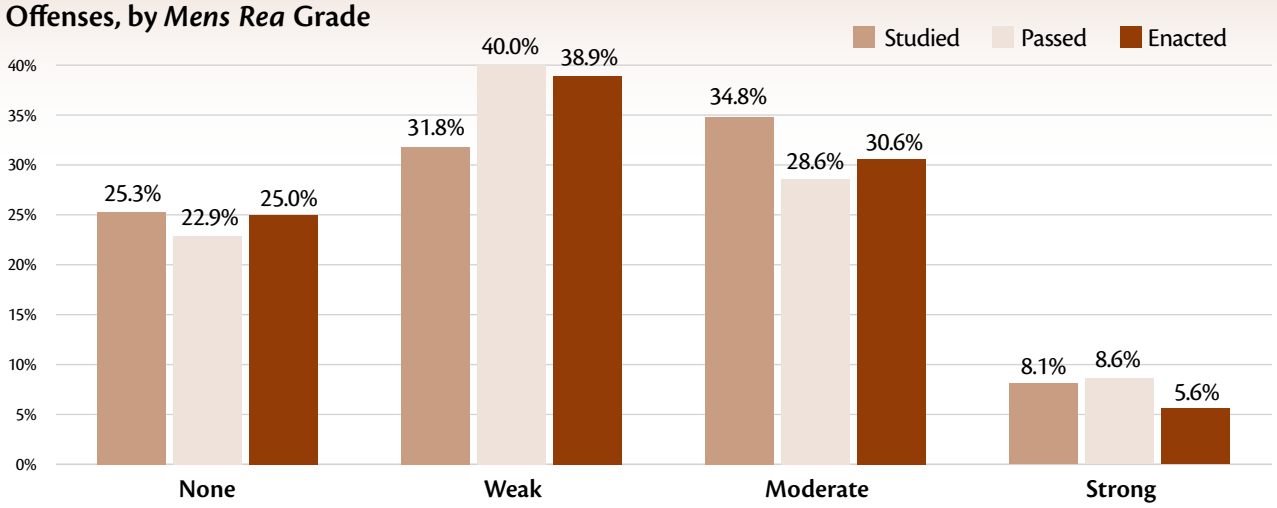
to the 109th Congress. For almost three years, every criminal offense introduced in Congress that fits this study's criteria has been reviewed for The Heritage Foundation's Overcriminalized.com Web site.[88] The percentages of criminal offenses in each of the four *mens rea* categories for non-violent offenses introduced in the 109th Congress appear to be generally consistent with those introduced in the 110th Congress.

Public debate in recent Congresses over *mens rea* requirements has been rare, with few Members objecting to proposed criminal offenses with *mens rea* requirements that this study would characterize as None or Weak.[89] Rather, most Members of Congress appear to be sensitive to the potential political costs of appearing to be "soft on crime" by strengthening *mens rea* requirements to protect those acting without culpable intent. The current system is not working, and Congress will need new structural and procedural devices if it is to thwart this political pressure and return to crafting criminal offenses with adequate *mens rea* requirements.

Chart 5

Mens Rea Requirements of Studied, Passed, and Enacted Offenses

Offenses, by *Mens Rea* Grade



Source: Calculations by The Heritage Foundation and the National Association of Criminal Defense Lawyers.

B. The Judiciary Committees Are Frequently Afforded No or Inadequate Opportunities for Oversight of Criminal Offenses

Congress consistently neglects the special expertise of the two judiciary committees when drafting criminal offenses. Over one-half (52 percent) of the criminal offenses in this study were neither referred to a judiciary committee nor subject to any oversight by either committee. The number of criminal offenses proposed and enacted has grown so sharply that, on the whole, individual Members of Congress and congressional leaders may have concluded that the judiciary committees lack the time and resources to review every criminal offense that is proposed. Thus, for expediency or for strategic purposes, Members may forgo or even evade judiciary committee review.

Without adequate **mens rea** *requirements, these federal criminal offenses greatly increase the danger that law-abiding individuals will find themselves facing prosecution and even prison time in the federal system.*

Bypassing the judiciary committees may not always be intentional. This study frequently uncovered criminal offenses that were buried in much larger bills entirely unrelated to criminal law and punishment. It may be that these offenses were simply overlooked or were obscure enough, in the context of their legislative vehicles, to fail to alert anyone to the need for judiciary committee review. In some cases, criminal offenses may be added to a bill by amendment after the bill has already been assigned to a non-judiciary committee or once the bill is on the floor of its respective chamber. When this happens, unless the Members of Congress responsible for the amendment containing criminal provisions pause the process, notify their chamber's judiciary committee, and grant that committee sufficient time to review and appropriately revise the criminal provisions, judiciary committee members may not even know that the amendment contains criminal provisions.[90] While the cause of this neglect is not entirely clear, the result is that hundreds of criminal offenses are being proposed in a typical Congress, and many of them are not afforded judiciary committee oversight.

C. The Proliferation of Federal Criminal Law Continues

Much has already been said about the magnitude of new criminalization that was proposed and enacted by the 109th Congress. The numbers speak for themselves:

- 446 non-violent criminal offenses were introduced,
- 70 non-violent criminal offenses were passed by at least one chamber, and
- 36 non-violent criminal offenses were enacted into law.

Given these large numbers, it unsurprising that Congress created 452 entirely new crimes from 2000 through 2007,[91] legislating at a rate of over one new crime each week for every week of every year. Without adequate *mens rea* requirements, these federal criminal offenses greatly increase the danger that law-abiding individuals will find themselves facing prosecution and even prison time in the federal system. These numbers do not, of course, capture the full magnitude of the effect that regulatory criminalization authorized by the 36 newly enacted offenses will have on federal law.

Further, these numbers concern only those types of offenses included in this study, generally non-violent, non-drug, non-firearm, non-pornography, and non-immigration offenses. Many additional offenses that were not a part of this study were proposed during the 109th Congress and ultimately enacted into law.

D. Poor Legislative Draftsmanship Is Commonplace

The lack of clarity in the studied offenses cannot be quantified, though its existence and frequency

are plain. The authors can attest to the many hours, days, and months that went into performing these individual assessments and to the significant proportion of that time spent trying to answer such questions as:

- What conduct is actually covered by this offense and what conduct is not?
- How far into the language of the statute does the *mens rea* terminology extend, and to which elements?
- To which current federal laws and to which regulations (assuming they have already been promulgated) does this statute refer, and which does it incorporate?

Questions of this sort required substantial research, deliberation, and discussion before an offense could be categorized. Some appreciation of this process may be gleaned from the individual assessments in the online appendix, which illustrate much of this reasoning for the benefit of readers and other researchers.

The complexity of this part of the study's analysis is offered as further evidence in support of the criticisms that have been leveled against Congress's criminal lawmaking by academics, practitioners, judges, and others. Congress frequently fails to speak clearly and with the necessary specificity when legislating criminal offenses. Consider, for example, the *Flores-Figueroa* litigation discussed above.[92] It took several years of litigation and the opinions of three different courts, including the United States Supreme Court, to determine the meaning of a single criminal offense, which is all of one sentence long. Another example can be found in the federal honest services fraud statute.[93] More than 20 years after the statute's enactment, the federal circuit courts are hopelessly divided over this exceedingly vague and overbroad statute. The statute is finally being scrutinized by the Supreme Court, and the Justices face the choice of striking the statute down on the ground of vagueness, saving the statute by doing Congress's job of making it more definite and precise, or allowing the chaos and confusion surrounding the statute's meaning to continue.[94]

This complexity has serious consequences. When tort law or other civil law is vague, unclear, or confusing, there can be substantial consequences. But those consequences generally take the form of monetary damages. When the criminal law is vague, unclear, or confusing, the consequences are particularly dire: the misuse of governmental power to unjustly deprive individuals of their physical freedom.

Congress frequently fails to speak clearly and with the necessary specificity when legislating criminal offenses.

E. Congress Regularly and Inappropriately Delegates Criminal Lawmaking Authority

Finally, the amount of regulatory criminalization authorized in the studied offenses demonstrates that congressional delegation of its authority to make criminal law occurs at every stage of the legislative process and, notably, more frequently in those studied offenses that were either passed by a chamber or enacted into law than in the larger sample of proposed offenses. Specifically, 14 percent of all proposed non-violent offenses included some form of regulatory criminalization. That increases to 17 percent among only those offenses passed by one of the chambers of Congress. The figure increases yet again, to 22 percent, among enacted offenses. In raw numbers, eight of the 36 offenses enacted into law delegate Congress's authority to make criminal laws. Those eight offenses were contained in four separate bills, two originating from each chamber.

As previously discussed, these numbers do not reflect the actual number of offenses that will be added to federal criminal law. Almost every time such offenses are enacted into law, countless additional federal regulations also become criminal offenses. In fact, the regulations that become punishable as crimes often do not even exist at the time the statutory offense is enacted. But statutory

offenses authorizing criminalization by administrative agencies typically do not limit criminal exposure just to regulations; in addition, they often create criminal exposure based on violations of any "rules" or "orders" issued by the agency or its officials. For these reasons, the presence of these regulatory criminalization offenses prevents the authors from providing a complete tally of the number of criminal offenses that will result from the bills enacted by the 109th Congress. Rather, this study's data provide only the minimum number of federal criminal offenses enacted into law by this single Congress. The ultimate number is likely to be considerably higher.

The question of whether a matter is important enough to send a person to prison should be decided by the people's elected representatives.

While it might strike some as odd that Congress so readily and frequently abdicates its constitutional authority to create criminal laws, there are several possible explanations. The most obvious is expediency: Some believe that, rather than devoting time and energy to actually defining regulations, Congress should focus on broader policymaking. Other arguments for delegation generally assert that decisions about technical areas of administrative law should be left to those with specific expertise. Whatever merit these arguments may have, they lack persuasiveness with respect to Congress's power and responsibility to define what conduct and mental state justifies depriving an individual of her personal freedom. The question of whether a matter is important enough to send a person to prison should be decided by the people's elected representatives.

Other explanations that have been offered are more cynical. Delegating to administrative agencies the authority to make criminal law might allow Members of Congress the benefit of appearing "tough on crime" without being politically accountable to the individuals most affected by regulatory criminalization. Further, Congress can obtain this benefit without performing the arduous drafting process that the criminal law traditionally requires. A more generous argument is that most Members of Congress simply do not fully realize the many negative ramifications of this type of delegation.

Regardless of the explanation, Congress frequently and consistently delegates its criminal lawmaking authority. This delegation results in more regulatory criminalization, which, in turn, contributes to the continued proliferation of the federal criminal law.

VI. Ending the Trend: Federal Criminal Law Reforms

Congress should adopt basic, good-government reforms that will slow, stop, or even reverse the dangerous trend of haphazard federal criminalization. This shift should begin with the recognition that the proliferation of criminal offenses lacking meaningful *mens rea* requirements is a threat to civil liberty. In order to be effective, proper reforms must be tailored to:

- Address the root causes of the overcriminalization problem;
- Encourage Congress to legislate more clearly and deliberatively and with greater coherence; and
- Reduce Congress's knee-jerk tendency to criminalize in response to every problem and as a solution to all of society's real and supposed ills.

The authors of this report recommend the following reforms to bring an end to the deterioration

Recommendations

Congress should:

- **Enact Default Rules of Interpretation to Ensure that *Mens Rea* Requirements Are Adequate to Protect Against Unjust Conviction.**
- **Codify the Common-Law Rule of Lenity, which Grants Defendants the Benefit of the Doubt When Congress Fails to Legislate Clearly.**
- **Require Judiciary Committee Oversight of Every Bill that Includes Criminal Offenses or Penalties.**
- **Provide Detailed Written Justification for and Analysis of All New Federal Criminalization.**
- **Draft Every Federal Criminal Offense with Clarity and Precision.**

of *mens rea* requirements and related problems of overcriminalization.

A. Enact Default *Mens Rea* Rules

Of the several reforms that could be implemented to help ensure that innocent individuals are protected from unjust conviction under federal criminal offenses that have inadequate *mens rea* requirements, perhaps the most straightforward and effective reform would be to codify default rules for the interpretation and application of *mens rea* requirements. This reform would add new provisions to the U.S. Code that would specifically direct federal courts to grant a criminal defendant the benefit of the doubt when Congress has failed to adequately and clearly define the *mens rea* requirements for criminal offenses and penalties.

The first statutory enactment would address the unintentional omission of *mens rea* terminology by directing federal courts to read a protective, default *mens rea* requirement into any criminal offense that lacks one.[95] Although it would almost always be unwise to do so, Congress would remain free to enact strict liability offenses even after this reform is implemented, but to do so, it would have to make its purpose clear in the express language of the statute. Adopting this type of reform would help law-abiding individuals know in advance which criminal offenses carry an unavoidable risk of criminal punishment and safeguard against *unintentional* legislative omissions of *mens rea* requirements.

The second statutory enactment, similar to subsection 2.02(4) of the American Law Institute's Model Penal Code, would direct courts to apply any introductory or blanket *mens rea* terms in a criminal offense to each element of the offense.[96] This reform would eliminate much of the uncertainty that exists in federal criminal law over the extent to which an offense's *mens rea* terminology applies to all of the offense's elements. It would also save all parties—defendants, the government, and the courts—from having to exhaust their time and resources litigating this question, as in the *Flores-Figueroa* case. Again, Congress could still limit the application of the *mens rea* terms to certain elements of the offense, but it would have to articulate such limitations clearly in the text of the statute. This reform would greatly reduce the disparities that exist among the federal courts in the interpretation and application of *mens rea* requirements, and thereby result in the fairer, more consistent application of federal criminal laws. Further, it would provide additional protection to

Perhaps the most straightforward and effective reform would be to codify default rules for the interpretation and application of* mens rea *requirements.

defendants who did not intend to violate the law and did not have knowledge that their conduct was unlawful or sufficiently wrongful.

Enacting these two statutory provisions would improve the *mens rea* protections throughout federal criminal law, provide needed clarity, force Congress to give careful consideration to *mens rea* requirements when adding or modifying criminal offenses, and help ensure that fewer individuals are unjustly prosecuted and punished.

B. Codify the Common-Law Rule of Lenity

A related statutory reform that would reduce the risk of injustice stemming from criminal offenses that lack clarity or specificity would be to codify the common-law rule of lenity. The rule of lenity directs a court, when construing an ambiguous criminal law, to resolve the ambiguity in favor of the defendant.[97] In a recent U.S. Supreme Court decision, Justice Scalia explained that this "venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead."[98] Giving the benefit of the doubt to the defendant is consistent with the traditional rules that all defendants are presumed innocent and that the government bears the burden of proving every element of a crime beyond a reasonable doubt.[99]

The rule of lenity directs a court, when construing an ambiguous criminal law, to resolve the ambiguity in favor of the defendant. Adding the rule of lenity to federal law would serve the rights of all defendants at every stage of the criminal process.

Explicitly applying the rule of lenity to federal criminal law would simply codify what the Supreme Court has called a fundamental rule of statutory construction and cited as a wise principle that it has long followed.[100] Despite the Supreme Court's statements, the rule has not been uniformly or consistently applied by the lower federal courts, and adding it to federal law would serve the rights of all defendants at every stage of the criminal process, not just those who have the means and opportunity to successfully appeal their convictions to the Supreme Court. Codifying the rule of lenity would also protect Congress's lawmaking authority because it would restrict the ability of federal courts to legislate from the bench and reduce the frequency with which those courts must speak because Congress has failed to legislate clearly. Further, it would require Members of Congress to legislate more carefully and thoughtfully, with the knowledge that courts would be forbidden from filling in any inadvertent gaps left in criminal offenses. Most importantly, an explicit rule of lenity would protect individuals from unjust criminal punishment under vague, unclear, and confusing offenses by reinforcing the principle of legality, which holds that no conduct should be punished criminally "unless forbidden by law [that] gives advance warning that such conduct is criminal."[101]

C. Require Sequential Referral to the Judiciary Committees

A third recommended reform is to change congressional rules to require every bill that would add or modify criminal offenses or penalties to be subject to automatic sequential referral to the relevant judiciary committee. Sequential referral is the practice of sending a bill to multiple congressional committees. In practice, the first committee has exclusive control over the bill until it reports the bill out or the time limit for its consideration expires, at which point the bill moves to the second committee in the sequence, in the same manner. Whereas every new or modified criminal offense introduced in Congress should be subject to automatic referral to a judiciary committee, more than half of the studied offenses received no such referral.

Judiciary committee referral may not automatically produce stronger, more protective *mens rea*

requirements. However, this study's statistical analysis of the relationship between the strength of *mens rea* requirements and specific actions by the House Judiciary Committee, considered in the context of the special expertise and jurisdiction of both judiciary committees, make it reasonable to conclude that automatic sequential referral would likely:

- Reduce the practice of including new or modified criminal offenses in many bills unrelated to crime and punishment;
- Reduce the frequency of regulatory criminalization; and
- Stem the overall tide of federal criminalization by forcing a measured and prioritized approach to criminal lawmaking.

This assumes, of course, that the committees carefully review, rather than rubber-stamp, proposed criminal offenses. The judiciary committees alone have the special competence and expertise required to properly draft and design criminal laws. Automatic referral should result in clearer, more specific, and higher quality criminal offenses.

More importantly, this rule could stem the tide of criminalization by forcing Congress to adopt a measured and prioritized approach to criminal lawmaking. Members of Congress have grown accustomed to thinking of criminal offenses as an appropriate feature of any piece of legislation. But as this study shows, ensuring that a proposed criminal offense is a necessary addition to federal criminal law—and that it is properly drafted—requires substantial expertise with the intricate details of criminal law as well as its broader operation and objectives. The House and Senate Judiciary Committees are uniquely positioned to evaluate:

- Whether the approximately 4,450 statutory criminal offenses and an estimated tens of thousands of regulatory criminal offenses now in federal law already cover the conduct being criminalized;
- Whether a new offense is consistent with the Constitution, particularly constitutional federalism's reservation of general police power to the 50 states;
- Whether federal law enforcement has the resources to investigate and prosecute a new offense, and whether federal public defenders have the resources to defend indigent defendants charged under it; and
- Whether enforcing a new offense will divert resources from more important law enforcement goals.

These fundamental questions should be answered before Congress considers enacting any new criminal offense. If the judiciary committees carefully considered these and related questions for each proposed criminal offense, Members of Congress might become reluctant to propose new or modified offenses that are ill conceived, poorly drafted, or superfluous.

Requiring sequential referral of all bills with criminal provisions to the judiciary committees would also increase congressional accountability for new criminalization, help prioritize criminal legislation, and reduce overcriminalization.

Further, the special expertise for fashioning *mens rea* requirements that are no broader than necessary to allow conviction of only those who are truly culpable or blameworthy resides in the judiciary committees. Prosecutorial discretion plays an important role in the American criminal justice system, particularly in selecting enforcement priorities, determining whether the evidence is sufficient to support a prosecution, and negotiating plea bargains where the evidence of a defendant's culpability is strong. But a criminal offense should never be so broad, or its *mens rea* requirements so lax, that it allows prosecutors to obtain convictions of persons who are not truly blameworthy and who did not have fair notice of possible criminal responsibility. The judiciary committees are in the best position to ensure that Congress ends its practice of passing these dangerous criminal offenses.

Requiring sequential referral of all bills with criminal provisions to the judiciary committees would also increase congressional accountability

for new criminalization, help prioritize criminal legislation, and reduce overcriminalization. As it now stands, no single committee can take overall responsibility for reducing the proliferation of new (and often unwarranted, ill-conceived, and unconstitutional) criminal offenses or for ensuring that adequate *mens rea* requirements are a feature of all new and modified criminal offenses. Sequential referral would empower the judiciary committees to take responsibility for all new criminal provisions. Further, Members of Congress and the public would know that they should address their interests and concerns about new criminal offenses to the judiciary committees, which could act on them.

Finally, the judiciary committees are well positioned to prioritize new criminal offenses because they have the best information about the level and allocation of federal law enforcement's resources and must operate within their own time and resource limitations. Such prioritization should reduce the proliferation of federal criminal offenses, the erosion of adequate *mens rea* requirements from federal criminal law, the unwarranted and unconstitutional federalization of inherently local crime, and other forms of overcriminalization. Given the current neglect of these concerns in the legislative process, such improvements would be a welcome change.

D. Require Reporting on All New Federal Criminalization

The fourth reform is a reporting requirement for all new federal criminalization, which would work hand-in-hand with the sequential referral reform. Similar to a bill Representative Don Manzullo (R–IL) introduced in 2001, this reform would require the federal government to produce a regular public report that includes much of the information necessary to assess the purported justification, costs, and benefits of all new criminalization.

This reform proposal would require Congress to deliberate over and provide factual and constitutional justification for every expansion of the federal criminal law.

Today, there is no effective check on overcriminalization. Over the past half century, the political pressures to criminalize have been difficult for most Members of Congress, irrespective of party affiliation, to resist. In addition, federal regulators who criminalize conduct should be subject to far more public accountability than they are today. This reform would help to provide such accountability by requiring the federal government to perform basic but thorough reporting on the grounds and justification for all new and modified criminal offenses and penalties. Implementing this reform would require rules changes in both chambers of Congress and statutory reporting requirements governing the federal agencies that create and modify criminal offenses and penalties.

For every new or modified criminal offense or penalty that Congress passes, it must report:

- A description of the problem that the criminal offense or penalty is intended to redress, including an account of the perceived gaps in existing law, the wrongful conduct that is currently unpunished or under-punished, and any specific cases or concerns motivating the legislation;
- A direct statement of the express constitutional authority under which the federal government purports to act;
- An analysis of whether the criminal offenses or penalties are consistent with constitutional and prudential considerations of federalism;
- A discussion of any overlap between the conduct to be criminalized and conduct already criminalized by existing federal and state law;
- A comparison of the new law's penalties with the penalties under existing federal and state laws for comparable conduct;
- A summary of the impact on the federal budget and federal resources, including the judiciary, of enforcing the new

offense and penalties to the degree required to solve the problem that the new criminalization purports to address;

- A review of the resources that federal public defenders have available and need in order to adequately defend indigent defendants charged under the new law; and
- An explanation of how the *mens rea* requirement of each criminal offense should be interpreted and applied to each element of the offense.

Congress should also collect information on criminalization reported by the executive branch of the federal government. This information should be compiled and reported annually and, at minimum, should include:

- All new criminal offenses and penalties that federal agencies have added to federal regulations and an enumeration of the specific statutory authority supporting these regulations; and
- For each referral that a federal agency makes to the Justice Department for possible criminal prosecution, the provision of the United States Code and each federal regulation on which the referral is based, the number of counts alleged or ultimately charged under each statutory and regulatory provision, and the ultimate disposition of each count.

Congress should always be required to determine the true cost of new criminal offenses prior to enactment. The United States is already saddled with in excess of 4,450 federal statutory criminal offenses, tens of thousands of regulatory criminal offenses, an overworked federal judiciary with an ever-growing case load, and a crowded and expensive prison system. The federal government's failure to assess and justify the full costs of any new or modified criminal offenses or penalties is irresponsible.

This reform proposal would require Congress to deliberate over and provide factual and constitutional justification for every expansion of the federal criminal law. In the 109th Congress alone, federal legislators introduced over 200 bills proposing new or expanded non-violent criminal offenses, and that number does not include the bills proposing new or expanded criminalization concerning violence, firearms, drugs, pornography, or immigration violations. Many offenses in these bills would have created new federal crimes, duplicated existing federal criminal statutes, or provided redundant penalties for crimes already punished under state law. As it stands today, there is no comprehensive process for Congress to determine whether these new offenses are necessary and appropriate. A strong reporting requirement reform would compel Congress to address such matters.

E. Focus on Clear and Careful Draftsmanship

One overarching reform recommendation is a slower, more focused, and deliberative approach to the creation and modification of federal criminal offenses. When drafting legislation, Members of Congress should always:

One overarching reform recommendation is a slower, more focused, and deliberative approach to the creation and modification of federal criminal offenses.

- Include an adequate *mens rea* requirement;
- Define both the *actus reus* (guilty act) and the *mens rea* (guilty mind) of the offense in specific and unambiguous terms;
- Provide a clear statement of whether the *mens rea* requirement applies to all the elements of the offense or, if not, of which *mens rea* terms apply to which elements of the offense; and
- Avoid delegating criminal lawmaking authority to regulators.

Criminal offenses frequently fail to define the *actus reus* in a clear and understandable manner and often include an *actus reus* that is broad,

overreaching, or vague. Practically speaking, the magnitude of conduct proscribed by an overbroad *actus reus* can actually have a diminishing effect on the protection afforded by the *mens rea* provision. When a criminal offense does not have clearly defined boundaries, the risk of unjust criminal punishment increases. For this reason, legislative drafters must make every reasonable effort to craft a clear and precise definition of each criminal offense and of the offense's boundaries, regardless of whether Congress is proposing new criminal offenses or simply amending existing ones.

The importance of sound legislative drafting cannot be overstated, for it is the drafting of a criminal offense that frequently determines whether a person acting without intent to violate the law will endure a life-altering prosecution and conviction, and lose his freedom.

Determining the proper *mens rea* requirement for a criminal offense requires great deliberation, precision, and clarity. Any Member of Congress proposing a new or modified federal criminal offense must carefully consider how the *mens rea* requirement will actually operate when applied to the specified *actus reus*. Legislative drafters should almost never rely merely on a standard *mens rea* term in the introductory language of a criminal offense. Instead, the criminal offenses that provide the best protection against unjust conviction are those that include specific intent provisions and provide sufficient clarity and detail to ensure that the precise mental state required for each and every act and circumstance in the criminal offense is readily ascertainable.

The importance of sound legislative drafting cannot be overstated, for it is the drafting of a criminal offense that frequently determines whether a person acting without intent to violate the law and lacking knowledge that his conduct was unlawful or sufficiently wrongful to put him on notice of possible criminal liability will endure a life-altering prosecution and conviction, and lose his freedom. Members of Congress drafting criminal legislation must resist the temptation to bypass this arduous task by handing it off to unelected regulators. The United States Constitution places the power to define criminal responsibility and penalties in the hands of the legislative branch. Therefore, it is the responsibility of that branch to ensure that no one is criminally punished if Congress itself did not devote the time and resources necessary to clearly and precisely articulate the law giving rise to that punishment.

These five reforms would help ensure that every proposed criminal offense receives the attention due when Congress is determining how to focus the greatest power government routinely uses against its own citizens.[102] Coupled with increased public awareness and scrutiny of the criminal offenses Congress enacts, these reforms would strengthen the protections against unjust conviction and prevent the dangerous proliferation of federal criminal law. With their most basic liberties at stake, Americans are entitled to expect no less.

I. The *Mens Rea* Analysis

A. The Studied Offenses Defined

The best way to define the offenses included in this study is by listing the types of offenses that were *not* included. The offenses in this study are not primarily directed at conduct involving firearms, illicit drugs or other controlled substances, pornography, immigration violations, or what is typically referred to as violent or street crime (murder, rape, robbery, arson, larceny, assault, battery, vandalism, carjacking, etc.). The relatively few included offenses that actually involve physical damage to property, bodily injury, or death are not intentional crimes of the sort that have historically been charged as a crime. They are more akin to the injuries for which a person or organization could be sued because their negligence caused personal injuries or damage to property, the remedy for which would be a monetary award in a civil suit. In the cases of a few offenses that are included in this study that involve intentional injury or damage, the definition of the prohibited conduct requires the intent or objective of the property damage or bodily injury to be something other than the damage or injury itself.[103] Similarly, while this study generally does not include immigration offenses, it does include some offenses that are often associated with immigration violations, such as identity theft, false statements, and certain employment practices.

The authors and their research teams used reasonable efforts to review every bill introduced in the 109th Congress that created or modified any criminal offense and then excluded those offenses that did not fit the study's selection criteria. Omissions and oversights are possible, but with very few exceptions,[104] no offenses that fit this study's parameters were intentionally excluded. In all instances, the authors and their researchers attempted to use the latest publicly available version of the bill, regardless of whether it was enacted into law or at what stage of the legislative process it came to rest in its originating chamber when the 109th Congress ended on January 3, 2007.

B. Counting the Studied Offenses

The term "offense," as used in this study, is defined in a specific manner that requires some elaboration. Unlike other studies that identify and count "crimes" or "offenses" based solely on the covered conduct and the statute's structure, this study also accounts for the *mens rea* requirements in the statutory language when determining what constitutes an "offense" for counting purposes. This method is consistent with the study's main purpose, which is to examine the independent protectiveness of each offense's *mens rea* requirement.

A criminal provision that includes only one mental state requirement applied to only one course of conduct is counted as one "offense." However, where a criminal provision includes more than one course of conduct, the number of offenses within that provision is determined by analyzing the application of the mental state requirement to each course of conduct. Thus, where the application of the mental state requirement to two different courses of conduct is analytically distinct, each course of conduct counts as

a separate offense. Similarly, multiple subsections of the same criminal provision are counted as separate offenses if the application of the mental state requirement to the conduct proscribed by the subsections is analytically distinct. As the term "offense" is used throughout this report, it takes on the definition specific to this method of counting offenses.[105] Comparisons with any other study's results should take into consideration the differences in counting methods and the definition of the term "offense."

C. Offense Interpretation

This study's primary focus is the independent protectiveness of each offense's *mens rea* requirement. In other words, the focus of the analysis was on the likelihood that the government could charge, prosecute, and convict individuals who acted without intent to violate a law and lacked the knowledge that their conduct was unlawful or sufficiently wrongful to put them on notice of possible criminal responsibility. When assessing each offense, the study does not rely on the ideal use of prosecutorial discretion, the existence of which some rely on to defend laws that are vague or overbroad or lack meaningful *mens rea* requirements. The idea that prosecutors will protect innocent individuals from unjust prosecution and punishment under such laws has not always proven true, and even if it were true in 99 percent of cases, few would take comfort in knowing that laws sanction the conviction, in some cases, of those who are not culpable. Therefore, this analysis does not take into account how an ideal prosecutor would, or would not, charge an offense and does not assume that prosecutorial discretion will protect potential defendants from unjust conviction. This is consistent with the purpose of the study, which is to assess the protections provided by the *mens rea* requirements themselves.

In addition to plain language analysis, this study is guided by relatively recent Supreme Court decisions that define or interpret common *mens rea* terms used in federal statutes. Federal law does not include standard, well-defined *mens rea* terms, such as those included in state criminal codes based on the American Law Institute's Model Penal Code (MPC). The use of *mens rea* terms in federal criminal law is haphazard, and almost all of the terms have been subjected to a wide variety of (sometimes inconsistent) judicial interpretations.[106] Recent Supreme Court opinions have provided guidance on the interpretation of the terms "willfully" and "knowingly" when used as a blanket or introductory *mens rea* term.[107]

To the extent possible, this study is also guided by the Supreme Court's *Flores-Figueroa* decision, as amplified upon and qualified by Justice Alito's concurring opinion, on the scope of the introductory *mens rea* term ("knowingly") in the federal aggravated identity theft statute.[108] Specifically, where an offense includes a blanket or introductory *mens rea* term (usually "knowingly," "willfully," or both) and the operative language of the offense follows directly and immediately after this term, this study's analysis generally applies the *mens rea* term to each non-jurisdictional element[109] of the offense unless the statute's grammar, context, or structure raises significant uncertainty about this approach. With regard to those offenses where the application of the *mens rea* requirement is not entirely clear, or where the courts are likely to reach differing conclusions, the authors have chosen not to apply the *mens rea* requirement to those elements. Again, this is consistent with the purpose of the study: to determine the actual protection afforded by the *mens rea* requirement standing alone, and not to rely on the additional protections that might be afforded to defendants through an exemplary exercise of prosecutorial discretion or through a particular court's interpretation of a debatable provision of law. Further, this is consistent with the principle that the protectiveness of the *mens rea* requirement in each offense should be analyzed individually according to its unique terminology, grammar, and structure.

Finally, this study does not consider how an ideal court would rule on a motion to dismiss or whether the court would, for example, apply the common-law rule of lenity, or some other doctrine, to aid a

particular defendant.[110] Again, consistent with the purpose of this study, the focus is not on whether a court *might* or *could* protect potential defendants from unjust conviction, but on the protections afforded by the *mens rea* requirements themselves, independent of such considerations.

D. Categorizing the Offenses

1. The Four *Mens Rea* Categories

Each of the offenses included in this study was assigned one of four grades describing the protection provided by the offense's *mens rea* requirement.

a. Inadequate *Mens Rea* Requirements: "None" and "Weak"

- **None:** Nothing in the language of the offense prevents conviction of an individual who
  - Did not intend to violate a law, and
  - Did not have knowledge that his conduct was unlawful or sufficiently wrongful to put him on notice of possible exposure to criminal responsibility.

  The None category includes offenses that omit any *mens rea* requirement, which are usually strict liability offenses, and those offenses that rely on tort-law terminology, such as "should have known," "reasonably should have known," or "negligently," rather than the criminal law's traditional *mens rea* terminology.

- **Weak:** The language of the offense is reasonably likely to prevent the conviction of at least some individuals who
  - Did not intend to violate a law, and
  - Did not have knowledge that their conduct was unlawful or sufficiently wrongful to put them on notice of possible exposure to criminal responsibility.

  At the same time, the language of an offense characterized as Weak could, without being misinterpreted, allow the conviction of a sizable number of these individuals.

  The Weak category includes most offenses that use the terms "knowingly" or "intentionally" in a blanket manner or as part of the introductory language of the offense, without any additional *mens rea* terminology.

  In light of these definitions of None and Weak, this study considers the *mens rea* requirements of offenses falling into either of these two categories to be inadequate.

b. Adequate *Mens Rea* Requirements: "Moderate" and "Strong"

- **Moderate:** The language of the offense is more likely than not to prevent the conviction of an individual who
  - Did not intend to violate a law, and
  - Did not have knowledge that his conduct was unlawful or sufficiently wrongful to put him on notice of possible exposure to criminal responsibility.

Nonetheless, some of these individuals could be convicted of an offense graded as Moderate without engaging in substantial misinterpretation of its language because of inconsistent judicial interpretation and application of the *mens rea* terms it uses.

The Moderate category includes most offenses that use the terms "willfully" or "knowingly and willfully" (or "willfully and knowingly") in a blanket manner as part of their introductory language, without any additional *mens rea* terminology. It also includes some offenses that apply a variation of the phrase "with knowledge" to conduct involving making or using false statements or writings.

- **Strong:** The language of the offense, absent substantial misinterpretation, is highly unlikely to permit the conviction of an individual who
  - Did not intend to violate a law, and
  - Did not have knowledge that his conduct was unlawful or sufficiently wrongful to put him on notice of possible exposure to criminal responsibility.

  This category includes, for example, offenses that use some combination of the *mens rea* terms "knowingly" and "willfully" with a specific intent to violate the law or to act in a manner that the average person knows to be inherently wrongful or in violation of the law.

  Although the *mens rea* requirements of offenses categorized as Moderate (and especially those categorized as Weak-to-Moderate yet tallied as Moderate) are not ideal and would allow for criminal conviction and punishment of some inculpable persons, this study considers the *mens rea* requirements of offenses falling into both the Strong and Moderate categories to be adequate.

The preceding definitions state the basic guidelines for grading the studied offenses, but this study analyzed each offense's *mens rea* requirement individually and within the context of the rest of the offense's structure and language. As part of the analysis and in addition to being assigned a grade, important parts of the individual assessment were recorded in the tables included in this report's online appendix. These tables include a basic explanation of the strengths and weaknesses of each offense's *mens rea* requirement and a discussion of any offense-specific or other unusual considerations that affected an offense's grade.

2. Tabulating Intermediate *Mens Rea* Grades

In some instances, an offense could not be placed squarely into one of the four *mens rea* categories. Where the authors agreed that the protectiveness of an offense's *mens rea* requirement fell between two categories, it was given an intermediate grade, such as None-to-Weak. Offenses receiving one of these intermediate grades are indicated as such in the online appendix to this report. However, in order to give the benefit of the doubt to congressional drafting, these offenses were assigned the higher, more protective grade for this report's other analyses. For example, an offense graded as Weak-to-Moderate in the online appendix is tabulated simply as Moderate for the purposes of this study's data reporting and statistical analyses.

E. Congressional Actions

In addition to grading each offense's *mens rea* requirement, the study also determined whether any of seven major congressional actions were taken on each bill that contained a studied offense. Of these

seven actions, three concern chamber-wide activities: (1) whether a bill was referred to the House or Senate Judiciary Committee; (2) whether a bill was passed by either the House or Senate; and (3) whether a bill was ultimately enacted into law. If the bill was referred to a House or Senate Judiciary Committee, the study tracked whether the committee (or one of its subcommittees, as possible) held a hearing on the bill, amended the bill, marked up the bill, or reported the bill for consideration by the full chamber.

F. Statistical Analysis of Possible Correlations Between Congressional Actions and Protectiveness of *Mens Rea* Requirements

The Heritage Foundation's Center for Data Analysis conducted several types of statistical calculations to identify where the legislative process might be improving or undermining the *mens rea* requirements of non-violent criminal offenses. The statistical calculations looked for correlations between the protectiveness of *mens rea* requirements and the cataloged actions—specifically, whether the bill was enacted, passed by a chamber, referred to a judiciary committee, or subjected to other major actions by a judiciary committee. The results of CDA's calculations are included in the online appendix.

Endnotes

1. This report and the underlying study on which it is based use the terms *mens rea* and "guilty mind." Neither finds its perfect synonym in the term "criminal intent," which is employed in the report's title solely for its wider usage in the media and public discourse.

2. This report uses the term "non-violent offenses" as a shorthand for these offenses. Whereas all the offenses included in this study are non-violent, many other offenses proposed by the 109th Congress could also be described as non-violent. Specifically, this study did not include offenses that involve firearms, drugs and drug trafficking, pornography, and immigration violations. This report's use of the term "non-violent offenses" is merely a shorthand description and is not intended as a statement that the excluded offenses are necessarily violent in nature.

3. As explained more fully later in the report, this study considered a criminal offense's *mens rea* requirement to be adequate if the language of the offense itself provides sufficient protection from criminal punishment to individuals who act without intent to violate a law and without knowledge that their conduct was unlawful or sufficiently wrongful to put them on notice of possible criminal liability. *See* Methodological Appendix, *infra*.

4. Sequential referral is the practice of sending a bill to multiple congressional committees in an ordered sequence. The first committee in the ordered sequence has exclusive control over the bill until it either reports the bill out or its time for consideration expires, at which point the bill moves on to the second committee in the same manner.

5. *See, e.g.*, John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation L. Memo. No. 26, June 16, 2008, at 1 (finding that from 2000 through 2007 Congress enacted an average of 56.5 crimes a year).

6. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952).

7. Bouie v. City of Columbia, 378 U.S. 347, 351 (1964) (internal quotation marks omitted) (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)).

8. *Id.* at 350.

9. Morissette v. United States, 342 U.S. 246, 251–52 (1952).

10. *See* Rollin M. Perkins, *A Rationale of* Mens Rea, 52 Harv. L. Rev. 905, 908 (1939).

11. *See* Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 Hastings L.J. 815, 821–46 (1980) (discussing, *inter alia*, the development in the 13th century English courts of the legal doctrine that a criminal defendant could be convicted only upon proof that he acted with a guilty mind).

12. Dennis v. United States, 341 U.S. 494, 500 (1951).

13. *Morissette*, 342 U.S. at 251.

14. As described later in the report, the President of the United States and others in the executive branch play a substantial role in the proliferation of criminal offenses with inadequate *mens rea* requirements.

15. Where the prohibition of certain conduct is justified, civil rather than criminal enforcement is often the most effective method for regulating and punishing that conduct. Civil enforcement does not inflict the stigma of criminal punishment on inadvertent violators and those who are insufficiently blameworthy, and it still effectuates deterrence, retribution, and rehabilitation through the use of fines and other penalties. *See* Marie Gryphon, *It's a Crime?: Flaws in Federal Statutes That Punish Standard Business Practice*, Manhattan Inst. Civil Justice Report No. 12, at 10 (Nov. 2009).

16. 1 J. Austin, Lectures on Jurisprudence, 497 (Robert Campbell ed., Gaunt, Inc. 4th ed. 1976) (1879); *see also* 4 William Blackstone, Commentaries 27 (William S. Hein & Co. 1992) (1769) ("[E]very person of discretion…is bound and presumed to know [the law].").

17. Joshua Dressler, Understanding Criminal Law 166 (3d ed. 2001) (emphasis added, internal citation omitted).

18. *See generally* Baker, *supra* note 5; Criminal Justice Section, American Bar Association, The Federalization of Criminal Law (1998) [hereinafter *Federalization of Criminal Law*].

19. Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 713–14 (2005).

20. 18 U.S.C. § 1112 (2008).

21. *See* Black's Law Dictionary 957 (6th ed. 1991) (defining "malice aforethought" as an "intent, at the time of a killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life").

22. 18 U.S.C. § 1111(a) (2008).

23. *Id.*

24. In his dissent from denial of certiorari in *Sorich v. United States*, Justice Antonin Scalia noted that one federal court of appeals "confidently proclaimed" that the vague, overbroad federal honest services fraud statute, 18 U.S.C. § 1346, is "'not violated by every breach of contract, breach of duty, conflict of interest, or misstatement made in the course of dealing.'" 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari) (quoting United States v. Welch, 327 F.3d 1081, 1107 (10th Cir. 2003)). In expressing his skepticism about the appeals court's proclamation, Justice Scalia argued that such an overbroad law could be unjustly applied to make virtually any unseemly conduct a crime:

> Without some coherent limiting principle to define what "the intangible right of honest services" is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.

Id.; *see also* 2 St. Thomas Aquinas, Summa Theologica pt. I-II, q. 96, art. 2, at 1018 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1948) ("[H]uman laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and such like.").

25. Lanzetta v. New Jersey, 306 U.S. 457, 453 (1939).

26. *See generally* Baker, *supra* note 5; *Federalization of Criminal Law*, *supra* note 18.

27. *See* Rachel Brand, *Making It a Federal Case: An Inside View of the Pressures to Federalize Crime*, Heritage Found. L. Memo. No. 30, Aug. 29, 2008, at 2–4 (describing political, media, and public pressure to fashion new federal criminal laws or increase federal law enforcement authority in response to problems that garner nationwide attention).

28. *See Federalization of Criminal Law*, *supra* note 18, at 2.

29. *See generally* Baker, *supra* note 5; *Federalization of Criminal Law*, *supra* note 18; Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 Buff. Crim. L. Rev. 46 (1998); Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 Crim. L. Forum 99 (1989).

30. "While a figure of 'approximately 3,000 federal crimes' is frequently cited, that helpful estimate is now surely outdated by the large number of new federal crimes enacted in the 16…or so years intervening since its estimation. The present number of federal crimes is unquestionably larger." *Federalization of Criminal Law*, *supra* note 18, at 94.

31. *Id.* at 7–8.

32. *Id.* at 93.

33. *Id.* at 10.

34. *Id.* at 10 n.13.

35. The Baker study used a methodology based closely on that used by the Justice Department, which was the basis of the ABA Report's 3,000 federal crimes estimate. Baker, *supra* note 5, at 5.

36. *Id.* at 1–2.

37. *Id.* at 2.

38. *See id.* (finding that from 2000 through 2007 Congress created an average of 56.5 entirely new crimes a year).

39. Morissette v. United States, 342 U.S. 246, 251 (1952).

40. *See, e.g.*, 18 U.S.C. § 707 (providing a criminal penalty of up to six months imprisonment for making unauthorized use of the logo of the 4-H Clubs).

41. 18 U.S.C. §§ 1341, 1343 (2008).

42. *See* Black v. United States, 530 F.3d 596 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2379 (U.S. 2009); Weyhrauch v. United States, 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (U.S. 2009); Skilling v. United States, 554 F.3d 529 (5th Cir. 2009), *cert. granted*, 130 S. Ct. 393 (U.S. 2009); *see also* Brief of the National Association of Criminal Defense Lawyers as *Amici Curiae* in Support of Petitioner, Skilling v. United States, No. 08-1394 (U.S. Dec. 18, 2009); Brief of the National Association of Criminal Defense Lawyers as *Amici Curiae* in Support of Petitioner, Weyhrauch v. United States, No. 08-1196 (U.S. Sep. 21, 2009); Brief of the National Association of Criminal Defense Lawyers and New York Council of Defense Lawyers as *Amici Curiae* in Support of Petitioners, Black v. United States, No. 08-876 (U.S. Aug. 6, 2009).

43. S. 2509, 109th Cong. § 1713(b) (2006).

44. *Id*.

45. *See* 18 U.S.C. § 1033(f)(1) ("[T]he term 'business of insurance' means (A) the writing of insurance, or (B) the reinsuring of risks, by an insurer, including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons[.]").

46. Flores-Figueroa v. United States, 129 S. Ct. 1886 (2009).

47. 18 U.S.C. § 1028A(a)(1).

48. *Flores-Figueroa*, 129 S. Ct. at 1888.

49. *Id*. at 1894.

50. *Id*. at 1890.

51. *Id*. at 1891.

52. *Id*. at 1895 (Alito, J., concurring).

53. *Id*. at 1895–96. As Justice Alito explained:

> For example, 18 U.S.C. § 2423(a) makes it unlawful to "knowingly transpor[t] an individual who has not attained the age of 18 years in interstate or foreign commerce…with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." The Courts of Appeals have uniformly held that a defendant need not know the victim's age to be guilty under this statute…. Similarly, 8 U.S.C. § 1327 makes it unlawful to "knowingly ai[d] or assis[t] any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony)…to enter the United States." The Courts of Appeals have held that the term "knowingly" in this context does not require the defendant to know that the alien had been convicted of an aggravated felony.

Flores-Figueroa, 129 S. Ct. at 1895–96 (alterations in original, internal citations omitted).

54. *Id*. at 1896.

55. *Id*. at 1891 (majority opinion).

56. For example, one provision in the federal Lacey Act states that any person who "knowingly imports or exports any fish or wildlife or plants in violation of any provision of this chapter" shall be criminally punished. *See* 16 U.S.C. § 3373(d)(1)(A). Another provision of the Lacey Act incorporates every wildlife rule or offense present in "any law, treaty, or regulation of the United States or…any Indian tribal law." 16 U.S.C. § 3372(a)(1).

57. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991); *see also* Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, Competitive Enter. Inst. 13 (2007), *available at* http://cei.org/pdf/6018.pdf ("Since 1980, the CFR [Code of Federal Regulations] has grown from 102,195 pages to 144,040. By contrast, in 1960, there were only 22,877 pages.").

58. H.R. 3968, 109th Cong. § 506(g)(2) (2005).

59. 16 U.S.C. § 3371 *et seq*.

60. *See, e.g.*, Marie Gryphon, *It's a Crime?: Flaws in Federal Statutes That Punish Standard Business Practice*, Manhattan Institute Civil Justice Report No. 12, at 2–6 (Nov. 2009) (explaining how missing or inadequate *mens rea* requirements in federal criminal law undermine the principle that to be punished criminally a person must be truly blameworthy); Harvey A. Silverglate, *Federal Criminal Law: Punishing Benign Intentions—A Betrayal of Professor Hart's Admonition to Prosecute Only the Blameworthy*, *in* In the Name of Justice 65 (Timothy Lynch ed., 2009). Silverglate's essay in response to Professor Henry Hart's classic article on *The Aims of the Criminal Law*, 410 Law & Contemp. Probs. 25 (1958), briefly reviews the path that federal criminal law has followed since a few U.S. Supreme Court precedents undermined common-law protections requiring criminal punishment to be based on actual blameworthiness. *Id.* at 66–73. Silverglate's essay also reviews several federal criminal prosecutions that were based on vague, overbroad criminal offenses lacking adequate *mens rea* requirements and similar protections necessary to protect defendants who are not truly blameworthy. *Id.* at 73–94. The development of criminal law in the 50 states has generally followed a different path. Silverglate points out that "efforts to codify state criminal codes in the 1950s and 1960s were intended to modernize and organize—not to reject—ancient common law concepts, firmly establishing their place in the statute books." *Id.* at 67. When considering *mens rea* and related concepts, "the crafters of the new state criminal statutes were attuned to the need to keep the law linked to the moral notions of blameworthiness that underpinned the common law of crimes." *Id.*

61. The rule of lenity is a judicial doctrine used to construe ambiguous criminal laws. *See* United States v. Santos, 128 S. Ct. 2020, 2025 (2008). In such cases, the rule requires the court to resolve the ambiguity in the defendant's favor. *See id.*

62. These numbers include only bills, not resolutions.

63. H.R. 3192, 109th Cong. § 107(1) (2005).

64. S. 3506, 109th Cong. § 2(c) (2006).

65. As amended by the Stolen Valor Act of 2005, Pub. L. No. 109-437, § 3, 120 Stat. 3266 (2006) (hereinafter *Stolen Valor Act*) (S. 1998, 109th Cong.), 18 U.S.C. § 704(a) now reads: "Whoever knowingly wears, purchases, attempts to purchase, solicits for purchase, mails, ships, imports, exports, produces blank certificates of receipt for, manufactures, sells, attempts to sell, advertises for sale, trades, barters, or exchanges for anything of value any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration or medal, or any colorable imitation thereof, except when authorized under regulations made pursuant to law, shall be fined under this title or imprisoned not more than six months, or both."

66. *Stolen Valor Act*, *supra* note 65 § 1.

67. *See* Orders and Medals Society of America, *OMSA President's Message, March-April 2007*, http://www.omsa.org/forums/president.php ("Although the intent of the [l]aw was to restrict and provide severe consequences to those individuals who fraudulently claimed that they were recipients of the Medal of Honor, Distinguished Service Cross, Navy Cross, Air Force Cross, Silver Star and Purple Heart, the actual wording left much to be desired. In fact the law appears to restrict all commerce in the above decorations and[,] depending on how it is interpreted[,] possibly all U.S. Federal awards.").

68. Dixon v. United States, 126 S. Ct. 2437, 2441 (2006) (quoting Bryan v. United States, 524 U.S. 184, 193 (1998)).

69. 524 U.S. at 192. In some federal circuits, any *mens rea* requirement based on knowledge (e.g., "knowingly," "knowing," or "knew") is likely to draw a government request for a jury instruction on willful blindness. *See, e.g.*, United States v. Jewell, 532 F.2d 697, 700–04 (9th Cir. 1976) (en banc) (holding that a jury may convict under a "knowingly" standard if it finds the evidence satisfies a liberal formulation of the "willful blindness" or "deliberate ignorance" doctrine). Any "willful blindness" instruction that follows, for instance, the *Jewel* line of cases is likely to be inferior to and less protective than the formulation of the doctrine in the American Law Institute's Model Penal Code. *See* Model Penal Code § 2.02(7) (2009) ("Requirement of Knowledge Satisfied by Knowledge of High Probability.").

70. H.R. 3968, 109th Cong. § 506(g)(2) (2005).

71. *Bryan*, 524 U.S. at 192.

72. H.R. 3968, 109th Cong. § 506(g)(2).

73. *Id.*

74. *See* Dixon v. United States, 548 U.S. 1, 6–7 (2006) ("[U]nless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." (internal quotation marks omitted)); Bryan v. United States, 524 U.S. 184, 192 (1998) ("[T]he term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law. As Justice Jackson correctly observed, 'the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.'" (quoting Boyce Motor Lines v. United States, 342 U.S. 337, 345 (1952) (Jackson, J., dissenting))).

75. H.R. 4148, 109th Cong. § 2(a) (2005).

76. Although this report's analysis focuses on the *mens rea* requirement of the criminal provision, and not the *actus reus*, it should be taken into consideration when assessing the strength of the offense's *mens rea* provision that the conduct constituting this particular offense is quite broad, vague, and far-reaching. When considering the practical application of such an offense, the conduct proscribed by an overbroad *actus reus* can undermine the protection afforded by the *mens rea* provision.

77. As the U.S. Supreme Court noted in *Bryan v. United States*, the "word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears. Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. As we [have] explained…, a variety of phrases have been used to describe that concept." 524 U.S. 184, 191 (1998) (internal citations omitted). Further, "[t]he word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by careless disregard whether or not one has the right so to act." *Id.* at 191 n.12 (internal citations omitted); *see also id.* at 191–92 ("As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.'"). However, the Court has held that in "certain cases involving willful violations of the tax laws…the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating." *Id.* at 194 (citing Cheek v. United States, 498 U.S. 192, 201 (1991)). In *Ratzlaf v. United States*, 510 U.S. 135 (1994), for example, the Court concluded that "in order to satisfy a willful violation…the jury had to find that the defendant knew that his structuring of cash transactions to avoid a reporting requirement was unlawful." *Bryan*, 524 U.S. at 194. The Court reasoned that "[b]oth the tax cases and *Ratzlaf* involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct." *Id.* at 194 (citing *Ratzlaf*, 510 U.S. at 149). For purposes of analysis, this report relies on the Supreme Court's discussion of the term "willfully" in *Bryan*, in particular, the Court's statements defining "willfully" to require a "culpable state of mind," an act "undertaken with a 'bad purpose,'" or both. Unless the context dictates otherwise, the analysis does not interpret "willfully" as requiring a defendant's specific knowledge of the law or his intent to violate a specific provision of law. This approach steers a course somewhere near the middle of the way through the varied definitions and usages of "willfully" in a significant body of Supreme Court case law.

78. H.R. 4572, 109th Cong. § 5 (2005).

79. H.R. 5188, 109th Cong. § 2(a) (2006).

80. S. 414, 109th Cong. § 303 (2005).

81. U.S. Senate Committee on the Judiciary, http://judiciary.senate.gov/about/ (last visited Feb. 4, 2010). For similar information about the House Judiciary Committee, see http://judiciary.house.gov.

82. U.S. Senate Rule XXV, *available at* http://rules.senate.gov/public/index.cfm?FuseAction=HowCongressWorks.RulesOfSenate.

83. The authors did not overlook the possibility that greater judiciary committee oversight might correlate with *less* protective *mens rea* requirements. Federal law enforcement agencies, including the U.S. Department of Justice, routinely provide some of their employees the opportunity to serve "on detail" as staff to Members of Congress and congressional committees. Anecdotal reports indicate that a substantial percentage of these detailees work for the House and Senate Judiciary Committees and for Members of Congress who serve on those committees and that detailees not infrequently become permanent members of congressional staff. While they serve as congressional staff, law enforcement detailees remain employees of their respective law enforcement agencies. The possibility has been recognized that detailees could exert an institutional bias on the legislative process in favor of broader, harsher criminal offenses under which it is easier to secure a conviction.

84. Future studies might consider whether any of the following factors correlates with the strength of *mens rea* requirements in non-violent offenses: the identity of each bill's primary sponsor or sponsors, the length of sponsors' tenure in Congress, and the length of sponsors' tenure (if any) as a member of a judiciary committee.

85. The term "the offense" is in quotation marks in the text because statutes directing regulatory criminalization are not proper criminal offenses. Such statutes do not define the entire *actus reus*, and they usually do not define the entire *mens rea* requirement or provide the specificity and definiteness of language needed to direct how any *mens rea* requirement should be applied to the elements of the offense as ultimately defined by regulatory action.

86. *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. (2009) [hereinafter *House Hearing*] (written statement of former U.S. Att'y Gen. Dick Thornburgh, July 22, 2009, at 9), *available at* http://judiciary.house.gov/hearings/pdf/Thornburgh090722.pdf, 2009 WL 2186682 ("Congress needs to rein in the continuing proliferation of criminal regulatory offenses. Regulatory agencies routinely promulgate rules that impose criminal penalties that are not enacted by Congress…. Congress should not delegate such an important function to agencies."); *see also id.* (recommending reform similar to that proposed by the Congressional Responsibility Act, H.R. 931, 109th Cong. (2005), which "sought to ensure that Federal regulations would not take effect unless passed by a majority of the members of the Senate and House and signed by the President").

87. Columbia law professor John Coffee has reported estimates that up to 300,000 federal regulations can be punished criminally. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991).

88. Since the beginning of 2007, the Heritage Foundation has been using the Legislative Update system that it developed in conjunction with the National Association of Criminal Defense Lawyers to monitor and perform basic analysis of every criminal offense introduced in Congress that meets the same criteria as the offenses that are the subject of this study. The Legislative Update is publicly available on Heritage's Overcriminalized.com Web site. *See* Overcriminalized.com, http://overcriminalized.com/Legislation.aspx. When Congress is in session, Heritage's weekly Legislative Update Alert provides email subscribers status updates and a brief summary of newly introduced and pending bills that would add non-violent criminal offenses to federal law or modify those already in law. The analysis conducted for the Legislative Update Alert strongly suggests that the data in this report on the number, type, and *mens rea* requirements of criminal offenses introduced and passed in the 109th Congress are generally consistent with the number, type, and *mens rea* requirements of criminal offenses introduced and passed in the 110th Congress.

89. *But see House Hearing*, *supra* note 86 (statement of Chairman Robert "Bobby" Scott), video *available at* http://judiciary.edgeboss.net/real/judiciary/crime/crime072309.smi (noting widespread concern over the deterioration in the standards for what constitutes a criminal offense, including "the disappearance of the common-law requirement of *mens rea*," and emphasizing that "*mens rea* has long played an important role in protecting those who do not intend to commit wrongful acts from prosecution and conviction"); *id.* (statement of Ranking Member Louie Gohmert) (noting that, in the "labyrinth" of criminal laws scattered throughout the U.S. Code and federal regulations, there is "a significant element missing from many of the criminal provisions: criminal intent" and explaining that the *mens rea* requirement is "a cornerstone of criminal law, and it is eroding as regulatory crimes are being prosecuted under reduced, or even non-existent, mental states").

90. Similarly, the Legislative Update system attempts to identify every amendment that contains relevant criminal provisions and to include such amendments in the weekly Legislative Update Alert emails. It is not unusual for this process to identify amendments with criminal provisions being added to bills approximately a week before the bill is passed, leaving too little time for adequate review of the criminal provision by Members and almost no time for the public to be apprised of the new criminalization before it is passed.

91. Baker, *supra* note 5, at 1, 5.

92. *See supra* notes 46–55 and accompanying text.

93. 18 U.S.C. § 1346 (2000).

94. *See supra* note 42 and accompanying text.

95. In doing so, some consideration should be given to the key provisions in the American Law Institute's Model Penal Code (MPC) that standardize how courts interpret criminal statutes that have no or unclear *mens rea* requirements.

See Model Penal Code § 2.02(1) (2009) ("Minimum Requirements of Culpability"); *id.* § 2.02(3) ("Culpability Required Unless Otherwise Provided"); *id.* § 2.02(4) ("Prescribed Culpability Requirement Applies to All Material Elements"). Although the general rule articulated in MPC subsection 2.02(3) is salutary insofar as it provides an express remedy for an omission of *mens rea* terminology, "recklessly" should not be used as a default term because it is insufficient to protect those actors who are not truly culpable or blameworthy. *See id.* § 2.02(3) ("When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly, or recklessly with respect thereto."). In order to avoid unjust convictions, it is strongly recommended that any default *mens rea* provision enacted into federal law rely on the *mens rea* terms that are most protective of persons who are not truly blameworthy.

96. *Id.* § 2.02(4) ("When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.").

97. *See, e.g.*, United States v. Santos, 128 S. Ct. 2020, 2025 (2008).

98. *Id.*

99. *See* Taylor v. Kentucky, 436 U.S. 478, 483–87 (1978) (explaining the presumption of innocence and the government's burden of demonstrating the defendant's guilt beyond a reasonable doubt); Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence…is a basic component of a fair trial under our system of criminal justice.").

100. In *United States v. Bass*, the Supreme Court referred to the rule of lenity as a "wise principle[] this court has long followed." 404 U.S. 336, 347 (1971). Quoting Justice Oliver Wendell Holmes, Jr., and Judge Henry Friendly, respectively, the Court further explained:

> This principle is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."… Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."

Id. at 348 (internal citations omitted); *see also* Bell v. United States, 349 U.S. 81, 83 (1955) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this is not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.").

101. Wayne R. LaFave, Criminal Law 11 (4th ed. 2003).

102. It would be of great benefit to the nation, and little would be lost, if Congress were to place a non-partisan, across-the-board moratorium on enacting new criminal offenses for at least one year and invest the legislative time and resources that are now being squandered on creating new criminal offenses into studying existing federal criminal offenses and rewriting the currently monstrous, disorganized, and incomprehensible body of federal criminal law. *Cf.* Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643, 643 (2006) (characterizing federal criminal law as "an 'incomprehensible,' random and incoherent, 'duplicative, ambiguous, incomplete, and organizationally nonsensical' mass of federal legislation that carries criminal penalties" (internal citations omitted)).

103. One example of such an offense is found in section 303 of the Voter Protection Act, S. 414, 109th Cong. (2005), which criminalizes damage to property if the offender intended thereby to prevent a person from voting in an election for national office. *See supra* note 80 and accompanying text.

104. The only known exceptions that fit this study's criteria are the bills in the 109th Congress criminalizing cloning and conduct related to cloning, which were removed because the authors were unable to reach agreement on the nature of these offenses' *mens rea* provisions.

105. The reader is referred to the online appendix to this report, available at http://report.heritage.org/sr0077 and www.nacdl.org/withoutintent. Each individual offense defined in this study has its own table in the Offenses Appendix in the Online Appendix.

106. *See, e.g.,* Dixon v. United States, 548 U.S. 1 (2006); Bryan v. United States, 524 U.S. 184 (1998); Ratzlaf v. United States, 510 U.S. 135 (1994).

107. *See, e.g.*, *Dixon*, 548 U.S. at 6–7; *Bryan*, 524 U.S. at 193; *Ratzlaf*, 510 U.S. at 141.

108. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1888 (2009) (holding that the *mens rea* term "knowingly" in the introductory language of the federal aggravated identity theft statute (18 U.S.C. § 1028A(a)(1)) applies to the phrase "of another person" located at the end of the offense's definition). For a more complete discussion of the Supreme Court's decision in *Flores-Figueroa*, see *supra* notes 46–55 and accompanying text.

109. Because the federal government is a body of limited, enumerated powers, a high percentage of the non-violent offenses in this study require (or purport to require) a nexus between the violative conduct and interstate commerce. The purpose of language requiring this nexus is to bring the conduct under the power granted to Congress under the Commerce Clause of the U.S. Constitution. Some offenses, for example, require the conduct to be "in or affecting interstate commerce," an extremely broad jurisdictional "hook," which ostensibly makes the prohibited conduct a matter of federal jurisdiction. Where a single *mens rea* term (usually "knowingly" or "willfully") is used as a blanket or introductory requirement at the beginning of the language defining the offense, this study generally does not assume that the federal courts will require the government to prove that the defendant knew that his conduct was, for example, "in or affecting interstate commerce" in order to secure a conviction.

110. The rule of lenity is a judicial doctrine used to construe ambiguous criminal laws. *See* United States v. Santos, 128 S. Ct. 2020, 2025 (2008). In such cases, the rule requires the court to resolve the ambiguity in the defendant's favor. For a discussion of the rule of lenity, see *supra* notes 97–101 and accompanying text.

Online Appendix available at:

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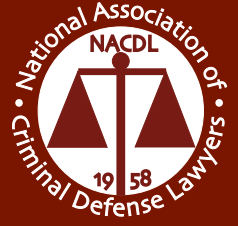
The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, D.C. 20002
(800) 546-2843
heritage.org



National Association of Criminal Defense Lawyers
1660 L Street, NW, 12th Floor
Washington, D.C. 20036
(202) 872-8600
nacdl.org