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before the

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Subcommittee on Crime, Terrorism, and Homeland Security

on

"Reining in Overcriminalization: Assessing the Problems, Proposing Solutions"

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Thank you, Chairman Scott, Ranking Member Gohmert, and members of the Subcommittee for allowing me the privilege of testifying about "overcriminalization" and its implications for the efficacy and integrity of federal criminal law. I commend the Subcommittee for its interest in this important subject.

I begin by explaining what I mean by "overcriminalization." Next, I discuss the impact that overcriminalization has had on the quality of the federal criminal code and on federal enforcement priorities. I conclude with some potential solutions intended to restore protections for the important values that overcriminalization has jeopardized.

I. DEFINING "OVERCRIMINALIZATION"

Few issues of criminal law have received more sustained attention from scholars over the last generation or two than overcriminalization. It is fair to say the judgment of the scholarly community has been almost uniformly negative. From all across the political spectrum, there is wide consensus that overcriminalization is a serious problem.[1] Indeed, a recent book-length treatment of the subject describes overcriminalization as "*the most pressing problem* with the criminal law today."[2]

As the term itself implies, critiques of "overcriminalization" posit that there are too many crimes on the books today. It is, of course, difficult to make such claims without a normative baseline – an idea of what constitutes the "right" number of criminal laws – and such a baseline is elusive. Still, history and crime rates provide relevant benchmarks, and they strongly suggest that the criminal sanction is being seriously overused.

Federal criminal law is growing at a break-neck pace. According to a 1998 report issued by an American Bar Association task force, an incredible forty percent of the thousands of crimes on the federal books were enacted after 1970.[3] The relentless pace at which new federal crimes are passed has continued despite significant recent declines in crime rates. On average, Congress created fifty-six new crimes every year since 2000, roughly the same rate of criminalization from the two prior decades.[4] Thus, whether crime rates are low or high, the one constant is that scores of new federal crimes are always being enacted.

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[1]According to Harvard Law Professor William Stuntz, overcriminalization "has long been the starting point for virtually all the scholarship in this field, which (with the important exception of sexual assault) consistently argues that existing criminal liability rules are too broad and ought to be narrowed." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 507 (2001).

[2]DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3 (Oxford Univ. Press 2007) (emphasis added).

[3]AMERICAN BAR ASSOCIATION, THE FEDERALIZATION OF CRIMINAL LAW 7-8 (1998).

[4]*See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memorandum No. 26, at 5 (June 16, 2008).

Standard critiques of overcriminalization also bemoan the scope of modern criminal codes. Today's expansive criminal codes reach conduct that, in previous generations, would not have been punished criminally. The classic example is so-called "regulatory" offenses. Such offenses punish conduct that is *mala prohibita*, or wrongful only because it is illegal, and may allow punishment where "consciousness of wrongdoing be totally wanting."[5] With the proliferation of regulatory offenses, infractions that, in prior generations, might not even have resulted in civil fines or tort liability, are now subject to the punishment and stigma of the criminal law.[6]

The discussion of overcriminalization offered thus far is fundamentally *quantitative* in nature, concerning the number of existing criminal laws and the amount of conduct that is subject to punishment. It is important to recognize that overcriminalization has *qualitative* dimensions as well.

Simply stated, overcriminalization tends to degrade the quality of the criminal code. For example, a code that is too large and grows too rapidly will often be poorly organized, structured, and conceived. The crimes may not be readily accessible or comprehensible to those subject to their commands. Moreover, a sprawling, rapidly growing criminal code is likely to contain crimes that are inadequately defined – crimes, for example, in which the conduct (actus reus) and state of mind (mens rea) elements are incompletely fleshed out, giving unintended and perhaps unwarranted sweep to those crimes.

Though the two dimensions of overcriminalization are related – having too many crimes tends to produce inadequate criminal codes – they should be recognized as separate and distinct.

II. A QUALITATIVE CRITIQUE OF OVERCRIMINALIZATION

Like many who write about criminal law and procedure, I have written about the problem of overcriminalization. My work in this area emphasizes the qualitative aspects of overcriminalization over the quantitative.[7] This is not out of disagreement with the idea that the scope of existing criminal liability is too broad. Indeed, I could not agree more. In my view, a narrower, more

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[5] *United States v. Dotterweich*, 320 U.S. 277, 284 (1943). As *Dotterweich* further explained, regulatory offenses employ criminal penalties as a form of regulation to promote the effectiveness of health, safety, and welfare rules otherwise enforced through noncriminal means. *See* id. at 280-81. Regulatory offenses differ from the types of crimes punishable at common law, which were deemed *mala in se*, or wrong in themselves.

[6] Another frequently voiced complaint about the scope of modern criminal codes is that they contain a host of outmoded "morals" offenses, offenses that punish even "victimless" crimes principally as a means of expressing moral disapproval. *See, e.g.*, HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 296-331 (Stanford Univ. Press 1968). Even when the moralistic impulses that originally gave rise to such offenses have abated, and such offenses are rarely (if ever) charged, the crimes remain enforceable. *E.g.*, White Slave Traffic (Mann) Act, Pub. L. No. 61-277, §2, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421 (2000)) (prohibiting interstate transportation of females "for the purpose of prostitution or debauchery, or for any other immoral purpose").

[7] *See, e.g.*, Stephen F. Smith, *Proportional Mens Rea*, 46 Am. Crim. L. Rev. 127 (2009); Stephen F. Smith, *Proportionality and Federalization*, 91 Va. L. Rev. 879 (2005).

targeted federal criminal code – one that kept federal enforcers focused on terrorism, border security, and other truly national issues and stopped them from playing district attorney and "beat cop" by prosecuting street crime and other local matters that belong in state court – would be ideal.

Nevertheless, given that broad criminal codes serve the interests of legislators (and prosecutors),[8] I believe critiques of the number and scope of modern criminal codes point to a disease for which there is, realistically speaking, no cure. This, however, is not true of the qualitative approach. From a qualitative perspective, as I will endeavor to show, overcriminalization is still a disease, but it is a *treatable* one.

The main problem with federalization is that federal crimes are often (if not usually) poorly defined – and poorly defined in ways that exacerbate their already considerable breadth and punitiveness, maximize prosecutorial power, and undermine the goal of providing fair warning of the acts that can lead to criminal liability. Even if the number of crimes continues to grow, Congress can vastly improve matters by remedying the many deficiencies in the quality of federal criminal law – deficiencies that are explained more fully below.

A. *A "Code" in Name Only*

A major problem with federal criminal law, quite simply, is that we do not have a "federal criminal code" in any recognizable sense of the phrase. A "code" is a systematic body of laws that is organized into a coherent, and cohesive, whole. That characterization does not fit the hodge-podge we refer to as federal criminal law.

Although Title 18 of the United States Code is entitled "Crimes and Criminal Procedure," the roster of federal crimes is not contained in that or any other single title of the U.S. Code. Instead, they are scattered throughout the dozens of titles of the Code. That might not be a serious defect if the crimes were carefully organized and comprehensively indexed, but that is not the case.

As one participant in prior federal criminal law reform efforts has explained:

> The accumulated *ad hoc* enactments appear in a uniquely unhelpful arrangement. They are clumped together in a series of chapters bearing titles apparently chosen by lexicographers rather than lawyers versed in the penal law, and are laid out in alphabetical order of their titles (Aircraft and Motor Vehicles; Animals, Birds, Fish, and Plants; Arson; Assault; etc.) rather than by concept. Individual provisions have proven to be so difficult to find that, until a change in type fonts several years ago, the paperback edition of Title 18 consisted of approximately 500 pages of statutory text, and, in a vain attempt to provide the reader with some rough idea of the

[8] *See generally* Stuntz, supra note 1.

contents, 300 pages of an index.[9]

This state of affairs is unacceptable for several reasons. *First*, it makes it difficult for even specialists in criminal law to find the law, much less ordinary citizens trying to determine their legal obligations. This frustrates the rule-of-law imperative that the criminal law should be accessible to the public so they can conform their behavior to it, and potentially the notion that it is unfair to punish absent fair warning. *Second*, it complicates the task of effective crime definition. With such poor organization, it is no surprise that federal criminal law contains scores of overlapping crimes that address the same criminal act but, for no apparent reason, are defined or punished quite differently.[10]

B. *Overlapping Crimes, Inconsistent Definitions and Penalties*

Enormous overlap across statutes is a particularly significant problem stemming from overcriminalization. Where there is a large number of overlapping crimes addressing the same conduct, the actus reus and mens rea elements are frequently defined inconsistently across statutes, producing the arbitrary result in which elements deemed essential to criminal liability in one context may be avoided – and defendants who would otherwise be acquitted or not charged, convicted – simply by prosecuting under a different statute.[11] Furthermore, overlapping criminal statutes often prescribe different (and, at times, radically different) penalties for the same act. In these situations, the prosecutor's choice of which statute to proceed under, not the gravity of the defendant's conduct, is the determinative factor in the penalties to which convicted offenders are exposed.

The crime of credit-card fraud illustrates how prosecutors exploit the existence of overlapping crimes to evade congressional policy choices about the definition and grading of crimes. Credit-card fraud is a serious crime, punishable by up to ten years in prison.[12] Now that the

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[9]Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 Buff. Crim. L. Rev. 45, 67 (1998) (footnotes omitted).

[10]As Justice John Paul Stevens wrote in a fairly recent case: "[A]t least 100 federal false statement offenses may be found in the United States Code. About 42 of them contain an express materiality requirement; approximately 54 do not. The kinds of false statements found in the first category are, to my eyes at least, indistinguishable from those in the second category. Nor is there any obvious distinction between the range of punishments authorized by the two different groups of statutes." *United States v. Wells*, 519 U.S. 482, 505-06 (1997) (Stevens, J., dissenting) (footnotes omitted).

[11]In cases of overlap, prosecutors are free to pick and choose among the applicable statutes as they see fit, absent either a constitutional violation or specific legislative intent to make a particular statute exclusive of others. The Supreme Court has "long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." *United States v. Batchelder*, 442 U.S. 114, 118 (1979); see also, e.g., *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1187 (4th Cir. 1982) (ruling that false claims can be punished as mail fraud despite the False Claims Act).

[12]*See* 15 U.S.C. § 1644.

maximum punishment for mail and wire fraud is twenty years,[13] allowing those statutes to be used for frauds involving credit cards will double the maximum penalty that Congress specifically prescribed for credit-card fraud.[14]

Moreover, the mail and wire fraud statutes can be used by prosecutors, in effect, to redefine credit-card fraud. The credit-card fraud statute does not permit federal prosecution unless the fraud exceeds a specified monetary amount.[15] Presumably Congress imposed a monetary limit to prevent prosecutors from "making a federal case" out of small-scale frauds involving credit cards. Credit-card authorization and billing, however, invariably involves some use of the mails and interstate wires. The existence of overlapping mail and wire fraud statutes thus allows prosecutors to evade the monetary limit imposed by Congress by simply charging fraudulent uses of credit cards below the statutory minimum amount as mail or wire fraud instead of credit-card fraud.

The ability of prosecutors to use overlapping fraud statutes to override congressional policy choices concerning crime definition and grading is hardly peculiar to credit-card fraud. As one commentator has explained:

> [T]he federal criminal code contains . . . exactly three hundred and twenty-five provisions that prescribe criminal penalties for fraud [or fraudulent behavior]. . . . These frauds range in statutory maximum penalties from a fine of $300 or $1000 or six months' imprisonment to 10 years or 20 years or life. These latter provisions are not aberrational: the federal code contains fifty fraud statutes that provide for a maximum penalty of ten years or more. It also contains at least triple that number that are misdemeanors, with the rest obviously falling in between one and ten years.[16]

It is puzzling that Congress and the courts have allowed federal prosecutors to exploit the redundancies in federal criminal law, in effect, to redefine crimes and override congressional choices concerning the proper penalty for crimes. A bedrock principle of American criminal justice is legislative supremacy – the idea that it is for *legislatures*, not courts or law enforcement, to define

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[13] *See* 18 U.S.C. § 1341 (mail fraud); id. § 1343 (wire fraud). The maximum can be as high as thirty years for frauds involving financial institutions or certain federal disaster relief efforts. Id.

[14] The punishment effects are even more staggering when the mail and wire fraud statutes are used, instead of the False Claims Act, to prosecute the submission of false claims to federal agencies: the maximum penalty increases four-fold, from five to twenty years. *See* 18 U.S.C. § 287.

[15] The current monetary limit for most purposes is one thousand dollars in any given year. See 15 U.S.C. § 1644(a), (d),(f).

[16] Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 289-90 (1998) (footnotes omitted). The same could be said of federal false statement offenses, of which there are approximately one hundred, and those offenses have significant differences in definitions and penalties. *See United States v. Wells*, 519 U.S. 482, 505 (1997) (Stevens, J., dissenting) (quoted in supra note 10). For further examples of this common phenomenon, see generally Smith, *Proportionality and Federalization*, supra note 7, at 908-25.

what is a crime (and, in doing so, grade the offense).[17] Allowing prosecutors to use overlapping statutes to prosecute behavior that Congress exempted from criminal sanction in statutes specifically addressing that type of behavior and to drive up the penalty Congress prescribed for a particular criminal act is fundamentally at odds with legislative supremacy in crime definition and grading.

C. *Judicial Crime-Creation*

Another major problem with federal criminal law is that it allows courts essentially to create new crimes. Although they would have us believe otherwise, the federal courts are not innocent bystanders watching helplessly as the political branches federalize crime and drive up punishments for federal defendants. Instead, the courts have been playing the overcrimination game right along with the political branches – unwittingly, perhaps, but playing all the same – by expansively construing federal crimes on a routine basis. The federal criminal code is as broad and harsh as it is today in large part because the federal courts helped make it that way.[18]

The root of the problem here is that the courts are notoriously inconsistent in their adherence to the venerable "rule of lenity." The rule of lenity requires court to construe ambiguous criminal laws narrowly, in favor of the defendant.[19] It does so, not to show lenience to lawbreakers, but to protect important societal interests against the many adverse consequences that judicial expansion of crimes produces – consequences such as the usurpation of the legislative crime-definition function, not to mention potential frustration of legislative purpose and unfair surprise to persons convicted under unclear statutes. The rule of lenity therefore reflects, as Judge Henry Friendly once put it, a democratic society's "'instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'"[20]

More to the point here, faithful adherence to the rule of lenity would require courts to

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[17]*See, e.g., United States v. Bass*, 404 U.S. 336, 348 (1971) (stating that "because criminal punishment usually represents the moral condemnation of the community, legislatures . . . should define criminal activity"). This notion inheres in the "principle of legality," which posits that only legislatures are "politically competent to define crime." John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 190 (1985).

[18]This result is ironic indeed because federal judges are among the most vocal critics of the severity of federal sentences and of the federalization of crime. *See, e.g.*, William H. Rehnquist, *Congress is Crippling Federal Courts*, St. Louis Post-Dispatch, Feb. 16, 1992, at 3B (arguing that the federal judiciary "cannot possibly become federal counterparts of courts of general jurisdiction ... without seriously undermining their usefulness in performing their traditional role"). The late-Chief Justice Rehnquist regularly delivered that urgent message to Congress on behalf of the Judicial Conference of the United States, alas to no avail.

[19]*See, e.g., United States v Bass*, 404 US 336, 349 (1971).

[20]Id. (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, reprinted in HENRY J. FRIENDLY, BENCHMARKS 196, 209 (Chicago, 1967)). The rule also has an important, albeit underappreciated, role in preventing courts from overriding legislative grading decisions by increasing the penalties for criminal acts. *See generally* Smith, *Proportionality and Federalization*, supra note 7, at 934-44.

counteract overcriminalization. The rule of lenity rules out expansive interpretations of criminal statutes and, in do so, requires courts to narrow, rather than broaden, the scope of ambiguous criminal laws. This would prevent prosecutors from exploiting the ambiguities of poorly defined federal crimes to criminalize conduct Congress has not specifically declared a crime. The rule of lenity would thus make poor crime definition an *obstacle* to – not an *occasion* or *excuse* for – more expansive applications of federal criminal law.

Unfortunately, the federal courts treat the rule of lenity with suspicion and, at times, outright hostility. While sometimes faithfully applying the rule of lenity, the Court has on many other occasions either ignored lenity or dismissed it as a principle that applies only when legislative history and other interpretive principles cannot give meaning to an ambiguous statute.[21] Indeed, the federal courts so frequently disregard the rule of lenity that it is questionable whether it is even accurate today to describe the rule of lenity as a "rule":

> [T]he courts' aversion to letting blameworthy conduct slip through the federal cracks has dramatically reversed the lenity presumption. The operative presumption in criminal cases today is that whenever the conduct in question is morally blameworthy, statutes should be *broadly* construed, in favor of the prosecution, unless the defendant's interpretation is compelled by the statute. . . . The rule of lenity, in short, has been converted from a rule about the proper locus of lawmaking power in the area of crime into what can only be described as a "rule of severity."[22]

The result of the judiciary's haphazard adherence to the rule of lenity is as predictable as its results have been misguided. Federal judges have repeatedly used ambiguous statutes as a basis for creating new federal crimes.[23] They have also expanded the reach of overlapping federal crimes to

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[21] *Muscarello v. United States*, 524 U.S. 125 (1998), exemplifies the dismissive treatment lenity usually receives in federal court. Faced with a statutory term that even the majority admitted had literally dozens of different dictionary meanings and no evidence of the meaning Congress intended, the majority simply chose the one it preferred, and in doing so brought the defendant under a strict, and otherwise inapplicable, mandatory minimum. Id. Where Justice Ruth Bader Ginsburg correctly saw an easy case for the rule of lenity, the majority dismissed the rule as irrelevant. Justice Stephen Breyer wrote: "The rule of lenity applies only if, after seizing everything from which aid can be derived, ... we can make no more than a guess as to what Congress intended. To invoke the rule, we must conclude that there is a grievous ambiguity or uncertainty in the statute." Id. at 138-39 (citations and internal quotation marks omitted). For a discussion of the Supreme Court's schizophrenic case law on lenity, see Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 384-89.

[22] Smith, *Proportionality and Federalization*, supra note 7, at 926.

[23] One notorious example is mail and wire fraud. Courts have cut the concept of "fraud" under 18 U.S.C. §§ 1341 & 1343 loose from preexisting notions of fraud and allowed prosecutors to substitute in its place all sorts of imaginative "intangible rights." The result has been federal prosecution of a stunning array of misbehavior involving breaches of contract, conflicts of interest, ethical lapses, and violations of workplace rules that otherwise would not be federal crimes (and, in some cases, may not have been crimes at all). *See generally* John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117 (1981). For further examples, see generally Smith, *Proportionality and*

drive up the punishment Congress prescribed for comparatively minor federal crimes.[24] The end result of such assaults on the rule of lenity is necessarily a broader and more punitive federal criminal law – a *worsening* of overcriminalization, rather than an improvement.

D. *Inadequate Mens Rea Requirements*

Another area of serious concern in federal criminal law is that statutory crimes often have inadequate mens rea requirements. In writing new crimes, Congress takes pains to identify the actus reus elements that describe the act to be prohibited, but all too often specifies no mens rea requirements or inadequate mens rea requirements. This is troublesome because mens rea requirements are an essential safeguard against unjust convictions and disproportionate punishment.

As the Supreme Court explained in *Morissette v. United States*,[25] the concept of punishment based on acts alone, without a culpable state of mind, is "inconsistent with our philosophy of criminal law." In our system, crime is understood as a "compound concept," requiring both an "evil-doing hand" and an "evil-meaning mind."[26] The historic role of the mens rea requirement is to exempt from punishment those who are not "blameworthy in mind" and thereby to limit punishment to persons who disregarded notice that their conduct was wrong.[27] Mens rea also serves to achieve proportionality of punishment for blameworthy acts – to make sure the punishment the law allows "fits" the crime. It is mens rea, for example, that guarantees that the harsher penalties for intentional

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Federalization, supra note 7, at 896-908.

[24]An example is extortion under the Hobbs Act, 18 U.S.C. § 1951. In *Evans v. United States*, 504 U.S. 255 (1992), the Court expanded the concept of "extortion" to include the passive acceptance of bribes and gratuities by public officials. The result was a dramatic increase in the maximum punishment available under other federal statutes regulating bribery and gratuities offenses: the maximum punishment for bribery and gratuities *qua* extortion is twenty years, far in excess of the applicable maximums under the federal bribery statute (fifteen years for bribery and two years for gratuities, *see* 18 U.S.C. § 201(b)-(c)), the federal program bribery statute (ten years, *see* 18 U.S.C. § 666), and the then-applicable maximum for "honest services" mail fraud (five years, *see* 18 U.S.C. § 1341 (1992)). For situations where courts expanded overlapping crimes in ways that increased the penalty available under other federal criminal statutes, see generally Smith, *Proportionality and Federalization*, supra note 7, at 908-930.

[25]342 U.S. 246, 250 (1952).

[26]Id. at 251. Notice that, *Morissette*'s colorful reference to the "evil-doing hand" notwithstanding, the actus reus often is innocuous conduct. For example, the actus reus of mail fraud is simply using the mails, *see* 18 U.S.C. § 1341, and the actus reus of Travel Act violations is interstate or international travel, *see* U.S.C. § 18 U.S.C. § 1952(a). The blameworthiness of such crimes comes entirely from mens rea – in the examples just given, the illicit purpose for which the mails or channels of commerce are used. See 18 U.S.C. § 1341 (intent to defraud); id. § 1952(a) (intent to commit crimes).

[27]Id. at 252.

homicides will not be applied to accidental homicides.[28]

Importantly, the linkage between punishment and blameworthiness is no artifact from a bygone retributivist age. Although utilitarians reject the retributivist view that moral blameworthiness is the *justification* for punishment, most utilitarians agree that moral blameworthiness as an "important limiting principle" for criminal punishment.[29] The fundamental insight here is that there is considerable "utility" in moral "desert" – that a criminal law which distributes punishment according to blameworthiness will more effectively achieve its crime-prevention goals than one which punishes regardless of the moral sentiments of the community.[30]

Despite the critical importance of mens rea to the effectiveness and legitimacy of federal criminal law, federal crimes often lack sufficient mens rea elements. Many federal crimes – including very serious crimes – contain no express mens rea requirements.[31] Perhaps more commonly, federal crimes include express mens rea requirements for part of the crime but are silent as to the mens rea (if any) required for others.[32] Here, it is evident that Congress intended to require mens rea, but it is unclear whether Congress intended the express mens rea requirement to exclude additional mens rea requirements.

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[28]*See* Smith, *Proportional Mens Rea*, supra note 7, at 133-35. As a consequence, the role of mens rea "is broader than exempting morally blameless conduct from punishment. It involves limiting guilt and punishment in accordance with the blameworthiness of the defendant's act. The means of doing so differs. In some cases, mens rea serves to carve morally innocent conduct out of the reach of a criminal statute whereas, in others, it ensures that morally blameworthy conduct will not be punished out of proportion with its level of blameworthiness; in still others, it does both. The goal, however, is the same: to ensure that guilt and punishment track the moral blameworthiness of the conduct that gives rise to liability." Id. at 136.

[29]H. PACKER, supra note 6, at 66-67. Packer was not alone in this regard. As no less an authority than Oliver Wendell Holmes, Jr. declared, "a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." O.W. HOLMES, JR., THE COMMON LAW 50 (1881).

[30]*See generally* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 N.W. U. L. REV. 453 (1997) (finding that deviations from moral desert can undercut the criminal law's moral credibility and hence its power to gain compliance by its moral authority).

[31]To give but two examples, the National Firearms Act, 26 U. S. C. § 5861(d), construed in *United States v. Freed*, 401 U.S. 601 (1971), makes it a serious felony to possess unregistered grenades and other "firearms," but contains no express mens rea requirements. Similarly, the Hobbs Act, 18 U.S.C. § 1951(a), makes it a crime to commit extortion, defined as obtaining money or property from another, with his consent, through the wrongful use of coercion, *id.* § 1951(b)(2). No mens rea requirements appear in the definition of the crime.

[32]The false statement statute, for example, requires that the false statement have been made "knowingly and willfully" but provides no mens rea requirement for the part of the crime requiring that the false statement have been made in a matter within the jurisdiction of a federal agency. *See* 18 U.S.C. § 1001. Similarly, the federal child-pornography law requires that the defendant "knowingly" transported or received a visual depiction, but prescribed no mens rea either for the sexually explicit nature of the visual depiction or the fact that it involved minors. *See* 18 U.S.C. § 2252(a).

In many cases, even when Congress includes mens rea terms in the definition of crimes, it uses terminology, such as "willfully" and "maliciously," that have no intrinsic meaning and whose meaning may vary widely in different statutory contexts. Take, for example, "willfulness." "Willfulness" has a chameleon-like quality in federal criminal law: "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 . . . a 'willful' act is one undertaken with a 'bad purpose.'"[33]

The lack of consistent meanings attributed to express mens rea terms across statutes is inevitable given the large universe of mens rea terms used in federal criminal law. According to the Brown Commission, known more formally as the National Commission for Reform of Federal Criminal Law, federal criminal statutes contain a "staggering array" of mens rea terms.[34] After noting almost eighty different mens rea requirements contained in federal crimes, the Commission explained:

> Understandably, the courts have been unable to find substantive correlates for all of these varied descriptions of mental states and, in fact, the opinions display far fewer mental states than the statutory language. Not only does the statutory language not reflect accurately or consistently what are the mental elements of the various crimes; there is no discernible pattern or consistent rationale which explains why one crime is defined or understood to require one mental state and another crime another mental state or indeed no mental state at all.[35]

In situations such as the ones previously described, where the crimes enacted by Congress contain incomprehensible or incompletely defined mens rea requirements, it is difficult, if not impossible, to know which elements will require mens rea and the precise level of mens rea that will be required. Unlike the drafters of the Model Penal Code, for example, Congress has enacted no default level of mental culpability that applies when statutes are silent as to mens rea.[36] Again in contrast to the Model Penal Code, there are no federal statutes that provide uniform definitions for

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[33] *Bryan v. United States*, 524 U.S. 184, 191 (1998) (citations omitted). Even when the "bad purpose" definition of "willfulness" is adopted, there still may be no consistency of usage. In *Bryan*, the Court ruled that, in the context of a willful violation of federal firearms requirements, "willfulness" merely required proof that the defendant understood, in a general way, that his conduct was illegal. Id. In *Ratlzaf v. United States*, 510 U.S. 135 (1994), however, the Court adopted an even more stringent understanding of "willfulness." In order to commit a willful violations of the prohibition against "structuring" a cash transaction in excess of $10,000 into smaller transactions in order to evade currency transaction reporting requirements, the Court ruled, the defendant has to know specifically that "structuring" is illegal. Id. at 149.

[34] 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 119 (1970).

[35] Id. at 119-20.

[36] *See* MODEL PENAL CODE § 2.02(3) (prescribing "recklessness" as the default MPC level of mental culpability).

mens rea terms[37] or supply interpretive rules specifying which elements require mens rea and, for the ones that do, how to determine the precise level of mental culpability that is required.[38] In all these respects, it is up to the federal courts to decide, on an *ad hoc* basis, what additional mens rea requirements to impose (if any) and how to construe "willfulness" and other vague mens rea terms.

This confusing state of affairs might be acceptable if the courts provided the clear interpretive tools or methods that Congress has failed to enact. Unfortunately, however, the courts have been inconsistent in their approach to mens-rea selection. Increasingly of late, the Supreme Court stands ready to read mens rea requirements into statutes that are silent, in whole or part, as to mens rea, and the reason is that the Court has placed renewed interest in making a morally culpable state of mind a prerequisite to punishment.[39] This, however, is not invariably so.

Sometimes, courts treat legislative silence concerning mens rea as a legislative signal to dispense with mens rea requirements. This is especially the case with regulatory crimes protecting the public health, safety, and welfare. Even *Morissette v. United States*, with its strong emphasis on the usual requirement that a culpable mental state is a prerequisite to punishment, conceded that the requirement may not apply to regulatory or other crimes not derived from the common law.[40] The Court seized on this statement in *United States v. Freed*[41] as justification for treating a felony punishable by ten years in prison as a regulatory offense requiring no mental culpabilty.

To be sure, more recent cases cast doubt on *Morissette* and *Freed* in this respect. Among

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[37]*See* id. § 2.02(2)(a)-(d) (defining "purpose," "knowledge," recklessness," and "negligence").

[38]*See* id. § 2.02(1) (mandating that all "material elements" of MPC offenses require mens rea); id. § 2.02(4) (supplying interpretive rule to determine mens rea for all elements where mens rea is prescribed for part but not all of an MPC offense).

[39]A good example is *Staples v. United States*, 511 U.S. 600 (1994). In that case, the defendant was convicted for possession of an unregistered machine gun despite his claimed ignorance of his rifle's ability to fire automatically. To the prosecution, all that mattered was that he knew his rifle was a gun. The Court disagreed. In our gun-friendly culture, where ordinary firearms are lawful possessions in millions of households, mere knowledge that one is in possession of a gun fails to give notice of a potential violation. In order for the requisite culpable mental state to exist, the government must prove the defendant knew the characteristic of his gun (its automatic-firing capabilty) that placed it in the category of "quasi-suspect" weapons as to which citizens expect legal regulation.

[40]*See Morissette*, 342 U.S. 246, (1952). As unfortunate as *Morissette*'s dicta was in this respect, the Court had previously *held* that the category of regulatory offenses that *Morissette* later referred to as "public welfare offenses" "*dispenses* with the conventional requirement for criminal conduct – awareness of some wrongdoing." *United States v. Dotterweich*, 320 U.S. at 281 (emphasis added).

[41]401 U.S. 601, 607 (1971) (noting that common-law crimes belong to a "different category" than the "expanding regulatory area involving activities affecting public health, safety, and welfare" as to which relaxed mens-rea requirements apply).

these cases are *Arthur Andersen LLP v. United States*,[42] *Ratzlaf v. United States*,[43] and *Staples v. United States*.[44] In each case, the Supreme Court adopted heightened mens rea requirements, and two of these cases (*Arthur Andersen* and *Ratzlaf*) went so far as to make ignorance of the law a defense.[45] Each time, the Court ratcheted up mens rea requirements for the stated purpose of preventing conviction for morally blameless conduct.

These cases, I believe, are best read as making a culpable mental state a prerequisite for punishment for all crimes, even regulatory offenses. As I have noted elsewhere:

> [T]he Supreme Court has dramatically revitalized the mens rea requirement for federal crimes. The "guilty mind" requirement now aspires to exempt all "innocent" (or morally blameless) conduct from punishment and restrict criminal statutes to conduct that is "inevitably nefarious." When a literal interpretation of a federal criminal statute could encompass "innocent" behavior, courts stand ready to impose heightened mens rea requirements designed to exempt all such behavior from punishment. The goal of current federal mens rea doctrine, in other words, is nothing short of protecting moral innocence against the stigma and penalties of criminal punishment.[46]

The fact remains, however, that *Freed* and cases like it have never been overturned. Unless that happens, confusion will persist – and, with it, the possibility that a culpable mental state may be not be required for some crimes, especially regulatory offenses involving health and safety concerns.

One thing, however, is certain: as long as Congress fails to make proof of a culpable mental state an unyielding prerequisite to punishment, federal prosecutors will continue to water down mens rea requirements in ways that allow conviction without blameworthiness. That is exactly what prosecutors did, for example, in *Arthur Andersen* during the wave of post-Enron hysteria over corporate fraud. In seeking to convict Enron's accounting firm of the "corrupt persuasion" form of obstruction of justice, prosecutors – flatly disregarding the lesson of cases like *Staples* and *Ratzlaf* – argued for incredibly weak mens rea requirements that, as the Court noted, would have

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[42]544 U.S. 696 (2000).

[43]510 U.S. 135 (1994).

[44]511 U.S. 600 (1994).

[45]As previously explained, *Ratzlaf* held that, to be guilty of willfully violating the "structuring" ban, defendants must have known that "structuring" is illegal. *See* supra note 33. *Arthur Andersen* held that ordering the destruction of documents to keep them out of the hands of federal investigators cannot be considered "knowing corruption," within the meaning of 18 U.S.C. § 1512(b), unless the person who gave the order knew he was acting illegally. *See Arthur Andersen*, 544 U.S. at 706.

[46]Smith, *Proportional Mens Rea*, supra note 7, at 127 (footnotes omitted); *see generally* John S. Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 Va. L. Rev. 1021 (1999).

criminalized entirely innocuous conduct.[47]

Although the Supreme Court unanimously rejected the Justice Department's efforts and overturned Arthur Andersen's conviction, the firm has less cause to celebrate than one might think. After being convicted on a prosecution theory so aggressive that it could not win even a *single* vote from the Justices, the firm – once a "Big Five" accounting firm – went out of the consulting business. Even now that it no longer stands convicted of a crime, its reputation has, in all likelihood, been damaged beyond repair. Its own conduct in the Enron matter had a lot to do with that, of course, but so did the overzealousness of federal prosecutors in exploiting the serious imperfections in the federal mens rea doctrine. The Arthur Andersen episode simultaneously shows the need for substantial mens rea reform – and the high cost of not having strong mens rea requirements.

E. *Disproportionately Severe Penalties*

Of the wide array of critiques that have been leveled against federal criminal law in recent decades, one of the most consistent is that it frequently produces disproportionately severe sentences. Especially in the frequently prosecuted area of drug and firearms offenses (which account for roughly half of all federal prosecutions), federal mandatory *minimums* sentences sometime equal or exceed the *maximum* punishment that would be available in state court for parallel offenses.[48] As a result of tough federal mandatory minimums and sentencing guidelines that are considerably harsher than those followed in many states, "similarly situated offenders now receive radically different sentences in federal and state court."[49]

Even defenders of tough, guidelines-based sentencing have criticized the proliferation of mandatory minimums throughout federal law. As former U.S. District Judge Paul G. Cassell has noted, "many of the[] 'horror stories' [in federal sentencing] stem from mandatory minimums in general and the narcotics mandatory minimums in particular."[50] Consistent with this view, the U.S. Sentencing Commission recommended long ago that statutory mandatory minimums be repealed in

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[47]The government's interpretation would have made it a crime to either withhold documents from federal investigators or to destroy documents pursuant to the sort of document-retention policies that are commonplace in the business world, even if the person responsible for nondisclosure or destruction of the documents honestly believed he was acting lawfully – and even if the person did not know, or have reason to know, that the documents pertained to a federal investigation. *See Arthur Andersen*, 544 U.S. at 705-08.

[48]*See generally* Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 674 (1997).

[49]Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979, 962 (1995). As an example, Professor Sara Sun Beale cites federal drug offenses, which result in sentences that are often "ten or even twenty times higher" than the sentences that would be imposed in state court for the same conduct. Id. at 998-99.

[50]Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 Stan. L. Rev. 1017, 1045 (2004).

favor of its more context-specific, guidelines-based approach to sentencing.[51]

Despite these sensible recommendations, the number of provisions for mandatory minimum sentences, like the number of federal crimes, has increased considerably. Consider the following:

> There are approximately one hundred different provisions in the federal criminal code imposing mandatory minimum sentences, and a number of these provisions concern the frequently prosecuted areas of drug and weapons offenses. The impact of these provisions is far greater than their number would suggest. For example, between 1984 and 1991 alone, "nearly 60,000 cases" were sentenced pursuant to mandatory minimums.[52]

The presence of such severe penalties on the federal books is directly related to overcriminalization, in two different respects. Most obviously, the extreme penalties that federal law affords are a product of overcriminalization. Higher penalties, like new crimes, are a cheap but politically effective means through which legislators can signal to their constituency that they are "tough" on crime.

Furthermore, the severity of federal penalties serves to *exacerbate*, in a fairly dramatic way, the problem of overcriminalization. The point is that federal prosecutors are much more likely to bring prosecutions for the kinds of crimes that carry unusually high penalties, as compared to state law. The ability of high penalties to skew federal enforcement policies may be why drug offenses are the most commonly prosecuted federal crimes and why crimes regularly prosecuted in state court account for the bulk of the federal prosecutions annually.

To see the kind of mischief that unusually high federal penalties can cause, consider *United States v. Armstrong*.[53] By virtue of the infamous 100-1 "crack"/powder cocaine rule, federal sentences for offenders convicted of dealing crack cocaine faced far exceeded the penalties they would have faced had they not been targeted for federal prosecution. The high penalties under state law resulted in more federal crack prosecutions – and enormous racial disparities in sentencing in which eighty-six percent of federal defendants convicted for dealing crack were black (only four percent were white) and blacks "on average received sentences over 40% longer than whites."[54]

In a historic move, Congress finally addressed this unjust situation earlier this year, albeit in a manner that operates prospectively only. Under the Fair Sentencing Act of 2010,[55] which passed with bipartisan support, Congress rejected the 100-1 rule in favor of a more defensible 18-1 rule. Congress also acted to ameliorate the harsh statutory mandatory minimums for crack offenses, raising the drug quantity necessary to trigger the mandatory minimums for crack and even going so

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[51] *See* United States Sentencing Commission, *Report on Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991).

[52] Smith, *Proportionality and Federalization*, supra note 7, at 895 (footnotes omitted).

[53] 517 U.S. 456 (1996).

[54] Id. at 479-80 (Stevens, J., dissenting).

[55] Pub. L. 111-220, § 1, Aug. 3, 2010, 124 Stat. 2372 (amending 21 U.S.C. §§ 841, 844 & 960).

far as to repeal outright the mandatory minimum for simple possession of crack.

Having recently addressed itself to the problems that needlessly severe punishments caused in the area of crack offenses, Congress should recognize that crack offenses were far from the only federal offenses with unusually severe sentences and harsh mandatory minimums. These other offenses are worthy of the same thoughtful attention Congress eventually gave to crack offenses to ensure that such severity in federal sentencing policy is appropriate and just.

F. *Inadequate Defenses*

Although not often recognized as such, defenses are an important element in the overcriminalization debate. The problem is not just that there are too many crimes, and crimes are poorly defined. The deeper problem is that overcriminalization tends to treat the criminal law as a one-way ratchet: while crimes are continuously enacted and cast in very broad, capacious language (language that prosecutors and courts make *even broader* through expansive interpretations), the defenses to criminal liability are few in number and framed incredibly narrowly.

This is unfortunate because defenses have a vital role to play in keeping criminal liability within appropriate bounds. This is easy to see with "justification" defenses, such as self-defense and necessity. Such defenses exist to exempt from criminal liability otherwise illegal conduct that is morally justified in the circumstances. Using force to repel a rapist, or breaking into a house as a necessary means of rescuing an occupant from a deadly fire, for example, are exempt from punishment even though, in other circumstances, the law punishes using force against others or breaking into houses.

Other defenses, called "excuses," differ from justification defenses in that excuses concern blameworthy conduct. Nonetheless, like justification defenses, excuses serve to prevent conviction in circumstances where punishment would be unfair. Where, for example, a person committed a crime due to insanity or duress, the law withholds punishment – not because the crimes were morally appropriate or justified, but rather because, in such extreme circumstances, the lawbreaker cannot fairly be blamed for his crimes.

In the federal system, some crimes include statutory defenses specific to those crimes. The crime of perjury, for example, carries a recantation defense: if a witness voluntarily admits the falsity of a perjured statement in a timely manner, "such admission shall bar prosecution under this section."[56] Such crime-specific defenses are rare, comparatively speaking. Most federal crimes contain no such defenses. In those situations, the only defenses available to defendants will be the classic common law defenses, such as insanity, necessity, duress, and entrapment – defenses that, with the exception of the insanity defense, are not recognized by statute.[57]

The federal courts have exacerbated the one-way ratchet nature of overcriminalization. The same courts that so often create *crimes* (by expansively interpreting ambiguous criminal laws, in

[56] 18 U.S.C. § 1623(c).

[57] The insanity defense is recognized by statute, but only because Congress sought to limit the defense in the wake of John Hinckley's acquittal, on insanity grounds, for the attempted assassination of President Ronald Reagan. *See* 18 U.S.C. § 17. Prior to that point, the insanity defense, like other common law defenses, existed in the federal system through decisional law only.

violation of the rule of lenity) refuse to create *defenses* to crimes.

In *Brogan v. United States*, for example, the Supreme Court refused to recognize an "exculpatory no" defense to false statement charges.[58] The majority declared, flatly, that "[c]ourts may not create their own limitations on [criminal] legislation, no matter how alluring the policy arguments for doing so," the obvious implication being that it is for Congress alone to determine whether criminal conduct be exempt from punishment.[59] Ironically, although courts will create crimes under the guise of statutory interpretation, they will not create defenses.

Worse still, a recent Supreme Court decision has called into serious question the very existence of the classic common law defenses. In *United States v. Oakland Cannabis Buyers' Cooperative*,[60] a case involving whether medical necessity is a defense to federal drug charges, the majority opinion contained sweeping dicta suggesting that necessity and other nonstatutory defenses may be inappropriate in federal prosecutions. Absent codification by statute, the Court viewed the necessity defense (and, by extension, other non-statutory defenses) not only as "controversial" but "especially so" because "federal crimes are defined by statute rather than by common law."[61] The disturbing implication is that there may be *no defenses at all* in federal cases except those few specifically created by Congress.

III. SOLUTIONS

The final topic for discussion is potential solutions for overcriminalization. My discussion of this topic is not intended to be exhaustive. The goal is simply to identify some reforms that would reduce the harmful effects of overcriminalization even if Congress is unwilling or unable to take the more drastic (but entirely appropriate) step of narrowing or repealing scores of federal crimes. Indeed, I think these reforms are so important that they should be implemented in their own right, even if the number and scope of federal crimes is significantly reduced.

A. *Criminal "Code" Review*

The first step is for Congress to take precise stock of where we are in federal criminal law today through a thorough, top-to-bottom review of federal criminal law. Once the review process has identified all of the existing statutes punishing a particular type of crime, Congress can then decide whether such a multiplicity of overlapping statutes is warranted. If it is not, then unnecessary

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[58] 522 U.S. 398 (1998). The "exculpatory no" doctrine would have exempted from punishment under the false statements statute, 18 U.S.C. § 1001, statements that consist only of a false denial of guilt.

[59] Id. at 408.

[60] 532 U.S. 483 (2001).

[61] Id. at 490. Ultimately, the Court did not rest on this broad ground but instead on the narrow that the Controlled Substances Act impliedly precluded necessity arguments for medicinal uses of marijuana and other "Schedule I" drugs. Id. at 494-95.

overlap should be eliminated.[62] Whether or not that happens, the review process should aim to bring much-needed uniformity to the definition and grading of overlapping crimes and to organize the crimes in a single title in a readily accessible format. Through this review process, federal criminal law can be streamlined and rationalized, and made more accessible to the regulated public.

A commission on the order of the Brown Commission would be the ideal vehicle to bring much-needed cohesiveness and organization to the lengthy roster of existing federal crimes. Through a new review commission, the Brown Commission's vital work of bringing modern crime definition techniques – techniques heavily, and quite properly, influenced by the American Law Institute's Model Penal Code – to bear in rationalizing federal criminal law can finally be completed.[63]

Indeed, this work is so important that Congress might wish to consider making the criminal code review commission a permanent body, akin to the Sentencing Commission. A permanent body devoted to criminal code reform could aid the Judiciary Committee, and Congress as a whole, in determining the need for new crimes and, where new crimes are warranted, draft the proposed legislation. It could also review court decisions on an ongoing basis, as the Sentencing Commission does in its area of responsibility, to identify interpretive questions being addressed in the courts that might be fruitful subjects of clarifying legislation.

However the review process might be structured, it is critical that Congress recognize that there is a continuing need to monitor how new criminal enactments fit within the framework of existing crimes. The *ad hoc* accretion of new crimes over many decades, without periodic review and reform, is precisely what has made federal criminal law the utter mess that it is today. As important as it is to rectify past mistakes, it is equally important to put safeguards in place against future repetition of those mistakes. A criminal code review commission (and, ideally, a permanent one) is one such safeguard.

B. *Legislative "Best Practices"*

Given that many of the problems associated with overcriminalization are the result of poor crime definition, it is imperative that Congress aim to improve the quality of the crime-enactment process. There are at least two ways to accomplish this goal.

First, House and Senate rules should require that all proposed crimes, and all amendments to existing crimes, must be referred to the House and Senate Judiciary Committees for review and committee passage prior to reaching the floor. Those committees and their staff have considerable expertise in writing criminal laws and thus and will be more likely to do an effective job drafting

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[62] Another way to arrive at the same result, without eliminating redundancies across statutes, would be to enact a rule requiring prosecutors, in cases of overlapping crimes, to prosecute under the most specific statute. *See* Smith, *Proportionality and Federalization*, supra note 7, at 944-49.

[63] A major stumbling block to enactment of the Brown Commission's proposed revised federal code was that it considerably expanded the reach of certain crimes by removing jurisdictional hooks from the definition of individual offenses. *See* Gainer, supra note 9, at 131-32. Although removing jurisdictional elements from criminal statutes facilitates crime definition, I believe it would be a serious mistake to extend federal crimes to the full extent of their permissible constitutional reach. To do so would be to take a body of federal crimes that is already too broad and make it even broader.

crime bills than Members and staff focused on other kinds of matters.[64] If a permanent code review commission is created, it could be tasked with reviewing proposed crime legislation in the first instance (and perhaps issuing the measure for public comment through a process similar to notice-and-comment rulemaking), before the legislation is referred to the Judiciary Committees.

Second, House and Senate rules should require that a formal needs assessment be prepared before any new crime, or amendment to an existing crime, may be passed. Such an assessment should require: (1) a comprehensive statement of all existing federal laws addressing the subject-matter of the proposed legislation, (2) an explanation of why new legislation is necessary in light of existing federal and state laws on the subject, and (3) an explanation of how the penalties available under other laws, state and federal, compare to the proposed new penalties. The purpose of this reform is to avoid the problem of federal crimes being passed that needlessly duplicate state criminal law and of overlapping federal crimes that are inconsistently defined or graded. Only if Congress is apprised of the existing crimes in an area can it intelligently decided whether new legislation is even needed and, if so, how proposed new legislation would interact with and affect existing law.

C. *The Rule of Lenity*

No matter how careful Congress is in writing new crimes, there will inevitably be some degree of ambiguity in the definition of crimes. With simple and complex criminal statutes alike, novel interpretive issues, not foreseen or fully appreciated at the time of enactment, will arise in real-world prosecutions, and the imprecision of human language will often confound even the more deliberative efforts to define crimes clearly. The federal courts, therefore, will continue to have an important role in defining crimes through statutory interpretation.

As long as the rule of lenity remains a matter of judicial policy only, courts will continue to succumb to the temptation to construe ambiguous crimes expansively and, in doing so, exacerbate the adverse effects of overcriminalization. In some cases, expanding the reach of ambiguous crimes may raise no fair warning concerns, but in others they will – and fair warning problems are particularly likely in the case of highly technical regulatory or other *mala prohibita* crimes, where the law itself is the only source for notice of one's legal obligations.

Elevating the venerable rule of lenity to the level of legislative command will help avoid the unfair surprise that can result from expansive interpretations of criminal statutes. It will also promote the separation of powers and democratic legitimacy by reserving to Congress – *not* the judiciary and the Justice Department – the fundamental policy choice of whether or not certain acts should be treated as crimes and what is the proper penalty for those acts.

D. *Mens Rea Reforms*

Adequate mens rea requirements play a vital role in keeping federal criminal liability within appropriate bounds. They serve to guarantee that persons will not face conviction for federal crimes unless they had fair warning of potential liability and acted with a culpable mental state.

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[64] According to a recent analysis issued by the Heritage Foundation and the National Association of Criminal Defense Lawyers, criminal bills that go through the Judiciary Committees tend to be much better defined than those that do not. *See* Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, at 28-30 (2010).

Nevertheless, absent two main reforms, it will be the rare case that mens rea requirements will be sufficient for their important work.

First, Congress should enact default rules bolstering the effectiveness of mens rea requirements in federal crimes. The Model Penal Code states that all "material elements" of a crime require mens rea[65] and that, absent provision to the contrary, "recklessness" is the default level of mental culpability necessary for conviction of a crime.[66] These provisions avoid the danger that courts will construe legislative silence as to mens rea as a signal to impose strict liability, and they (and related interpretive rules) make it possible to identify, in advance, the mens rea requirement applicable to each element of an MPC offense.

Unless Congress enacts the culpability structure and ancillary interpretive rules of the Model Penal Code –as the Brown Commission recommended decades ago – mens-rea selection will continue to be clouded in enormous confusion in federal cases. This will be especially true in the area of regulatory crimes involving heath, safety, and welfare concerns, where the federal courts have proven to be fairly quick to dispense with traditional mens rea requirements, even when serious injustice may result.

Second, Congress should streamline and harmonize the universe of mens rea terms used in federal criminal law. With almost one hundred different mens rea terms used in thousands of federal crimes, it is difficult, if not impossible, to maintain consistency of usage and meaning across statutes. As the Brown Commission recognized, this "staggering array"[67] of mens rea terms is both unnecessary and counterproductive. With careful definition, the Model Penal Code's four mens rea terms – "purpose," "knowledge," "recklessness," and "negligence"[68] – can express any desired level of mental culpability, and do so while achieving consistency of meaning and usage across statutes. Federal mens rea requirements would be greatly strengthened by adopting the Model Penal Code's streamlined vocabulary of mens rea.

E. *Penalty Review*

The time has come for Congress to undertake a comprehensive review of federal penalties. With the proliferation of statutory mandatory minimums and the continued influence of severe sentencing guidelines, it has long been clear that many overlapping offenses are punished much more harshly under federal law than state law. This creates incentives for federal prosecutors to exploit the virtually complete overlap between federal and state criminal law by increasing enforcement efforts in drugs and other areas where federal penalties are much harsher than the penalties typically available in state court.

Particularly given that the degree of overlap between federal and state criminal law is likely to remain unchanged, Congress should make sure that federal sentencing policies do not create

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[65] MODEL PENAL CODE § 2.02(1).

[66] Id. § 2.02(3).

[67] 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 119 (1970).

[68] See id. § 2.02(2)(a)-(d) (defining these mental states).

unwarranted incentives for federal prosecutors to exploit overcriminalization. As with cleaning up federal crimes, the place to begin is with a thorough review of the penalties available in federal court for crimes also punishable under state law.[69] The logical body to perform that review is the Sentencing Commission. With precise data about how the penalties for overlapping federal crimes compare with typical state punishments for the same crimes, Congress will be in a position to decide whether the penalties under federal law remain appropriate.

F. *Affirmative Defenses*

Particularly when there are so many crimes on the federal books, it is vital for Congress to ensure that appropriate defenses are available in federal law. Now that necessity and other classic common law defenses have come under attack in the federal courts,[70] Congress should codify those defenses so that there will be no question that these defenses remain available in federal prosecutions. Absent such action, common law defenses created to prevent unjust punishment will remain on uncertain footing in federal cases.

Moreover, Congress should enact a limited mistake-of-law defense. A major problem with the proliferation of poorly defined regulatory and other *mala prohibita* crimes is that they often fail to give fair warning of the prohibited conduct. This problem can (and hopefully will) be ameliorated through more effective crime definition and codification of the rule of lenity. The goal of providing fair warning is sufficiently important, and sufficiently difficult to achieve, that further protection is appropriate in the form of certain mistake-of-law defenses.

Several states have enacted laws mistake of law defenses. For example, the Model Penal Code and many states contain provisions affording a defense for mistakes of criminal law attributable to official misstatements of law.[71] These laws recognize that it is unfair to convict individuals for conduct they reasonably believed to be lawful based on assurances from authoritative but mistaken official sources. In these circumstances, the crimes are attributable to the official misstatement of law, not the blameworthy choice of the defendant.

Other states have gone even farther in recognizing mistake-of-criminal-law defenses, and Congress should as well. In New Jersey, for example, there is a statutory defense, applicable to all crimes, for mistakes of criminal law. The defense applies where the defendant "diligently pursues all means available to ascertain the meaning and application of the offense to his conduct and honestly and in good faith concludes his conduct is not an offense in circumstances in which a

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[69] After *United States v. Booker*, 543 U.S. 220 (2005), which made the federal sentencing guidelines advisory only, there is no need to revisit the sentencing guidelines. District Courts continue to follow the guidelines in most cases although they now have greater latitude to deviate from the guidelines in cases where they see sound penological reasons to do so. *See generally* NORMAN ABRAMS, ET AL., FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 1028 (West 2010) (citing data).

[70] *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) (questioning the propriety of allowing defendants to use necessity and other non-statutory defenses to escape federal criminal liability).

[71] Section 2.04 of the Model Code allows an official misstatement defense for situations where the defendant acted in "reasonable reliance upon an official statement of the law, afterward declared to be invalid or erroneous," emanating from a court, enforcement official, or certain other authoritative sources. MODEL PENAL CODE § 2.04(3)(b). At least seventeen states have enacted similar provisions. *See, e.g.*, TEXAS PENAL CODE, art. 8.03.

law-abiding and prudent person would also so conclude."[72]

Given how difficult it can be to find applicable federal crimes and determine what they mean, a defense for good-faith mistakes of criminal law (and reasonable *ignorance* of the criminal law) would be a particularly valuable addition to federal criminal law. In addition to providing a safeguard against conviction for morally upright, law-abiding behavior, such defenses would provide greater incentives for Congress and federal agencies to write laws that carry criminal penalties in clear, easily understandable terms – and, critically, for federal prosecutors not to charge individuals who were reasonably mistaken about the existence, meaning, or application of a criminal law. To the extent lawmakers fail to write clear laws, defendants who made diligent, good-faith efforts to obey the law do not deserve punishment.

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This concludes my statement. Again, I thank the Subcommittee for allowing me to appear today and for its attention to the problem of overcriminalization. I would be happy to answer any questions the members of the Subcommittee may have for me at this time.

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[72]N.J. STAT. ANN. 2C:2-4(c)(3). Some states have recognized equivalent defenses by court decision. *See, e.g., State v. Long*, 65 A.2d 489 (Del. 1949).