

CHAPTER 1

OVERCRIMINALIZATION OF CONDUCT, OVERFEDERALIZATION OF CRIMINAL LAW, AND THE EXERCISE OF ENFORCEMENT DISCRETION

THE ISSUE

The American Bar Association's (ABA) Task Force on the Federalization of Crime observed in 1998, "So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes."¹ As of 2007, there were more than 4,450 offenses that carried criminal penalties in the United States Code.² In addition, an estimated 10,000, and possibly as many as 300,000 federal regulations can be enforced criminally.³ Despite Supreme Court cases in the last 15 years cautioning against the federal assumption of plenary police power,⁴ Congress continues to introduce new criminal legislation. Recent studies demonstrate that from 2000 through 2007, Congress created 452 new federal crimes—that is, on average, one new crime a week for every week of every year.⁵

This over-federalization of criminal law is often a product of political considerations, wherein the response to a newsworthy problem is the introduction of federal legislation containing new criminal provisions or increased criminal penalties. So routine is this response that practitioners, academics, and even the Department of Justice (DOJ) have struggled to document the actual number of federal statutory offenses.⁶

The explosive growth of the federal criminal code in recent decades is noteworthy on its own, but it is only one part of the problem. Many of these new offenses do not punish conduct that is universally considered to be "criminal." This is because an increasing number of statutes lack an adequate criminal intent requirement to protect innocent people who act without intent to violate the law or knowledge that their conduct was illegal. For example, Abner Schoenwetter, a 64-year-old sea food importer with no criminal record, served six years in federal prison because he purchased a shipment of lobsters that were the wrong size and in the wrong packaging under Honduran treaty regulations.⁷ The absence of strong criminal intent requirements weakens protections for due process and civil liberties, especially where Congress criminalizes conduct involving regulatory violations

¹ AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIMINAL LAW 9 (1998) [hereinafter FEDERALIZATION OF CRIMINAL LAW].

² John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation L. Memo. No. 26, June 16, 2008, at 5.

³ FEDERALIZATION OF CRIMINAL LAW, *supra* note 2, at 9 n.11, app. C; See also 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).

⁴ See, e.g., U.S. v. Lopez, 514 U.S. 549 (1995); U.S. v. Morrison, 529 U.S. 598 (2000).

⁵ Baker, *supra* note 3, at 2.

⁶ JOHN BAKER, REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES (Heritage Foundation June 16, 2008), available at: <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>.

⁷ *Reining in Overcriminalization: Assessing the Problems, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (Sept. 28, 2010) (statement of Abner Schoenwetter), available at: <http://judiciary.house.gov/hearings/pdf/Schoenwetter100928.pdf>.

and highly technical prohibitions. Further, vague criminal laws, coupled with an expanding list of federal crimes, have led to abuses by the executive branch in the exercise of its prosecutorial discretion.

Enforcing this unwieldy criminal code has contributed to a backlogged judiciary, overflowing prisons, and the incarceration of innocent individuals who plead guilty not because they actually are, but because exercising their constitutional right to a trial is prohibitively expensive and too much of a risk.⁸ This enforcement scheme is inefficient, ineffective, and maintained at tremendous taxpayer expense.

HISTORY OF THE PROBLEM

The overcriminalization of conduct that is not inherently wrong⁹ and the overfederalization of criminal law enforcement are two faces of the same problem: the attractive but ineffective use of criminal sanctions as a solution for whatever current crisis faces the American public, be it a surge in gang crime or a breakdown on Wall Street. The new criminal offenses that result are frequently drafted in a vague and overly broad manner, without adequate criminal intent requirements, and enacted into law without any consideration of whether such criminalization is necessary and appropriate.

Overcriminalization occurs when federal policymakers enact criminal statutes lacking meaningful *mens rea* (criminal intent) requirements; federalize crimes traditionally reserved for state jurisdiction; adopt duplicative and overlapping statutes; expand criminal law into economic activity and regulatory and civil enforcement areas; impose vicarious liability with insufficient evidence of personal awareness or neglect; and create mandatory minimum sentences unrelated to the wrongfulness or harm of the underlying crime. These inevitably increase the size of the already massive federal criminal code.

Given the sheer number of criminal prohibitions, it is not surprising that only a small fraction of these offenses require “criminal intent.” Indeed, federal statutes provide for more than 100 types of *mens rea*.¹⁰ As a prominent casebook notes, “[e]ven those terms most frequently used in federal legislation—‘knowing’ and ‘willful’—do not have one

⁸ The Innocence Project, *When the Innocent Plead Guilty*, available at: http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php (last visited Jan. 25, 2010).

⁹ Crimes that are inherently wrong because of the intrinsic immoral nature of the act, such as rape or murder, are considered *malum in se*, or “wrong in itself.” These are acts that any reasonable person will know are wrong, regardless of whether or not that person knows they are illegal. In contrast, acts that are *malum prohibitum*, or “wrong due to being prohibited,” are those illegal acts that, on their face, would not immediately appear wrong to a reasonable person. For this latter category of crimes, reasonable notice of their illegality is necessary for effective compliance. See, e.g., *United States v. Bajakajian*, 524 U.S. 321 (1998).

¹⁰ JOHN S. BAKER, JR., THE FEDERALIST SOC’Y FOR LAW & PUB. POLICY STUDIES, *MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 10* (2004) available at <http://fedsoc.server326.com/Publications/practicegroupnewsletters/criminallaw/crimreportfinal.pdf>.

invariable meaning. . . . Another layer of difficulty is attributable to the fact that Congress may impose one *mens rea* requirement upon certain elements of the offense and a different level of *mens rea*, or no *mens rea* at all, with respect to other elements.”¹¹ The erosion of *mens rea* is especially problematic in the white collar arena, where potential defendants often have little (or no) notice that the conduct in which they have engaged is unlawful, much less criminal.

Similarly, through the imposition of vicarious liability for the acts of others, defendants can be prosecuted, convicted and punished without any evidence of personal awareness or neglect. Under this theory, off-duty supervisors can be criminally punished for the accidental acts of their employees, even if they did not know of, approve of, or benefit from the conduct.¹² Corporate criminal liability employs the doctrine of *respondet superior*, which is identical to the standard used in civil tort law. This means that as long as an employee is acting within the scope of his or her employment (broadly defined), the corporation is deemed criminally liable for that employee’s actions, despite the corporation’s best efforts to deter such behavior. Regardless of compliance programs, employment manuals, or even strict instructions to the contrary, if an employee violates the law, then the corporation can be criminally punished.

Past attempts to reform these problems have been unsuccessful. In the 1970s and early 1980s, Congress produced several iterations of a comprehensive and cohesive federal criminal code.¹³ After hundreds of markups and passage through the Senate, the effort finally died due lack of support from major stakeholders.¹⁴ Throughout the 1990s, then Chief Justice William Rehnquist and the Judicial Conference advocated a five-point, limited basis for federal criminal jurisdiction in order to ease the burden on federal courts and return plenary police power to the states.¹⁵ The Judicial Conference advocated the exercise of federal criminal jurisdiction in the following cases: (i) offenses against the federal government or its inherent interests; (ii) criminal activity with substantial multi-state or international aspects; (iii) criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise; (iv) serious high level or widespread state or local government corruption; and (v) criminal cases raising highly sensitive local issues.¹⁶ In 1998, the ABA issued nearly identical recommendations for

¹¹ *Id.*

¹² See *United States v. Hanousek*, 176 F.3d 1116, 1120-23 (9th Cir. 1999) (upholding the conviction of an off-duty construction supervisor under the Clean Water Act when one of his employees accidentally ruptured an oil pipeline with a backhoe).

¹³ University of Buffalo Criminal Law Center, *Federal Criminal Code Reform: A Selected Bibliography*, available at: <http://wings.buffalo.edu/law/bclc/biblio.htm> (last visited Jan. 25, 2010).

¹⁴ Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future* 2 *BUFF. L. REV.* 45 (1998), available at: <http://wings.buffalo.edu/law/bclc/bclrarticles/2%281%29/Bclrgain.pdf>.

¹⁵ WILLIAM H. REHNQUIST, 1998 YEAR-END REPORT OF THE FEDERAL JUDICIARY (Jan. 1, 1999). See also, *Rehnquist Blames Congress for Courts’ Increased Workload*, *WASH. TIMES*, A6 (Jan. 1, 1999).

¹⁶ *Id.* at 4-5. See also e.g., *Rehnquist Blames Congress for Courts’ Increased Workload*, *WASH. TIMES*, A6 (Jan. 1, 1999).

curbing the excessive costs of overcriminalization and overfederalization, and preventing the further diminishment of criminal enforcement.¹⁷

Despite these efforts, the dismal state of federal criminal law remains and the trend proceeds unabated. A prime example of overcriminalization is the honest services fraud statute,¹⁸ which is responsible for victimizing countless law-abiding individuals. Criticized by legal experts as vague and overbroad, it fails to define or limit the phrase “intangible right of honest services.” According to Justice Scalia, if “taken seriously and carried to its logical conclusion,” the statute makes it criminal for an elected official to vote for a bill because it will help secure the support of a particular constituency group in his re-election campaign; a mayor to use the prestige of his office to get a table at a restaurant without a reservation; or a public employee to call in sick to work in order to go to a baseball game.¹⁹

The failure of Congress to define criminal conduct in a clear and specific manner encourages prosecutors to charge criminally all sorts of conduct—from errors in judgment to behavior that is the slightest bit unsavory. Congress frequently relies on prosecutorial discretion to shape the contours of criminal offenses.²⁰ And, rather than limit the reach of prosecution to conduct truly belonging in the federal realm, these laws allow the federal government to directly encroach upon intra-state conduct and even criminalize behavior that state governments have deemed legal.

Another vague, poorly defined law that is subject to expansive application by prosecutors is the Foreign Corrupt Practices Act (FCPA).²¹ The law does not make clear what conduct is permissible and what is prohibited. To whom the law applies and the precise contours of the phrase “foreign official” are equally unclear.²² DOJ has had a free hand interpreting FCPA provisions, which have been virtually untested in the courts, since a criminal indictment would be a death sentence for corporations and going to trial is too risky and costly for most individual defendants. Thus, most FCPA investigations result in the settlement of allegations before there has been an opportunity to challenge a prosecutor’s interpretation of the statute’s application. Such risk and legal uncertainty is undoubtedly bad for business and decreases the competitiveness of American businesses abroad.

¹⁷ FEDERALIZATION OF CRIMINAL LAW, *supra* note 2, at 51.

¹⁸ 18 U.S.C. § 1346.

¹⁹ See *Sorich v. United States*, 129 U.S. S. Ct. 1308, 1300 (2009) (Scalia, J., dissenting from denial of certiorari).

²⁰ BRIAN WALSH AND TIFFANY JOSLYN, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW* (Heritage Foundation and National Association of Criminal Defense Lawyers, 2010), available at: <http://www.heritage.org/Research/Reports/2010/05/Without-Intent>.

²¹ The Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1, *et seq.*

²² James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act* 62 Bus. Law. 1233 (2006 – 2007).

The most recent evidence of overcriminalization is found in the newly enacted 884-page Dodd-Frank Wall Street Reform & Consumer Protection Act.²³ This law contains more than two dozen new criminal offenses, prohibiting conduct ranging from public disclosure of certain broadly defined information, to margin lending, to failure to reasonably foresee the bad acts of others.²⁴ In addition to creating these new criminal offenses, virtually every provision of the Act includes regulatory criminalization wherein Congress hands over the power to define criminally punishable conduct to unelected agency bureaucrats.²⁵ Like many new crimes created by Congress in recent years, these new criminal provisions were not reviewed by the Judiciary Committee of either the House or Senate, despite the fact that those committees are granted express jurisdiction over new criminal laws. And unsurprisingly, most of the criminal laws that are contained in the financial reform legislation lack an adequate criminal intent requirement.²⁶ This financial services reform bill demonstrates that Congress continues to criminalize business and economic conduct without appropriate care and consideration.

Because businesses are automatically held liable for the criminal acts of their employees—regardless of how high up the wrongdoing went and who knew of it—the executive branch has tremendous leverage when it threatens to indict an entire business. Coupled with the erosion of *mens rea*, this makes cases involving honest services fraud, environmental regulatory offenses, and any law that requires only a “knowing” violation, easy to win. And, until recently, DOJ exercised unprecedented leverage through policies that included threatening a business with indictment unless it turned over “culpable” employees and refused to indemnify those employees’ legal costs.²⁷

Currently, there is a groundswell of unprecedented, bi-partisan support for stemming the tide of increasingly broad, vague, and unnecessary criminal laws. Both the business and legal communities share a concern about the vast amount of discretion that vague criminal laws give to the executive branch. For the past five years, a coalition of diverse groups that includes the ABA, the U.S. Chamber of Commerce, the American Civil Liberties Union (ACLU), the National Association of Criminal Defense Lawyers (NACDL), the Heritage Foundation, and the Association of Corporate Counsel (ACC), has pressured DOJ to limit its scope in investigating corporate crime.²⁸ Successful lobbying by this large and diverse coalition, has led DOJ to retract some of these policies.²⁹

²³ Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. 111-203 (2010).

²⁴ See National Association of Criminal Defense Lawyers, Dodd-Frank Wall Street Reform & Consumer Protection Act, <http://www.nacdl.org/public.nsf/whitecollar/HR4173> (last visited Jan. 20, 2010).

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Brian W. Walsh & Stephanie A. Martz, *No Retreat Now: The Long Fight to protect the attorney-client relationship against aggressive prosecutors can only end with legislation*, LEGAL TIMES (Sept. 1, 2008), available at <http://www.law.com/jsp/nlj/legaltimes/PubArticleLT.jsp?id=1202424094454>.

²⁸ See Walsh & Martz, *supra* note 19.

²⁹ *Id.*

In the last two years, the overcriminalization coalition has expanded both in membership and scope. Washington Legal Foundation, the Federalist Society, the Cato Institute, Families Against Mandatory Minimums (FAMM), and the Constitution Project (TCP), among others, have joined the existing coalition to express support for positive reform.³⁰

Increased attention on the problem of overcriminalization helped spur two congressional hearings and a surge of attention to the topic by academics, legislators, and press. On July 22, 2009, under the bipartisan leadership of Reps. Bobby Scott (D-VA) and Louie Gohmert (R-TX), the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing to learn about the trend of overcriminalizing conduct and overfederalizing crime. The hearing received attention from national media and further ignited the overcriminalization reform movement.³¹

Shortly thereafter, two coalition organizations, NACDL and The Heritage Foundation, published a groundbreaking, non-partisan, joint report entitled: *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*.³² At the official release event, held on May 5, 2010 on Capitol Hill, Rep. Scott heralded the report as a “road map” for reform and Rep. Gohmert lamented the victimization of citizens by criminal laws lacking adequate intent requirements.³³

On September 28, 2010, the crime subcommittee held a second hearing to examine the problems through the lens of the *Without Intent* report and explored the report’s recommendations.³⁴ The coalition of organizations explicitly supporting this hearing included the ABA, ACLU, the Constitution Project, FAMM, The Heritage Foundation, Manhattan Institute, NACDL, and the National Federation of Independent Business (NFIB).

The explosive growth of federal criminal law in recent decades, the failure to guarantee adequate *mens rea* requirements, the proliferation of vague and overbroad criminal offenses, the expansion of vicarious criminal liability, and the increase in delegating Congress’s criminalization authority to unelected officials are all issues that Congress and the Obama administration need to address. Without reform, the federal criminal law is in

³⁰ Press release, National Association of Criminal Defense Lawyers, Diverse Coalition Urges Congress to Rein in Overcriminalization (Sept. 29, 2010), *available at*: <http://www.nacdl.org/public.nsf/NewsReleases/2010mn32?OpenDocument>.

³¹ See, e.g., Lesley Clark, Congress looks at laws that criminalize non-criminal behavior, MIAMI HERALD (Oct. 3, 2010), *available at*: <http://www.miamiherald.com/2010/10/03/1855997/congress-looks-at-laws-that-criminalize.html>.

³² WITHOUT INTENT, *supra* note 1.

³³ Heritage Foundation Symposium: Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law, Washington, DC: May 24, 2010. *Video available at*: <http://www.heritage.org/Events/2010/05/Without-Intent>.

³⁴ *Reining in Overcriminalization: Assessing the Problems, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*. 111th Cong. (2010).

danger of becoming a broad template for abuse of government power. The current fragile state of the economy, growing deficit, and calls for a smaller, more efficient, and less intrusive government demand that we revisit and reform our federal criminal code and lawmaking process.

Further, recent history has witnessed an erosion of important attorney-client privilege protections. In recent years, many federal government agencies have adopted policies that erode the attorney-client privilege, the work product doctrine, and employee legal protections in the corporate context. Each of these policies—including DOJ’s 2006 “McNulty Memorandum,” the SEC’s 2001 “Seaboard Report,” the Environmental Protection Agency’s “Audit Policy,” and similar policies by other agencies—pressure companies and other organizations to waive their attorney-client privilege and work product protections as a condition of receiving full cooperation credit during investigations. These policies also contain separate provisions that weaken employees’ Sixth Amendment right to counsel, Fifth Amendment right against self-incrimination, and other fundamental legal rights by pressuring companies not to pay their employees’ legal fees during investigations, to fire them for not waiving their rights, and to take other punitive actions against them long before any guilt has been established.

After considering the concerns raised by the ABA, NACDL, former DOJ officials, congressional leaders, and others during the course of congressional hearings, the U.S. Sentencing Commission (USSC) and the Commodity Futures Trading Commission voted to reverse their privilege waiver policies in April 2006 and March 2007, respectively.³⁵ In addition, in August 2008, DOJ replaced the McNulty Memorandum with revised corporate charging guidelines that generally bar prosecutors from pressuring companies to waive their attorney-client privilege, work product, or employee legal rights in return for cooperation credit, with certain exceptions.³⁶ The SEC also issued a revised Enforcement Manual on January 13, 2010 that provides additional guidance for agency staff but does not formally change the SEC’s waiver policy outlined in the Seaboard Report.³⁷ Although the Manual generally directs agency staff not to request waiver of the privilege during most investigations, it also contains several significant exceptions and does not provide adequate protection for the privilege and employee legal rights. Comprehensive reform is needed to maintain attorney-client privilege in all federal agencies.

³⁵ Michael S. Greco, President of the American Bar Association, Statement re: U.S. Sentencing Commission Vote Rescinding 2004 Privilege Waiver Amendment (Apr. 6, 2006), *available at*: <http://www.abanow.org/2006/04/statement-re-u-s-sentencing-commission-vote-rescinding-2004-privilege-waiver-amendment/>; Douglas Koff and Jason Jurgens, *CFTC Yields More Conflicting Advice on Privilege Waivers*, 237 NEW YORK L.J. (Apr. 13, 2007), *available at*: http://www.cadwalader.com/assets/article/041307KoffJurgensNYLJ_.pdf.

³⁶ AMERICAN BAR ASSOCIATION, INDEPENDENCE OF THE LEGAL PROFESSION: ATTORNEY-CLIENT PRIVILEGE, WORK PRODUCT, AND EMPLOYEE LEGAL PROTECTIONS (Oct. 2010), *available at*: <http://www.abanet.org/poladv/priorities/privilegewaiver/>.

³⁷ Press release, Securities and Exchange Commission, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), *available at*: <http://www.sec.gov/news/press/2010/2010-6.htm>.

These problems transcend political affiliation or ideology; the need for reform is an increasingly commonly held view from those on both the right and the left. Congress and the administration should work toward stemming the growth of federal crimes, creating tighter *mens rea* requirements, and supporting more Congressional oversight of executive branch discretion. Otherwise, even more law-abiding individuals may find themselves facing unjust prosecution and punishment.

RECOMMENDATIONS

1. Resist Overcriminalization and Overfederalization

A. *Insufficient Oversight of New and Modified Criminal Offenses and Penalties*

While the House and Senate Judiciary Committees have jurisdiction over federal criminal law, congressional rules do not require bills containing criminal offenses to be referred to and reported out by the respective judiciary committee before floor consideration by the full chamber. Further, Congress is not required to assess the justification for, and cost of, new criminal offenses or penalties before legislative action or enactment.

B. *Amend Rules and Reporting Requirements to Stem Overcriminalization and Overfederalization*

Legislative

Congress should amend its rules to require that every bill that would add or modify criminal offenses or penalties is automatically referred to the House or Senate Judiciary Committee, as appropriate. This “sequential” referral requirement would give the Judiciary Committees exclusive control over a bill until they either report the bill out or the time limit for its consideration expires; only at that time could the bill move to another committee or to the full chamber. This reform will require changes to the rules of the House and Senate through the Rules Committees.

Because of their jurisdiction over federal criminal law, the House and Senate Judiciary Committees have special expertise in drafting criminal offenses and knowledge of federal law enforcement priorities and resources. Therefore, requiring Judiciary Committee oversight of bills containing criminal offenses or penalties would produce clearer, more specific criminal laws. It should also help protect against overcriminalization and foster a measured, prioritized approach to congressional criminal lawmaking.

Currently, there is no comprehensive process for Congress to determine whether new offenses or penalties are necessary and appropriate. Therefore, Congress should enact legislation mandating reporting for all new or modified criminal offenses and penalties.

Mandatory reporting would increase accountability by requiring the federal government to perform a basic analysis of the grounds and justification for all new and modified criminal offenses and penalties. Working together with the sequential referral reform, this mandatory reporting requirement would decrease overcriminalization and overfederalization.

Congress should pass legislation similar to the Federalization of Crimes Uniform Standards Act of 2001 (Manzullo bill)³⁸, requiring mandatory reporting by which the federal government produces a standard public report assessing the purported justification, costs, and benefits of all new or modified criminalization. This report should also include an assessment of whether the criminal offense or penalty is duplicative of state law; a comparison to similar offenses or penalties in existing federal, state, and local laws; and an analysis of any overlap between the conduct to be criminalized and conduct already criminalized by existing laws. The report should be available to the public before any major legislative action on a proposed bill. Federal agencies should also be subject to mandatory reporting prior to issuance of new guidance or rules.

2. Prevent the Further Erosion of *Mens Rea* Requirements

A. *The Omission of Mens Rea Terminology and Use of Blanket or Introductory Mens Rea Terms Jeopardizes Innocent Individuals*

Where Congress omits *mens rea* terminology from a statute defining a criminal offense, innocent individuals are at risk of unjust conviction.³⁹ Similarly, when Congress uses a *mens rea* term in a blanket or introductory manner, all parties—defendants, the government, and the courts—are forced to litigate the proper application of such term, again, placing innocent individuals at risk of unjust conviction.⁴⁰

B. *Congress Should Enact Default Mens Rea Rules*

Legislative

Congress should enact legislation specifically directing 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. This statutory

³⁸ Federalization of Crimes Uniform Standard Act of 2001, H.R. 1998, 107th Cong. (2001).

³⁹ WITHOUT INTENT, *supra* note 1, at 14-15 (explaining the danger of “strict liability” offenses, i.e. offenses that do not contain any *mens rea* terminology, and providing examples of such offenses contained in bills introduced in the 109th Congress).

⁴⁰ See *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 509 U.S. ____ (2009) (exploring the difficulties of interpretation caused by an introductory *mens rea* term in the one-sentence long federal aggravated identity theft statute and reversing the appellate court’s affirmance of a jury conviction on the grounds that the statute’s “knowingly” *mens rea* term applies to its “a means of identification of another person” clause).

enactment should be two-fold. First, Congress should direct federal courts to read a protective, default *mens rea* requirement into any criminal offense that lacks one. This will address the problems that arise when Congress omits *mens rea* terminology. Second, Congress should direct federal courts to apply an introductory or blanket *mens rea* term in a criminal offense to each element of the offense. This reform will 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.

3. Increase Fairness in the Interpretation of Vague, Unclear, or Ambiguous Statutes

A. *Vague, Unclear, or Ambiguous Statutes Put Individuals at Risk of Unjust Prosecution and Punishment*

Vague, unclear, or ambiguous statutes violate the principle of due process because they fail to put individuals on notice of what conduct is criminal. Further, these statutes put federal courts in the position of legislating from the bench.

B. *Codify the Common-Law Rule of Lenity*

Legislative

Congress, through its Judiciary Committees, should enact legislation codifying 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. Codification of this rule should reduce the risk of injustice stemming from criminal offenses that lack clarity or specificity. Further, giving the benefit of the doubt to the defendant is consistent with traditional rules presuming all defendants are innocent and placing the burden of proof of every element of a crime beyond a reasonable doubt on the government.

Explicitly codifying the rule of lenity into federal law would simply codify a long-standing principle upheld by the Supreme Court, and which the Court has called a fundamental rule of statutory construction.⁴¹ It would also help federal courts treat defendants uniformly, thereby restricting the instances in which federal courts are forced to legislate from the bench. This would protect Congress's lawmaking authority and advance separation of powers principles. Finally, this reform should encourage Congress to speak with more clarity and legislate more carefully.

⁴¹ See *United States v. Santos*, 553 U.S. 507, 514, 128 S. Ct. 2020, 2025 (2008) ("Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. . . . The 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.") (internal citations omitted).

4. Reject and Repeal Mandatory Minimum Sentences

A. *Mandatory Minimum Sentences Result in Overcriminalization*

Mandatory minimum sentencing policies come with billions in direct costs. In 2008, American taxpayers spent over \$5.4 billion on federal prisons,⁴² a 925 percent increase since 1982.⁴³ This explosion in costs is driven, in part, by the expanded use of prison sentences for drug crimes and longer sentences required by mandatory minimums. The federal prison population has increased nearly five-fold since mandatory minimums were enacted in the mid-80s and mandatory guidelines became law.⁴⁴ About 75 percent of the increase was due to mandatory minimums and 25 percent due to guideline increases above mandatory minimums.⁴⁵

B. *Reject and Repeal Mandatory Minimum Sentences*

Legislative

Congress should reject proposals for new mandatory sentencing minimums and work to repeal existing mandatory sentencing minimums.⁴⁶

5. Preservation of the Attorney-Client Privilege in Federal Investigations and Proceedings

A. *The Attorney-Client Privilege is Under Federal Governmental Assault*

In recent years, many federal government agencies have adopted policies that erode the attorney-client privilege, the work product doctrine, and employee legal protections in the corporate context. Each of these policies—including DOJ’s 2006 “McNulty Memorandum,” the SEC’s 2001 “Seaboard Report,” the Environmental Protection Agency’s “Audit Policy,” and similar policies by other agencies—pressure companies and other organizations to waive their attorney-client privilege and work product protections as a condition of receiving full cooperation credit during investigations. These policies also contain separate provisions that weaken employees’ Sixth Amendment right to counsel, Fifth Amendment right against self-incrimination, and other fundamental legal rights by pressuring companies not to pay their employees’ legal fees during investigations, to fire them for not waiving their rights, and to take other punitive actions against them long before any guilt has been established.

⁴² U.S. DEP’T OF JUST., FY 2009 BUDGET AND PERFORMANCE SUMMARY, FEDERAL PRISON SYSTEM, available at http://www.usdoj.gov/jmd/2009summary/html/127_bop.htm.

⁴³ BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003 (2006), at 3, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jeeus03.pdf>.

⁴⁴ U.S. Bureau of Prisons, A Brief History of the Bureau of Prisons, <http://www.bop.gov/about/history.jsp>.

⁴⁵ U.S. SENT’G COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING (2004), at 54, available at http://www.ussc.gov/15_year/15year.htm

⁴⁶ See *Federal Sentencing Reform*, SMART ON CRIME (2011).

B. *Enact Attorney-Client Privilege Protection Act or Issue Executive Order to Preserve Its Protections*

Legislative

Congress should enact comprehensive legislation like the Attorney-Client Privilege Protection Act (ACPPA) to ensure that the basic reforms implemented by DOJ apply to all federal agencies. The Senate and House Judiciary Committees have held four separate hearings on this issue since early 2006. At each hearing, a broad range of concerned organizations and constituents testified in support of legislative reform.

In November 2007, the House overwhelmingly approved the ACPPA, sponsored by Reps. John Conyers (D-MI), Bobby Scott (D-VA), and Lamar Smith (R-TX).⁴⁷ The reforms in this bill were comprehensive, applying to *all* federal agencies. A Senate companion bill, sponsored by then-Senators Arlen Specter (R-PA), Joseph Biden (D-DE), and 12 others from both parties, was also introduced in the 110th Congress but failed to receive a vote.⁴⁸ On February 13, 2009, Senator Specter reintroduced similar legislation, and⁴⁹ on December 16, 2009, Rep. Scott subsequently reintroduced the House version of the bill.⁵⁰ Many of the bill's reforms were later adopted by the Justice Department (DOJ) in its revised corporate charging guidelines.⁵¹ The 112th Congress should reintroduce and pass the ACCPA.

However, Unlike the reforms in the House bill—sponsored by Representatives John Conyers (D-MI), Bobby Scott (D-VA), and Lamar Smith (R-TX)—which apply to *all* federal agencies, the DOJ policy was limited in scope.⁵² A Senate companion bill, S. 3217, sponsored by then-Senators Arlen Specter (D-PA, then R-PA), Joseph Biden (D-DE) and 12 others from both parties, was also introduced in the 110th Congress but failed to receive a vote. On February 13, 2009, Senator Specter reintroduced similar legislation, S. 445 in the 111th Congress. Representative Scott subsequently reintroduced the House version of the bill on December 16, 2009 as H.R. 4326.

Enactment of comprehensive legislation like the Attorney-Client Privilege Protection Act (ACPPA) is needed to ensure that the basic reforms implemented by DOJ apply to all federal agencies.

⁴⁷ Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007)

⁴⁸ Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. (2008).

⁴⁹ Attorney-Client Privilege Protection Act of 2009, S. 445, 111th Cong. (2009).

⁵⁰ Attorney-Client Privilege Protection Act of 2009, H.R. 4326, 111th Cong. (2009).

⁵¹ American Bar Association, Protecting the Attorney-Client Privilege, the Work Product Doctrine, and Employee Legal Rights: Comprehensive Reform Still Critically Needed (Oct. 2010), *available at*: http://www.abanet.org/poladv/priorities/privilegewaiver/2010Oct_factsheet.pdf.

⁵² *Id.*

Executive

Absent Congressional action, the President should issue an executive order preserving the protections of the attorney-client privilege.

In August 2008, DOJ replaced the McNulty Memorandum, which limited attorney-client privilege, with revised corporate charging guidelines that generally bar prosecutors from pressuring companies to waive their attorney-client privilege, work product, or employee legal rights in return for cooperation credit, with certain exceptions. The President should issue an executive order applying DOJ's reforms to all federal agencies to clearly protect the sanctity of the privilege.

APPENDICES

Experts

Overcriminalization

Shana-Tara Regon, Director of White Collar Crime, National Association of Criminal Defense Lawyers (<http://www.nacdl.org/whitecollar>)

Brian Walsh, Senior Legal Research Fellow, Center for Legal and Judicial Studies, The Heritage Foundation (<http://www.heritage.org/about/staff/w/brian-walsh>)

Attorney-Client Privilege

Larson Frisby, Senior Legislative Counsel, American Bar Association (<http://www.abanet.org/poladv/contact.shtml>)

Barry Pollack, Member, Miller & Chevalier, Washington, D.C. (<http://www.millerchevalier.com/bpollack/>)

Further Resources

Overcriminalization

BRIAN W. WALSH & TIFFANY M. JOSLYN, THE HERITAGE FOUNDATION & NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE INTENT REQUIREMENT IN FEDERAL LAW 6* (2010), *available at* [http://www.nacdl.org/public.nsf/WhiteCollar/WithoutIntent/\\$FILE/WithoutIntentReport.pdf](http://www.nacdl.org/public.nsf/WhiteCollar/WithoutIntent/$FILE/WithoutIntentReport.pdf)

ONE NATION UNDER ARREST: HOW CRAZY LAWS, ROUGE PROSECUTORS, AND ACTIVIST JUDGES THREATEN YOUR LIBERTY (Paul Rosenzweig & Brian W. Walsh, eds., 2010).

HARVEY SILVERGLATE *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009).

National Association of Criminal Defense Lawyers, *Battling Overcriminalization of Conduct*, www.nacdl.org/overcrim (last visited Jan. 24, 2011).

Attorney-Client Privilege

American Bar Association, *Resolution and Report 302A Regarding the Preservation of the Attorney-Client Privilege Throughout the Audit Process* (August 2006), available at: http://www.abanet.org/leadership/2006/annual/DAILY_JOURNAL.pdf.

American Bar Association, Resolution and Report 302B Regarding the Preservation of Employee Legal Rights During Government Investigations (August 2006), *available at*: http://www.abanet.org/leadership/2006/annual/DAILY_JOURNAL.pdf.

American Bar Association, Resolution and report Regarding Attorney-Client Privilege and Work Product Doctrine (August 9, 2005), *available at*: <http://www.docstoc.com/docs/51019355/ABA-August-9-2005-Resolution-and-Report-Regarding-Attorney-Client-Privilege-and-Work-Product-Doctrine>.

American Bar Association, Privilege Waiver Materials, a resource webpage *available at*: <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>.

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