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The Criminal Intent Report: Congress Is Eroding the *Mens Rea* Requirement in Federal Criminal Law

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For centuries, the concept of a “guilty mind” has been at the core of what makes someone a criminal. Most Americans rightly think that no one deserves criminal punishment unless he intended to break the law or knew that his conduct was unlawful or sufficiently wrongful so as to put him on notice of possible criminal liability.

Thousands of federal laws make otherwise innocent acts wrongful simply because they are prohibited. Such acts include fishing without a permit and shipping items safely but in a manner inconsistent with federal regulations. Americans who violate one of these thousands of federal laws inadvertently or by an innocent mistake should, at worst, suffer a civil fine and not prison time.

The “guilty mind” requirement (what lawyers call *mens rea*) historically restricted criminal punishment to those who were truly blameworthy and helped ensure Americans had fair notice of the law’s requirements. No one could be convicted of a crime without the government having proved that he acted with a guilty mind. In a sharp break with this tradition, recent Congresses have crafted scores of new federal criminal laws that lack adequate guilty-mind requirements and define the conduct that they criminalize in vague, overbroad terms.

An Unprecedented Study. Last week, The Heritage Foundation and the National Association of Criminal Defense Lawyers (NACDL) released *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (available online at <http://report.heritage.org/sr0077> and <http://nacdl.org/>

without intent). It presents the findings and conclusions of the two organizations’ unprecedented study of the federal legislative process for all non-violent and non-drug-related criminal offenses¹ introduced in the 109th Congress (2005–2006). One of the central purposes of the study was to understand how the federal legislative process is creating so many vague, overbroad criminal offenses that lack an adequate guilty-mind requirement.

The study revealed that Congress’s criminal law-making is badly broken: Offenses with inadequate *mens rea* requirements are ubiquitous at all stages of the legislative process. Over 57 percent of the offenses introduced—and 64 percent of those enacted into law—contained inadequate guilty-mind requirements, thereby putting the innocent at risk of criminal punishment. Consistently poor legislative drafting and broad delegation to largely unaccountable federal regulators of Congress’s authority to make criminal law only compounded the inadequate *mens rea* problem.

Without Intent provides further evidence in support of the findings by other scholars and legal researchers that Congress is criminalizing everyday conduct at a reckless pace. Indeed, Members of the 109th Congress proposed 446 non-violent and

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non-drug criminal offenses, of which 36 were signed into law by the President. It is important to note that these large numbers do not include the many offenses the 109th Congress directed at conduct involving, for example, intentional violence, firearms, or drug trafficking.

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

Reckless Pace of Criminalization. The sheer number of criminal offenses proposed, in tandem with the reckless pace of criminalization, suggests why so many offenses were poorly drafted and never subjected to adequate deliberation and oversight. Congress is awash with criminal legislation, and it seems apparent that the House and Senate Judiciary Committees lack the time and opportunity to review each criminal offense and correct weak guilty-mind requirements.

Over half (52 percent) of the offenses in the study were never referred to either judiciary committee. These committees have the greatest expertise in crafting criminal offenses, the best information on the priorities and resources of federal law enforcement, and explicit jurisdiction over federal criminal law.

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

improve *mens rea* requirements. More importantly, automatic referral could stem the tide of criminalization by forcing Congress to adopt a measured and prioritized approach to criminal lawmaking. By neglecting the expertise of the judiciary committees, Congress is endangering civil liberties.

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

Five Recommendations for Reform. To begin to solve the problems identified in the Heritage Foundation/NACDL study, *Without Intent* offers five specific recommendations for reform. Congress should:

1. Enact default rules of interpretation to ensure that *mens rea* requirements are adequate to protect against unjust conviction;
2. Codify the common-law rule of lenity, which grants defendants the benefit of doubt when Congress fails to legislate clearly;
3. Require adequate judiciary committee oversight of every bill that includes criminal offenses or penalties;
4. Require detailed written justification for and analysis of all new federal criminalization; and
5. Draft every criminal offense with clarity and precision.

These five reforms would help ensure that every proposed criminal offense receives the attention due whenever Congress determines how to focus the greatest power government routinely uses against its own citizens: criminal prosecution and punish-

1. The report uses the term "non-violent offenses" as a shorthand for the offenses studied. Whereas all the offenses included in the study are non-violent, many other offenses proposed by the 109th Congress could also be described as non-violent. Specifically, the study did not include offenses involving firearms, drugs and drug trafficking, pornography, and immigration violations.

ment. Coupled with increased public awareness and scrutiny of the criminal offenses Congress enacts, these reforms would strengthen the protections against unjust conviction and prevent the dangerous proliferation of federal criminal law. With their most basic liberties at stake, Americans are entitled to no less.

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