RIGHT ON CRIME

CONGRESS NEEDS TO MAKE UP ITS MIND: *MENS REA* REFORM AND WHY IT MATTERS

WRITTEN BY
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KEY POINTS

- **While the number of criminal laws** has grown, *mens rea* requirements have shrunk. This had led to overcriminalization and disparate outcomes.
- ***Mens rea* reforms** have enjoyed bipartisan success in the past and should again in the future.
- **Strengthening *mens rea*** is key to remedying the larger criminal justice issues of overcriminalization and abuse of prosecutorial discretion.

EXECUTIVE SUMMARY

Put in simple mathematical terms, *mens rea* + *actus reus* = crime. If a person has the intent to commit the crime (*mens rea*) and performs the act to follow through on that intent (*actus reus*), a judge or jury can have the reasonable belief that the crime has been committed. This formula is the backbone of the criminal justice system. However, in the modern era, the *mens rea* element has increasingly been abandoned, written in an unclear way, or underutilized. The flaw with eliminating or diminishing state of mind requirements is that Americans can be convicted and even imprisoned based solely on what they do, not whether they mean to do it.

The degradation of a critical element in criminal law will break down legitimacy in prosecutions, convictions, and even convict the innocent. To restore normalcy and preserve the criminal justice system, reforms should be made to improve the consistent use of the *mens rea* element in federal criminal law.

KEY POINTS

- While the federal criminal code and administrative regulations have ballooned in size, *mens rea* requirements in laws have shrunk, leading to overcriminalization and disparate application of the law.
- Congress should pass legislation to enact a default *mens rea* element to fill the gaps in the federal code when state of mind requirements are absent.
- Knowing that neither will be solved nor removed wholesale, lawmakers should review policies to strengthen *mens rea* elements to address broader policy issues of overcriminalization and abuse of prosecutorial discretion.

MENS REA: HISTORY AND DECLINE

Mens rea, commonly known as the "guilty mind," is the concept that a person must have the requisite intent to commit a crime. Broadly speaking, under our nation's criminal justice system, a person can be found guilty of a crime if two basic elements are met: he commits the act (*actus reus*) and he intends or has knowledge of committing the act (*mens rea*). This keynote feature of our criminal justice system is, at its core, quite simple. If a person's liberty and freedom are in jeopardy, the government must bear the burden of proving that the person meant to commit a crime. So straightforward yet critical is this cornerstone idea that "even a dog distinguishes between being stumbled over and being kicked" (Holmes, 2009).

Not only must *mens rea* exist in a statute, but it must be clear. When the government criminalizes something, it must do so with precision and clarity so that the average person can understand what is illegal. Without a clear intent requirement, a person does not know when they are crossing the line between legal and illegal conduct. This uncertainty can have large effects on criminal justice: it can tarnish the legitimacy of arrests, prosecutions, and convictions; it can lead to disparate sentences; and it can even incarcerate innocent individuals.

The ancient principle of *mens rea* "is as universal and persistent in mature systems of law as belief in freedom of the human will" (Jones et al., 2018; *Morrisette v. United States*, 1952). Yet, despite its universality and importance, criminal laws are increasingly passed without a state of mind element. For instance, it is a serious felony to possess an unregistered grenade and other "firearms" (26 U.S.C. § 5861(d)). Yet, no state of mind is required for a person convicted under this law to face up to 10 years in prison, a $10,000 fine, or both (26 U.S.C. § 5871). Similarly, Hobbs Act Robbery, codified in 18 U.S.C §1951(a), completely lacks a state of mind element. Under this law, a 20-year penalty can be triggered for committing robbery or extortion related to interstate commerce, but the government does not have to prove any intent (18 U.S.C. § 1951(a)).

Having a mental state requirement is critical, but, as seen above, it is sometimes altogether absent. Its absence is likely for a few reasons. First, there has been an explosion of criminal laws passed by Congress and promulgated by federal executive agencies. As of 2018, the U.S. Code encompassed 54 volumes and approximately 60,000 pages (U.S. Government Publishing Office, 2019). Over the last decade, Congress has adopted around 300 new laws each session (GovTrack, n.d.). Federal agencies have been busy, too. When the Federal Register began in 1936, it was 16 pages long. It now averages more than 70,000 new pages annually (The George Washington Regulatory Studies Center, 2024). Given this breadth, it should come as no surprise, then, that the average American reportedly commits three crimes a day (Crovitz, 2009). *Mens rea* elements should exist in every statute and should apply to every element. But given the breadth of acts that can and have been criminalized, "[i]t should be no surprise that as the volume increases, so do the number of imprecise laws" (*Sykes v. United States*, 2011).[1] And in turn, it is difficult for Congress to slow down or stop this momentum altogether (Smith, 2014). The result of reactive, political, and headline-grabbing legislating and rulemaking is the passage of laws that often lack clarity, particularly on one of the most important features of a criminal statute: the critical *mens rea* element.

Second, criminal penalties were historically imposed to only inherently immoral acts, such as murder, arson, or rape. Immorality, some could say, can largely mimic rules to protect public safety. However, nowadays, criminal penalties attach to a wide range of actions, many of which are not considered immoral and have no impact on public safety. Take, for example, 18 U.S.C. §336, which makes it a federal misdemeanor to write a check "for a less sum than $1." Or consider how a one-year penalty and monetary fine could apply if someone allows his "cattle,

1 Quote found in Justice Scalia's dissent.

horses, hogs, or other livestock" on federal land for the "purposes of destroying the grass or trees" (18 U.S.C. § 1857). While comical on one hand, these federal criminal laws are also concerning because they can make Americans felons for non-violent, innocuous behavior.

Third, *mens rea* elements may be absent from statutes and regulations because the drafters intended it. There are some offenses where the conduct (*actus reus*) alone constitutes a crime. These are known as strict liability offenses, but they are rare and largely disfavored.[2] But even if a *mens rea* element is absent, it does not mean that the crime is necessarily a strict liability offense. The United States Supreme Court ruled in *Morisette v. United States* that a jury can, in limited circumstances, infer a defendant's culpable state of mind without a mental state element being explicitly written (*Morrisette v. United States*, 1952). Under *Morisette*, judges have a measure of discretion to read a state of mind into the law where it is absent (*Morrisette v. United States*, 1952). So, even when Congress or agencies may intend to have no *mens rea* requirement, some judges may still infer a state of mind, absent language to the contrary.

Reasonable people can disagree about *what* should be a crime, but not that (generally speaking) *mens rea* + *actus reus* = crime. Reforms to improve the application and uniformity of *mens rea* are needed to ensure consistency, uniformity, and predictability in the criminal justice system. As U.S. Supreme Court Justice Neil Gorsuch has written, "when the number of crimes increases and the punishments they carry grow more severe, respect for criminal law as a whole decreases" (Gorsuch & Nitze, 2024). The massive growth of federal law has unfortunately had the opposite of its intended effect: it is not protecting Americans and making our nation better or safer. Instead, this "overextended use of the criminal process" has "creat[ed] cynicism and indifference to the whole criminal law" (Task Force on the Administration of Justice, 1967, p. 106). Such negative effects are exacerbated by the troubling lack of *mens rea* elements in federal law.

This paper examines the previous federal efforts to evaluate and improve *mens rea*, answers why such efforts are important to cure some of the ills of the criminal justice system and offers specific policy recommendations to effectuate meaningful change.

PREVIOUS EFFORTS TO IMPROVE *MENS REA*

Policies seeking to improve *mens rea* are not particularly new. In fact, it appears that the issue was first reviewed and considered at a federal level in 1971 (National Commission on the Reform of Federal Criminal Laws, 1971). The same takeaway rings true now as it did then: "[t]here is no pattern or rationale" for when *mens rea* is or is not present in a statute (National Commission on the Reform of Federal Criminal Laws, 1971, p. 29). So, to that end, in a nonpartisan report to Congress and the President, a National Commission on Reform of Federal Criminal Laws in 1971 proposed establishing a generally applicable culpability rule and definitions to remedy confusion over federal *mens rea* (National Commission on the Reform of Federal Criminal Laws, 1971).

Without further action, the baton was picked up more than 40 years later with the creation of a bipartisan congressional Task Force on Overcriminalization, which specialized in convening hearings, conducting oversight, and drafting legislation to address a slew of federal criminal law issues, chief among them being *mens rea* reform (House Judiciary Committee, 2013). Considerable bipartisan effort was poured into this task force, which, at the end of its tenure, conducted 10 hearings and issued a robust policy report replete with dozens of policy recommendations for Congress (House Judiciary Committee, n.d.; Scott, 2014).

2 *Staples v. United States*, 511 U.S. 600, 607 (1994); *see also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437- 38 (1978) ("[T]he limited circumstances in which Congress has created and this Court has recognized [strict liability] offenses . . . attest to their generally disfavored status."); *Morissette v. United States*, 342 U.S. 246, 251 (1952) (referencing "universal and persistent" notion that crime requires intention).

Although the task force eventually disbanded and reforms never came to fruition, interest in *mens rea* reform never truly disappeared. In fact, bills clarifying or strengthening *mens rea* have been a near-constant since 2006.[3] Legislation over the years has varied on specifics, but the bedrock principles have largely been the same: they have all sought to restore the foundational principle that no person should lose his liberty unless they commit a criminal act with a guilty mind.

Additionally, many of these reforms would codify a default *mens rea* element in all federal criminal laws. In particular, the *Mens Rea Reform Act*, as introduced in several congressional sessions, would establish the default *mens rea* requirement for federal criminal statutory and regulatory offenses that lack a state of mind requirement. Under these proposals, if the *mens rea* element is not specified for an element of the offense, it must be shown that the defendant acted willfully.[4]

United States Senator Orrin Hatch (UT) and Representative Jim Sensenbrenner (WI) have been the most consistent and vocal advocates for proposals to reform *mens rea*. But other prominent, bipartisan voices have weighed in over the years, too.[5] The ideological spectrum is well-represented on this issue, with supportive lawmakers ranging from Representative Sheila Jackson Lee to Senator Ted Cruz, and Representative John Conyers to Senator Chuck Grassley.

But, like every policy, there are detractors. Those opposed to the *Mens Rea Reform Act* and similar legislation have argued that default *mens rea* language is too broad of a fix and that piecemeal adjustments are preferential. Under the bill's text, default intent standards would apply only where there is a complete lack of *mens rea*. Many crimes do have *mens rea*, albeit there is significant room for improvement.[6] So, the solution proposed by the *Mens Rea Reform Act* is not nearly as vast as some may think. And even so, there is nothing preventing Congress or an agency from revisiting laws to specify the criminal intent standard. Short of default *mens rea* legislation, then, lawmakers could consider a proposal that the Department of Justice (DOJ) made in 2016 before the U.S. Senate Judiciary Committee: support work between the DOJ and lawmakers to identify laws that should be changed based on absent, inadequate, or confusing mental state language (Caldwell, 2016).

Other opponents of default *mens rea* policies argue that it would "provide cover" for corporate wrongdoing, particularly in the context of environmental laws and administrative rules (Johnson, 2015). However, many important environmental and public welfare statutes contain clear mental state language and would not be impacted by this bill. For example, criminal penalties attach to "knowing" and "negligent" violations of the Clean Water Act (42 U.S.C. § 7413(c)).

Lastly, some oppose default *mens rea* language because it is perceived as making a prosecutor's job more difficult. To be sure, absent some exceptions, the *Mens Rea Reform Act* would require the government to prove intent for all offenses, including even some terrorism or child sexual exploitation crimes

3 *See, e.g.*, H.R. 6523, 109th Cong., *Criminal Code Modernization and Simplification Act of 2006*; H.R. 4128, 110th Cong., *Criminal Code Modernization and Simplification Act of 2007*; H.R. 1772, 111th Cong., *Criminal Code Modernization and Simplification Act of 2008*; H.R. 1823, 112th Cong., *Criminal Code Modernization and Simplification Act of 2011*; H.R. 1860, 113th Cong., *Criminal Code Modernization and Simplification Act of 2013*; H.R. 4002, 114th Cong., *Criminal Code Improvement Act of 2015*; S. 2298, 114th Cong., *Mens Rea Reform Act of 2015*; S. 1902, 115th Cong., *Mens Rea Reform Act of 2017*; S. 3118, 115th Cong., *Mens Rea Reform Act of 2018*; S. 739, 117th Cong., *Mens Rea Reform Act of 2021*.

4 According to bill text, a person who acts "willfully" does so with the knowledge that the conduct is unlawful. *See, e.g.*, S. 739, Sect. 2(a), 117th Cong.

5 For example, the following bipartisan slate of lawmakers have cosponsored *mens rea* reform legislation in the past: Senators Chuck Grassley, Ted Cruz, David Perdue, Rand Paul, and Thom Tillis; and Representatives Bob Goodlatte, John Conyers, Raul Labrador, Sheila Jackson Lee, Doug Collins, Randy Forbes, Mike Bishop, and Louie Gohmert.

6 *See supra* page 4 (discussion on Hobbs Act Robbery).

(Carter, 2015). This concern can be valid, especially when considering morally abhorrent or violent crimes. But unclear, imprecise legislation is still a problem. In fact, as Senator Hatch retorted during a Senate Judiciary Committee hearing on *mens rea* reform, "What bothers me is the Department of Justice saying it will be harder to prosecute people. Good, it should be hard!" (U.S. Senate Committee on the Judiciary, 2016). To be sure, neither Senator Hatch nor proponents of *mens rea* reform want child sex predators, child sex abuse material peddlers, or the like to escape punishment; similarly, a prosecutor's job should not be impossible. However, picking and choosing which crimes should be *easy* to prosecute and which ones should be *difficult* to prosecute is antithetical to the maxim "equal justice under the law." Prosecutors are tasked with protecting communities and are held to the high burden of proving criminal conduct beyond a reasonable doubt. That standard and burden should apply always, not just sometimes. And these two goals—punishment for violent and reprehensible crimes, and clear laws—can and should coexist. *Mens rea* reforms support proportional punishment for bad actors and in no way limit Congress from clarifying that *no mens rea* may be appropriate in certain instances.

Beyond the halls of Congress, policies to improve *mens rea* have also garnered the attention and support of well-known conservative advocates and the criminal defense bar (Walsh & Joslyn, 2010). Of note, the bipartisan report by The Heritage Foundation and the National Association of Criminal Defense Lawyers (NACDL) ignited many policy considerations by Congress in the 2010s. This report was the result of a study of federal criminal legislation from the 109th Congress and found that almost 60% of the offenses considered by Congress contained inadequate *mens rea* requirements (U.S. Senate Committee on the Judiciary, 2016). An updated version of this report, reviewing legislation from the 114th Congress, found that "[o]f the 226 offenses analyzed, 17 House bills and 18 Senate bills included potentially strict liability crimes with no *mens rea* protection at all" (Roberts et al., 2021).

Mens Rea Reform and Overcriminalization

Mens rea-specific legislation has been an important part of the criminal justice reform conversation in large part because of the explosion of criminal laws in recent years. The Congressional Research Service (CRS), the DOJ, and the American Bar Association (ABA) have all tried and failed to count the federal criminal laws. The most recent accounting estimates that there are around 4,000 existing federal criminal laws, but even this massive number is dwarfed by incredibly high estimates that Americans are subjected to about 300,000 federal regulatory offenses. But nobody really knows how many criminal laws exist (Canaparo et. al, 2022).

There has been a dramatic expansion of substantive criminal laws, but as previously mentioned, there are often new criminal laws that do not require defendants to know that they are acting unlawfully. Requiring prosecutors to prove the defendant's culpable mental state reigns in an unintended consequence of overcriminalization. As a long-term result, the criminal justice system will have increased legitimacy and trust. Simply put, explicit and adequate *mens rea* is one of the greatest safeguards against overcriminalization.

The ill of overcriminalization and panacea of *mens rea* reform has been long recognized in legal and policy circles. For example, U.S. Supreme Court Justice Brett Kavanaugh, during his Senate Judiciary Committee confirmation hearing, highlighted that "it is not right to convict someone based on a fact that they did not know. It is just an elemental point of due process" (United States Senate Committee on the Judiciary, 2018). And when on the Washington, D.C., Circuit bench, then-Judge Kavanaugh stuck to this principle. Even when faced with defendants who "committed . . . heinous crime[s]," he was adamant about the importance of *mens rea* (United States Senate Committee on the Judiciary, 2018). In fact, during his confirmation hearing, Kavanaugh recalled a case of an armed bank robber who claimed he was unaware his weapon was automatic, and he balked at handing down a 30-year sentence "for a fact that

he did not know" (United States Senate Committee on the Judiciary, 2018).

Beyond the bench, policy experts have also made the important connection between *mens rea* reform and overcriminalization. For example, Senator Hatch has said, "[r]ampant and unfair overcriminalization in America calls for criminal justice reform which starts with default *mens rea* legislation" (U.S. Senator Mike Lee, 2017). And during the first congressional hearing by the 2013 Overcriminalization Task Force, each and every witness, when asked which policy would most effectively address overcriminalization, answered "*mens rea* reform" (House Judiciary Committee, 2013).

Ensuring a *mens rea* element in every statute will not automatically resolve overcriminalization, but it will improve it. Knowing that a default element will be added if it is absent may motivate Congress to be more intentional in drafting and ensure that every element of a criminal offense has a *mens rea* element clearly stated. As of late, that kind of intention has been lost because "[f]uzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty" (*Sykes v. United States,* 2011).[7] However, the first step in tamping down overcriminalization is to address *mens rea* reform.

Mens Rea Reform and Prosecutorial Discretion

Mens rea reforms will more effectively and consistently hold prosecutors to task. Criminal justice outcomes are more reliable and fairer when the government must prove not only that the accused committed the act but also that he meant to do it. And as it seems unlikely—not just procedurally but also politically—that Congress will repeal unnecessary criminal laws that have led to overcriminalization, it is prosecutors who are on the front lines of making sure that the law is applied adequately and effectively.

Prosecutors possess the unique privilege of discretion in our criminal justice system. According to the DOJ, prosecutorial discretion covers not only the initiation or declination of prosecutions, but also selecting charges, taking a position on pre-trial detention or release, entering plea agreements, and participating in sentencing (United States Department of Justice, n.d.). This discretion imbues power, and while many prosecutors use this power and discretion well, it can easily and even inadvertently be wielded.

Undoubtedly, prosecutorial discretion plays an important role in the American criminal justice system. But a criminal offense should not be written—or interpreted—with a broad or nonexistent *mens rea* requirement that would allow a prosecutor to obtain a conviction of someone who is not truly blameworthy and did not have any fair notice of possible criminal responsibility (Walsh & Joslyn, 2010). So, while prosecutorial discretion should not be eliminated, strong and consistent *mens rea* elements can check government power. Without *mens rea* in our criminal laws, "honest citizens are at risk of victimized and criminalized by poorly drafted legislation and overzealous prosecutors" (Over-Criminalization Task Force of 2013 of the Committee on the Judiciary, 2013).

Prosecutors, to be sure, often get it right and use their discretion wisely. Take, for example, Captain "Sully" Sullenberger. In 2009, Captain Sullenberger famously executed an emergency water landing of his commercial aircraft on the Hudson River (Sullenberger, n.d.). He did so to save the lives of his passengers and fellow crewmembers after the airplane's two engines lost thrust after striking several Canadian geese (Sullenberger, n.d.). But in striking a flock of geese, Captain Sullenberger violated federal law making it "unlawful at any time to take, capture, or kill … any migratory bird" (16 U.S.C. § 703(a)). Under the strict letter of the law, Captain Sullenberger could have been charged with violating federal law and punished up to six months in jail and a $15,000 fine (16 U.S.C. § 707(a)). Ultimately, no charges were

7 Quote found in Justice Scalia's dissent.

pursued, as no government investigator, prosecutor, or American would have wanted (National Transportation Safety Board, 2009).

Therein lies the importance of discretion. But not everyone is a hero like Captain Sullenberger, and not every case's outcome is so apparent. Where discretion worked in one instance, it may not work in another. As such, a state of mind element brings a necessary check on discretion. *Mens rea* ensures consistency and limits unwieldly prosecutorial discretion. Prosecutorial discretion is a helpful tool to reign in application of law without *mens rea*, but ultimately, the responsibility lies with Congress "to pass legislation that is fair, unambiguous, and protects the rights of all" (Over-Criminalization Task Force of 2013 of the Committee on the Judiciary, 2013).

Mens Rea Reform and the Rule of Lenity

With the overwhelming number of criminal laws in the books today, it is a foregone conclusion that not every one of them is clearly written, let alone interpreted clearly and consistently. Clear *mens rea* standards help remedy inconsistency and confusion. But to aid in making the interpretation and application of the law clearer and more consistent, courts often employ a statutory construction tool known as the "rule of lenity."

The rule of lenity guides judicial interpretation of criminal statutes, urging courts to read laws in the most favorable light of the accused.[8] This principle underlies the primary concern remedied by *mens rea* reform: if someone's liberties are at stake, the government ought to have to prove its case. To that end and in a similar vein, the rule of lenity does not just vindicate "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" (*United States v. Santos*, 2008). It also "induce[s] Congress to speak more clearly."[9] Speaking clearly means writing laws with clear *mens rea* requirements.

As cannon of statutory construction, the rule of lenity is invoked by judges when a statute is ambiguous, but not always and not consistently. Slapdash application of this rule is not ideal because case outcomes can differ substantially depending on whether a judge utilizes the rule of lenity in his analysis. Consistent application of the rule of lenity, then, could ensure more equal application of the law.

THE FUTURE OF *MENS REA* REFORM

As shown, *mens rea* reform is a critical piece of the puzzle to improve the criminal justice system. Understanding its perennial importance is simple; it is, according to Norman L. Reimer, the Executive Director of the NACDL, in a testimony before a U.S. House of Representatives subcommittee:

> because we are looking at a problem that cannot be traced to any political party or philosophy, but rather is a byproduct of a growing reliance upon the criminal provisions as a panacea for every perceived problem in society. This problem transcends ideology. It is not about right or left, it is about right and wrong. (Over-criminalization Task Force of 2013 of the Committee on the Judiciary, 2013).

Fortunately, this issue has enjoyed bipartisan support in the past and is beginning to earn recognition once again. The surge in favor of addressing nonexistent or weak *mens rea* is beginning again, particularly in light of the larger conversation on addressing over-criminalization. This momentum is seen in legislation, congressional hearings, and executive orders.

First, members of Congress continue to pursue legislation that would codify a default *mens rea* standard in any federal statutes or regulations lacking the state of mind element (S.739, 2021). Second, in a similar vein, other meaningful, bipartisan proposals

8 *See United States v. Gradwell*, 243 U.S. 476, 485 (1917); *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *United States v. Bass*, 404 U.S. 336, 347-49 (1971).

9 *Id.*; *see also infra* p. 11 (discussion of fall of *Chevron* deference).

lean into the *mens rea* reform conversation from the broader perspective of combatting overcriminalization. For example, the *Count the Crimes to Cut Act of 2024*, introduced by Representatives Chip Roy (R-TX), David Trone (D-MD), and Andy Biggs (R-AZ), would require the Attorney General to produce a report of all the federal criminal statutes and regulations that have criminal penalties (H.R. 8672, 2024). For each federal criminal offense, the report would outline the elements, the penalties, the number of prosecutions brought by the DOJ in the last 15 years, and the *mens rea* element. This bill would address the overcriminalization problem head-on by finally requiring a fulsome audit and evaluation of federal statutory and regulatory laws, something the CRS, DOJ, and ABA have all tried and failed to do. Understanding the volume of crimes, the attendant *mens rea* elements, and the use of the crimes by federal prosecutors will better inform criminal justice practitioners and the public about what the laws are and how to improve them.

States have also added to the wave of *mens rea* reforms. Ohio and Michigan, for example, have enacted default *mens rea* laws. In Ohio, a bill passed unanimously and was signed into law by Governor John Kasich in 2014, which required lawmakers to assess Ohio's criminal code before passing new criminal laws, and to specify a *mens rea* element in any new criminal laws or explicitly state that intent is not necessary for proof of conviction (S.B. 361, 2014). The Ohio law also provides that a default standard of "recklessly" should be applied to existing criminal offenses that fail to specify a *mens rea* requirement (S.B. 361, 2014). In 2015, the Michigan Legislature also unanimously passed a bill creating a presumption that when a criminal law does not specify a "culpable mental state," prosecutors must prove a defendant acted "purposely, knowingly or recklessly" (H.B. 4713, 2015). Similarly, a 2018 Virginia law requires state agencies to reduce "regulatory requirements, compliance costs, and regulatory burden" by 25% over a three-year period (H.B. 883, 2018). This law does not impose default *mens rea* language, like Ohio and Michigan, but it illustrates a trend: there are too many criminal laws, many of which are unnecessary and should be eliminated. The lesson to be learned is that lawmakers should have done a better job in drafting criminal laws, namely with clear and consistent criminal intent requirements.

At the federal level, interest in reforming *mens rea* laws is also evident via congressional hearings. First, as mentioned, the House Judiciary Committee held ten congressional hearings on overcriminalization in 2013, some tailored specifically to *mens rea* reform. In 2016, the Senate Judiciary Committee also convened a *mens rea* reform hearing to examine the merits of default *mens rea* legislation, particularly as part of the *First Step Act* (U.S. Senate Committee on the Judiciary, 2016). More recently, the House Judiciary Committee Subcommittee on Crime and Federal Government Surveillance dedicated a bipartisan hearing to examining the overreach of federal statutory and regulatory crimes (House Judiciary Committee, 2024). At this hearing, *mens rea* reform was discussed by a bipartisan slate of lawmakers and witnesses as a viable policy solution to remedy the woes of rampant overcriminalization.[10]

Similarly, some previous recommendations from the 2010s on *mens rea* reform have been instituted. As a result of the seminal bipartisan report on criminal intent, the House of Representatives in 2015 adopted a rule that the House Judiciary Committee should oversee bills that relate to its stated expertise and jurisdiction, namely the creation of criminal laws (Roberts et al., 2021).[11] As summarized in its follow-up report (2021), The Heritage Foundation and NACDL authors wrote:

10 For instance, Representative Jerrold Nadler stated during his opening remarks how "meaningful *mens rea* standards" are imperative to addressing overcriminalization (00:50:13). Also, when Chairman Andy Biggs asked all congressional hearing witnesses to recommend to Congress which legislative initiatives are "low-hanging fruit" (i.e., easy to accomplish), he urged witnesses to not recommend mens rea reform because "we all agree on the *mens rea* thing" (02:02:50).

11 Rules of the House of Representatives Rule X, clause 1(l), 117th Cong. (Feb. 2, 2021).

> If all bills creating new criminal provisions are referred to the Judiciary Committees, their Members and the Members' staffs will be aware of the need for strong *mens rea* provisions and the common issues that arise when drafting new criminal offenses … Criminal offenses should be reviewed and considered by Members and staff who are experts in criminal law. In Congress, those experts serve on their respective Judiciary Committees … In this vein, the committee that is experienced and specializes in criminal matters should be asked to consider any bill containing a criminal offense. Even bills that also have jurisdiction in other committees should be referred to the Judiciary Committee if they have criminal provisions.

There is some evidence that Judiciary Committee referrals do not necessarily strengthen the *mens rea* requirements in the bills; however, this intentional review would certainly not undermine *mens rea* standards (Roberts et al., 2021). To date, only the House has adopted this recommendation.[12] The Senate could—and should—follow suit. This small step shows engagement and interest in improving *mens rea*'s presence in criminal statutes and, in turn, preserving the legitimacy and strength of our criminal justice system.

The executive branch also plays a role in correcting course. Recognizing the connection between *mens rea* and overcriminalization, in the waning days of his 45th administration, President Trump issued Executive Order 13980, entitled "Protecting Americans from Overcriminalization Through Regulatory Reform" (2021). It required agencies that issue regulations with criminal penalties to "be explicit about what conduct is subject to criminal penalties and the '*mens rea*' standard applicable to those offenses" (Executive Order 13980, 2021). The order mandated agencies to make all regulatory criminal laws "clearly written so that all Americans can understand what is prohibited and act accordingly" (Executive Order 13980, 2021). Unfortunately, President Biden undid this executive order (Capanaro & Malcolm, 2021).

Lastly, interest in *mens rea* reform will get a boost in importance in the aftermath of the fall of *Chevron* deference. In broad strokes, *Chevron* deference refers to the principle requiring courts to defer to "permissible" administrative agency interpretations of statues, even if the reviewing court reads the statute differently (*Chevron v. National Resources Defense Council*, 1984). In *Loper Bright Enterprises v. Raimondo* (2024), the U.S. Supreme Court undercut the strength of the administrative state by placing interpretive discretion back in the hands of judges and the task of writing clear laws back in the hands of Congress. This ruling is a welcomed change, particularly given the demonstrated overbreadth of administrative criminal laws. But with this shift in reviewing agency rules comes the responsibility for Congress to, simply, do its job better. Plucking ideas out of the conceptual and putting pen to paper is a difficult task, but one that lawmakers have been elected to do, unlike their administrative state "counterparts." To that end, a resurgence in reviewing the value of *mens rea* standards is a natural consequence of the fall of *Chevron*. Congress must prove it is up to the task.

RECOMMENDATIONS

1. Congress should reintroduce and pass legislation similar to the *Mens Rea Reform Act* in the 119th Congress. The language should require a default *mens rea* standard of "willfulness" to be added to all federal statutes and regulations where *mens rea* is absent.

2. The DOJ should partner with Congress to identify specific criminal laws with missing *mens rea* elements, unclear *mens rea*, or inconsistently applied *mens rea*. The DOJ should then work with lawmakers to identify what the state of mind should be for these specified laws, or if the statute needs to clarify that the crime is intended to be a strict liability offense.

12 161 Cong. Rec. H21–22 (daily ed. Jan. 6, 2015) (statement of Rep. Goodlatte).

3. Pass legislation similar to H.R. 8672, the *Count the Crimes to Cut Act*, to understand the volume of crimes, the attendant *mens rea* elements, and the use of the crimes by the DOJ. This will better inform legislators, prosecutors, defense attorneys, judges, and the public about what the laws are and how to stop abuses of the criminal justice system.

4. To overcome the sporadic and inconsistent application of the rule of lenity as a canon of statutory construction, Congress should introduce and pass legislation that would codify the rule of lenity. Congress should direct federal courts to apply the rule of lenity as an initial part of textual analysis if a statute is ambiguous.

5. Congress should consider mimicking *mens rea* reforms instituted by the states, including not just the default *mens rea* laws of Ohio and Michigan, but also mandating federal agencies to scrub and eliminate unnecessary laws, like that of Virginia.

6. The Trump Administration should reinstitute the 2021 executive order "Protecting Americans from Overcriminalization Through Regulatory Reform," ensuring that the executive order requires agencies that pass regulations with criminal penalties to be explicit and unambiguous about the applicable *mens rea* standards.

7. The U.S. Senate should require its Judiciary Committee to have concurrent jurisdiction over any bills introduced in the Senate that create new criminal offenses.

CONCLUSION

Mens rea reform is a critical reform needed to improve our criminal justice system. Its bipartisan footprint can be replicated in the future, namely by Congress writing *mens rea* elements in all future criminal laws, and remedying past drafting errors by inserting a default criminal intent where absent. These reforms, among others listed in this paper, will not immediately fix all the ills of the criminal justice system, but for the sake of legitimacy and consistency, *mens rea* reform is needed. ■

REFERENCES

18 U.S.C. § 336 (1994). https://www.law.cornell.edu/uscode/text/18/336

18 U.S.C. § 1857 (1994). https://www.law.cornell.edu/uscode/text/18/1857

Caldwell, L. (2016, January 20). *The adequacy of criminal intent standards in federal prosecutions*. Committee on the Judiciary, United States Senate. https://www.judiciary.senate.gov/imo/media/doc/01-20-16%20Caldwell%20Testimony.pdf

Canaparo, G., McLaughlin, P., Nelson, J., & Palagashvili, L. (2022, January 7). *Count the code: Quantifying federalization of criminal statutes*. The Heritage Foundation. https://www.heritage.org/crime-and-justice/report/count-the-code-quantifying-federalization-criminal-statutes/#_ftnref17

Canaparo, G., & Malcolm, J. (2021, May 18). *Biden unwisely rescinds one of Trump's criminal justice reforms*. The Heritage Foundation. https://www.heritage.org/crime-and-justice/commentary/biden-unwisely-rescinds-one-trumps-criminal-justice-reforms

Carter, Z. D. (2015, November 19). *White House comes out against effort to curb white-collar crime prosecutions*. HuffPost. https://www.huffpost.com/entry/white-collar-crime-white-house-response_n_564dd06be4b00b7997f95240

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). https://supreme.justia.com/cases/federal/us/467/837/

Clean Water Act, 42 U.S.C. § 7413 (c) (1972). https://www.law.cornell.edu/uscode/text/42/7413

Crovitz, L. G. (2009, September 27). *You commit three felonies a day*. Wall Street Journal. https://www.wsj.com/articles/SB10001424052748704471504574438900830760842

Exec. Order 13980, 86 Fed. Reg. 6817 (January 18, 2021). https://www.federalregister.gov/documents/2021/01/22/2021-01645/protecting-americans-from-overcriminalization-through-regulatory-reform

Gorsuch, N. M., & Nitze, J. (2024). *Over ruled: The human toll of too much law*. HarperCollins Publishers.

GovTrack. (n.d.). *Statistics and historical comparison*. Retrieved October 29, 2024, from https://www.govtrack.us/congress/bills/statistics

Holmes, O. W. (2009). *The Common Law*. Harvard University Press. https://doi.org/10.2307/j.ctt13x0kkk

House Judiciary Committee. (2024, April 30). *Overreach: An examination of federal statutory and regulatory crimes* [hearing]. https://judiciary.house.gov/committee-activity/hearings/overreach-examination-federal-statutory-and-regulatory-crimes

House Judiciary Committee. (2013, June 14). *Defining the problem and scope of over-criminalization and over-federalization* [hearing]. https://judiciary.house.gov/committee-activity/hearings/subject-defining-problem-and-scope-over-criminalization-and-over

House Judiciary Committee. (2013, May 5). *House Judiciary Committee creates Bipartisan Task Force on over-criminalization*. https://judiciary.house.gov/media/press-releases/house-judiciary-committee-creates-bipartisan-task-force-on-over

House Judiciary Committee. (n.d.). *Criminal justice reform initiative*. Retrieved October 29, 2024, from https://judiciary.house.gov/criminal-justice-reform-initiative#:~:text=In%20the%20113th%20Congress%2C%20the,prison%20reform%2C%20among%20other%20topics

H.B. 883. Enrolled. General Assembly of Virginia. Regular. (2018). https://legacylis.virginia.gov/cgi-bin/legp604.exe?181+ful+HB883ER

H.B. 4713 Enrolled. 98th Michigan Legislature. Regular. (2015). https://legislature.mi.gov/documents/2015-2016/publicact/pdf/2015-PA-0250.pdf

H.R. 8672. Count the Crimes to Cut Act of 2024. 117th Congress. (2024). https://www.congress.gov/bill/118th-congress/house-bill/8672/text

Johnson, C. (2015, November 25). *Obama administration says House bill would give "cover" to white-collar defendants*. NPR. https://www.npr.org/2015/11/25/457369313/obama-administration-says-house-bill-would-give-cover-to-white-collar-defendants

Jones, O.D., Ginther, M.R., Shen, F.X., Bonnie, R.J., Hoffman, M.B., & Simons, K.W. (2018). *Decoding guilty minds: How jurors attribute knowledge and guilt*. *Vanderbilt Law Review*, *71*, 241. https://scholarship.law.vanderbilt.edu/faculty-publications/1053

Loper Bright Enterprises v. Raimondo, 603 U.S. ____ (2024). https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf

Migratory Bird Treaty Act, 16 U.S.C § 703(a), 707(a) (1918). https://www.law.cornell.edu/uscode/text/16/703

Morisette v. United States, 342 U.S. 246 (1952). https://supreme.justia.com/cases/federal/us/342/246/

National Commission on the Reform of Federal Criminal Laws. (1971, January 7). *Final report of the National Commission on the Reform of Federal Criminal Laws*. https://www.ndcourts.gov/Media/Default/Legal%20Resources/legal-research/criminal-code/FinalReport.pdf

National Firearms Act, 26 U.S.C. § 5861(d) (1994). https://www.law.cornell.edu/uscode/text/26/5861

National Firearms Act, 26 U.S.C. § 5871 (1968). https://www.law.cornell.edu/uscode/text/26/5871

National Transportation Safety Board. (2009, January 15). *Aircraft accident report*. https://www.ntsb.gov/investigations/accidentreports/reports/aar1003.pdf

Over-criminalization Task Force of 2013 of the Committee on the Judiciary, House of Representatives. (2013). *Mens rea: The need for a meaningful intent requirement in federal criminal law* [hearing]. https://www.govinfo.gov/content/pkg/CHRG-113hhrg81984/html/CHRG-113hhrg81984.htm

Roberts, K., Malcolm, J., Smith, Z., Sabelli, M., Wayne, L., O'Dowd, K., Pysno, N., & Dayaratna, K. (2021, December 13). *Without intent revisited: Assessing the intent requirement in federal criminal law 10 years later*. The Heritage Foundation. https://www.heritage.org/without-intent-revisited

S. 739. *Mens Rea* Reform Act of 2021. 117th Congress. (2021). https://www.congress.gov/bill/117th-congress/senate-bill/739/text

S.B. 361. Filed with Secretary of State. 130th Ohio General Assembly. Regular. (2015). https://publicfiles.ohiosos.gov/free/publications/SessionLaws/130/130-SB-361.pdf

Scott, B. (2014, December 16). *Democratic views on criminal justice reforms raised before the Over-Criminalization Task Force Subcommittee*. U.S. House of Representatives. https://bobbyscott.house.gov/sites/evo-subsites/bobbyscott-evo.house.gov/files/OTF%20FULL%20REPORT%20FINAL.pdf

Smith, S. (2014, August 21). *A judicial cure for the disease of overcriminalization*. The Heritage Foundation. https://www.heritage.org/courts/report/judicial-cure-the-disease-overcriminalization/#_ftnref8

Sullenberger, C. (n.d.). *About*. Sully Sullenberger. Retrieved October 29, 2024, from https://www.sullysullenberger.com/about/

Sykes v. United States, 564 U.S. 1 (2011). https://supreme.justia.com/cases/federal/us/564/1/

The George Washington University Regulatory Studies Center. (2024). *Total pages published in the Code of Federal Regulations*. https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2024-08/cfr_pages_by_calendar_year.pdf

The Hobbs Act, 18 U.S.C. § 1951(a) (1948). https://www.law.cornell.edu/uscode/text/18/1951

The Task Force on the Administration of Justice. (1967). *Task Force report: The courts*. U.S. Government Printing Office. https://www.ojp.gov/pdffiles1/Digitization/147397NCJRS.pdf

United States Department of Justice. (n.d.). *9-27.000 - Principles of federal prosecution*. Retrieved October 29, 2024, from https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.110

United States Senate Committee on the Judiciary. (2018). *Confirmation hearing on the nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States*. https://www.govinfo.gov/content/pkg/CHRG-115shrg32765/pdf/CHRG-115shrg32765.pdf

United States v. Santos, 553 U.S 507, 514 (2008). https://supreme.justia.com/cases/federal/us/553/507/

U.S. Government Publishing Office. (2019). *GPO produces U.S. Code with new digital publishing technology*. https://www.gpo.gov/who-we-are/news-media/news-and-press-releases/gpo-produces-US-code-with-new-digital-publishing-technology#:~:text=WASHINGTON%20%E2%80%94%20U.S.%20Government%20Publishing%20Office,technology%20for%20XML%2Dbased%20publishing

U.S. Senate Committee on the Judiciary. (2016, January 20). *The adequacy of criminal intent standards in federal prosecutions* [hearing]. https://www.judiciary.senate.gov/committee-activity/hearings/the-adequacy-of-criminal-intent-standards-in-federal-prosecutions

U.S. Senator Mike Lee. (2017, October 2). *Senators Hatch, Lee, Cruz, Perdue, and Paul introduce bill to strength* [sic] *criminal intent protections* [Press release]. U.S. Senate. https://www.lee.senate.gov/2017/10/senators-hatch-lee-cruz-perdue-and-paul-introduce-bill-to-strength-criminal-intent-protections

Walsh, B., & Joslyn, T. (2010). *Without intent: How Congress is eroding the criminal intent requirement in federal law*. National Association of Criminal Defense Lawyers. https://www.nacdl.org/getattachment/8d5312e0-70f8-4007-8435-0ab703dabda9/without-intent-how-congress-is-eroding-the-criminal-intent-requirement-in-federal-law.pdf

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Rachel also spent five years as counsel to the U.S. Senate Judiciary Committee in Washington, D.C., where she advised Senators on legislation and committee hearings, particularly those dealing with illicit drug policy and criminal justice reform. In this position, Rachel was fortunate to staff Senator Grassley (R-Iowa) on the implementation of the First Step Act, as well as several other criminal justice focused bills.

Rachel began her legal career as an Assistant Commonwealth's Attorney in Kenton County, Kentucky, where she specialized on drug possession cases, particularly those where alternatives to incarceration – such as diversion and drug court – were effective. She also got to participate in multiple jury trials, including attempted murder, arson, and rape.

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