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Components of Federal Criminal Law

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SUMMARY

Congress has enacted many federal criminal laws covering topics as diverse as drug trafficking, immigration, assault, computer hacking, bribery, and wildlife trafficking, among others. Congress's continuing interest in establishing criminal penalties for conduct in a wide range of areas presents the question: What are the requisite components of a valid federal law that is criminal in nature? This report examines that question, focusing on core components of a federal criminal law: (1) jurisdictional basis; (2) prohibited conduct; (3) mental states; and (4) penalties.

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- **Jurisdictional Basis.** A jurisdictional basis addresses Congress's constitutional authority to enact a criminal law. While the states possess a general police power to enact and enforce laws carrying criminal penalties, and most criminal law exists at the state level, several enumerated powers in the Constitution may provide Congress with the basis to enact federal criminal prohibitions, such as the authority to regulate interstate and foreign commerce; to protect federal property and personnel; and to secure certain rights under the Thirteenth, Fourteenth, and Fifteenth Amendments.
- **Prohibited Conduct.** Assuming that there is a source of constitutional authority to enact a criminal law, Congress may define the behavior or activity that is to be criminalized—that is, the prohibited conduct. A key requirement of prohibited conduct is an act (affirmative conduct) or omission (a failure to act), though exact formulations of the concept vary. Questions that may arise in defining proscribable conduct include the potential line between thoughts and speech, and special considerations for status offenses (e.g., criminalizing a condition) and inchoate offenses (e.g., solicitation, conspiracy, attempt).
- **Mental States.** With exceptions, criminal laws generally require not only a guilty act but also a guilty mind. The requirement of responsibility or blameworthiness implicates numerous, nuanced questions. For example, where on a spectrum of mental culpability should someone fall to trigger criminal liability under a statute, and what terminology can be used to identify that point? What happens if Congress omits a mental state requirement? If Congress includes a mental state requirement, to what portions of the prohibited conduct will it apply? Imprecise and variable terminology may complicate the answers to many of these questions. There is no centralized or standardized mental state framework at the federal level, meaning that the mental state required for a federal criminal offense depends on an array of interpretive tools, including context and caselaw.
- **Penalties.** Congress has authorized a variety of penalties in federal criminal statutes, including imprisonment, capital punishment, fines, criminal asset forfeiture, and restitution. The Eighth Amendment may limit the availability of these penalties, particularly in the context of capital punishment, in light of the amendment's prohibition of cruel and unusual punishment.

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Criminal offenses are generally established by the legislative branch of government.[1] At the federal level, this process dictates that Congress enacts criminal statutes and authorizes the relevant penalties for violations.[2] When Congress seeks to enact legislation that would impose criminal penalties, considerations regarding constitutional authority and the requisite elements of criminal law necessarily arise.[3]

Consider the example of theft. Imagine that Congress wished to add a new federal theft statute to the *U.S. Code*.[4] That process might raise several questions. First, does Congress have constitutional authority to criminalize theft? For example, is there some nexus between a source of such constitutional authority (say, the power to regulate interstate and foreign commerce) and the particular type of theft? Second, how can Congress describe the particular type of theft it wants to prohibit? Does the conduct to be proscribed include only certain types of goods, items only of a certain value, or theft only from certain places? Third, how culpable must a person be to fit within the confines of the statute? Must a person consciously intend to commit the theft? What if the person is merely negligent? Fourth, what penalties may Congress authorize for someone convicted of violating the theft statute? Does a violation of the theft statute subject the individual to fines and imprisonment, for example? Does the scale of the theft affect the amount of the punishment, and if so, at what amounts do penalties further increase?

The answers to these questions may vary, but each inquiry implicates key legal considerations regarding the scope and content of criminal statutes, which correspond to key components of federal criminal law:[5] (1) jurisdictional basis; (2) prohibited conduct; (3) mental states; and (4)

[1] *See, e.g.*, United States v. Santos, 553 U.S. 507, 523 (2008) (plurality opinion) ("[E]ven if . . . statutory ambiguity 'effectively' licenses us to write a brand-new law, we cannot accept that power in a criminal case, where the law must be written by Congress." (citing United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).

Congress may authorize the executive branch to develop the exact parameters of certain criminal conduct through regulations. *See, e.g.*, 16 U.S.C. § 690g ("Any person who shall violate or fail to comply with any provision of, or any regulation made pursuant to sections 690d to 690i of this title shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $500 or be imprisoned not more than six months, or both."). Even so, only Congress may set the authorized penalties. L.P. Steuart & Bro. v. Bowles, 322 U.S. 398, 404 (1944) ("[I]t is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute."). For example, a plurality of the Supreme Court concluded that Congress did not unconstitutionally delegate its legislative authority in a federal statute that allowed the Attorney General to make certain determinations about who should be subject to criminal penalties for failure to register as a sex offender. Gundy v. United States, 588 U.S. 128, 145 (2019) (plurality opinion).

The crime of treason is somewhat anomalous in that it is defined by the Constitution, although it has been codified by Congress in a statute authorizing penalties for violations. U.S. CONST. art. III, § 3, cl. 1; 18 U.S.C. § 2381.

[2] *See, e.g.*, United States v. Polk, 546 F.3d 74, 76 (1st Cir. 2008) ("When Congress has identified a particular scourge and, using reasoned judgment, articulated a response, courts must step softly and cede a wide berth to the Legislative Branch's authority to match the type of punishment with the type of crime.").

[3] For a discussion of the philosophical underpinnings of criminal punishment, see generally CRS Legal Sidebar LSB10929, *Can Retribution Justify the Revocation of Supervised Release? Courts Disagree.*, by Dave S. Sidhu (2023). For a discussion of the line between criminal laws and noncriminal laws, see generally CRS Legal Sidebar LSB11033, *The Supreme Court's Narrow Construction of Federal Criminal Laws: Historical Practice and Recent Trends*, by Dave S. Sidhu (2023).

[4] *See, e.g.*, 18 U.S.C. § 641 (criminalizing theft of public property); *id.* § 661 (proscribing theft in the special maritime and territorial jurisdiction of the United States); *id.* § 667 (prohibiting theft of livestock); *id.* § 668 (authorizing penalties for theft of certain artwork).

[5] This report focuses only on substantive criminal law. The report does not address criminal procedure, which "is concerned with the legal steps through which a criminal proceeding passes, from the initial investigation of a crime through the termination of punishment." WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1:1 (3d ed. 2023). A discussion of the federal rules of criminal procedure and Congress's role in creating them may be found in CRS In Focus IF11557, *Congress, the Judiciary, and Civil and Criminal Procedure*, by Joanna R. Lampe (2022).

penalties.[6] This report discusses these four foundational elements of federal criminal law. It begins with jurisdictional bases, which link criminal prohibitions to a source of constitutional authority for Congress to legislate. The report describes the respective and relative authority of the federal and state governments to enact criminal laws and summarizes several sources of constitutional authority that Congress can potentially rely on in the criminal context. The report then discusses considerations relevant to defining the proscribable conduct and the attendant mental states required of a person to violate a given law. Finally, the report offers a brief overview of the various types of criminal penalties Congress may consider imposing—including imprisonment, capital punishment, fines, asset forfeiture, and restitution—as well as certain constitutional limitations applicable to criminal penalty provisions.

Jurisdictional Basis

When enacting criminal laws, state legislatures have a luxury that Congress does not—a general police power.[7] The police power refers to the "inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice."[8] The Constitution reserves the police power to state governments, meaning that legislating to prohibit crime is a task that lies primarily within the purview of the states.[9] In contrast, the Constitution provides no such general police power to the federal government.[10] Instead, Congress can enact federal criminal statutes only pursuant to "one or more of its powers enumerated in the Constitution."[11] Federal criminal statutes—whether expressly or not—must therefore have a jurisdictional basis connecting the prohibited conduct to a source of constitutional authority.[12]

At the federal level, the jurisdictional bases invoked by Congress may in turn inform the substantive scope and framing of criminal legislation. For instance, intentionally killing another, without more, may lack a nexus to a congressional source of authority for proscribing it (though this conduct would surely constitute an offense subject to state law).[13] A federal law could be enacted, however, if it prohibits killing when it involves interstate commerce,[14] racial violence

[6] Models and formulations of the essential components of a criminal law and the meaning of each vary. *See infra* "Requirement of a Voluntary Act" (describing, for example, the various ways the concept of an act has been interpreted).

[7] United States v. Morrison, 529 U.S. 598, 618 n.8 (2000) ("Moreover, the principle that '[t]he Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States, is deeply ingrained in our constitutional history." (quoting New York v. United States, 505 U.S. 144, 155 (1992))).

[8] *Police Power*, BLACK'S LAW DICTIONARY (12th ed. 2024); *see also* Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) ("The States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (quoting Slaughter-House Cases, 16 Wall. 36, 62, 21 L.Ed. 394 (1873)).

[9] *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *Morrison*, 529 U.S. at 618 ("Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.").

[10] *Morrison*, 529 U.S. at 618.

[11] *Id.* at 607.

[12] *See infra* "Commerce Clause"; "Special Maritime and Territorial Jurisdiction"; "Federal Property as Jurisdictional Basis"; "Federal Personnel as Jurisdictional Basis"; "Reconstruction-Era Amendments."

[13] E.g., CONN. GEN. STAT. ANN. § 53a–54a.

[14] *See, e.g.*, 18 U.S.C. § 249(a)(2)(B) (listing various circumstances, many of which involve commerce, that may trigger a provision prohibiting willfully causing bodily injury to another because of certain biases).

prohibited by the Thirteenth Amendment,[15] a victim who is a federal employee, or a victim located where the federal government has jurisdiction.[16] Each of these illustrations reflects a jurisdictional basis that Congress has used to enact criminal laws. This section provides an abbreviated overview of several common jurisdictional bases in federal criminal legislation. These bases are found primarily in Article I, Section 8 of the Constitution, which enumerates the powers of Congress, and in Reconstruction Amendments to the Constitution, which empower Congress to enforce these respective civil-rights-related amendments. A more comprehensive overview of Congress's legislative authority may be found in other CRS products.[17]

Necessary and Proper Clause

One constitutional source of authority relevant to federal criminal law is Congress's power to "make all Laws which shall be necessary and proper for carrying" out other Constitutional powers. U.S. CONST. art. I, § 8, cl. 18. This provision—commonly known as the Necessary and Proper Clause—is "typically understood not as an independent grant of congressional power, but as an extension of all the other powers vested in the federal government, including Congress's enumerated Article I powers." CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview*, coordinated by Kevin J. Hickey, at 22 (2023) (footnote omitted). As numerous examples below illustrate, courts frequently interpret federal criminal statutes as grounded in a combination of the Necessary and Proper Clause and some underlying source of congressional authority like the Property or Enclave Clause. *See* United States v. Comstock, 560 U.S. 126, 156 (2010) (Alito, J., concurring) (explaining that "most federal criminal statutes rest upon a congressional judgment that, in order to execute one or more of the powers conferred on Congress, it is necessary and proper to criminalize certain conduct, and in order to do that it is obviously necessary and proper to provide for the operation of a federal criminal justice system and a federal prison system").

Commerce Clause

The Commerce Clause, found in Article I, Section 8, clause 3 of the Constitution, grants Congress the power to "regulate Commerce with foreign Nations, and among the several States."[18] This provision gives Congress fairly broad authority, and many federal criminal statutes rely on Congress's authority under the Commerce Clause.[19] In *United States v. Lopez*, the Supreme Court held that Congress's authority to regulate interstate commerce under the clause extends to "three broad categories of activity":[20]

[15] *See, e.g.*, 18 U.S.C. § 249(a)(1) (criminalizing willfully causing bodily injury because of actual or perceived race, color, religion, or national origin); *see also* United States v. Cannon, 750 F.3d 492, 498 (5th Cir. 2014) (explaining that "§ 249(a)(1) rests solely on Congress's authority under § 2 of the Thirteenth Amendment").

[16] *E.g.*, 18 U.S.C. §§ 1111(b), 1114.

[17] *See generally* CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview*, coordinated by Kevin J. Hickey (2023).

[18] U.S. CONST. art. I, § 8, cl. 3. The Commerce Power also extends to "Commerce . . . with the Indian Tribes." *Id.*

[19] *E.g.*, 18 U.S.C. § 33(a) (imposing fines, imprisonment, or both for certain acts of destruction to "any motor vehicle which is used, operated, or employed in interstate or foreign commerce"); *id.* § 1030(a)(6) (prohibiting computer password trafficking if "such trafficking affects interstate or foreign commerce" or if it impacts a federal government computer); *id.* § 1201(a)(1) (proscribing kidnapping when a "person is willfully transported in interstate or foreign commerce"); *id.* § 1343 (criminalizing intentional participation in schemes to defraud involving wire, radio, or television communications transmitted in interstate or foreign commerce); *see also* United States v. DiSanto, 86 F.3d 1238, 1244 (1st Cir. 1996) ("Congress has often invoked its authority under the Commerce Clause to federalize criminal activity.").

[20] 514 U.S. 549, 558 (1995).

1. "Channels of interstate commerce,"[21] generally the "physical conduits" necessary for interstate commerce to take place,[22] such as highways and telecommunications networks;[23]
2. "Instrumentalities of interstate commerce, or persons or things in interstate commerce,"[24] such as "automobiles, airplanes, boats . . . shipment[s] of goods . . . 'pagers, telephones, and mobile phones'";[25] and
3. "Those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."[26]

Under the third category, Congress may regulate intrastate conduct if it involves an economic activity that substantially affects interstate commerce when viewed in the aggregate.[27] For example, even purely local conduct, such as an individual's "production of [a] commodity meant for home consumption," may fall within Congress's commerce power if Congress has a rational basis to conclude that in the aggregate such conduct substantially affects "supply and demand in the national market for that commodity."[28]

In *United States v. Morrison*, the Supreme Court outlined four relevant considerations in determining whether conduct prohibited by a statute substantially affects interstate commerce.[29] The first consideration is whether the prohibited activity is commercial or relates to an economic enterprise.[30] Second, courts look to whether the statute at issue contains an "express jurisdictional element" limiting its reach to conduct affecting interstate commerce through case-specific inquiry.[31] The presence of an express jurisdictional factor weighs significantly in favor of a statute being an appropriate exercise of Congress's interstate commerce authority.[32] Third, courts examine whether the statute's "express congressional findings" concern the effect of the

[21] *Id.*

[22] Cong. Rsch. Serv., *ArtI.S8.C3.6.2 Channels of Interstate Commerce*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C3-6-2/ALDE_00013419/ (last visited Sept. 9, 2024).

[23] United States v. Roof, 225 F. Supp. 3d 438, 452 (D.S.C. 2016).

[24] *Lopez*, 514 U.S. at 558.

[25] United States v. Ballinger, 395 F.3d 1218, 1226 (11th Cir. 2005) (internal citations omitted) (quoting United States v. Pipkins, 378 F.3d 1281, 1295 (11th Cir. 2004), *vacated*, 544 U.S. 902 (2005)).

[26] *Lopez*, 514 U.S. at 558–59 (citation omitted). At least some federal courts have interpreted the extent of Congress's power over foreign commerce under the clause to be different from its power over interstate commerce. *See, e.g.*, United States v. Rife, 33 F.4th 838, 843–44 (6th Cir.) (holding that Congress's power over foreign commerce contains no equivalent to the third *Lopez* category), *cert. denied*, 143 S. Ct. 356 (2022); *see also* CRS Legal Sidebar LSB10767, *Congress's Foreign Commerce Clause Power Questioned*, by Charles Doyle, at 1–2 (2022) (surveying case law and discussing *Rife*).

[27] Taylor v. United States, 579 U.S. 301, 306 (2016).

[28] Gonzales v. Raich, 545 U.S. 1, 19, 22 (2005).

[29] 529 U.S. 598, 610–12 (2000). For an example of how lower courts may apply these factors in practice, see generally United States v. Roof, 225 F. Supp. 3d 438, 452–56 (D.S.C. 2016).

[30] *Morrison*, 529 U.S. at 610.

[31] *Id.* at 611–12; *Roof*, 225 F. Supp. 3d at 452; *accord* United States v. Gibert, 677 F.3d 613, 625 (4th Cir. 2012) ("We next consider . . . whether the statute at issue contains an express element limiting the statute's reach to activities having an explicit connection with or effect on interstate commerce.").

[32] *See* United States v. Coleman, 675 F.3d 615, 620 (6th Cir. 2012) ("Where a statute lacks a clear economic purpose, the inclusion of an explicit jurisdictional element suffices to 'ensure, through case-by-case inquiry, that the [violation] in question affects interstate commerce.'" (brackets in original) (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)); *see also* United States v. Hill, 927 F.3d 188, 204 (4th Cir. 2019) ("Notably, Defendant has not identified any case—nor have we found any such case—in which a federal criminal statute including an interstate commerce jurisdictional element has been held to exceed Congress's authority under the Commerce Clause.").

prohibited conduct on interstate commerce.[33] According to at least one federal district court, "[c]ongressional findings may weigh in favor of the validity of a statute," but their absence "cannot weigh against the validity of a statute."[34] The fourth consideration is the degree of attenuation between the prohibited conduct and its effect on interstate commerce.[35]

Select Examples of Interstate Commerce as Jurisdictional Basis

As discussed, statutes that contain a jurisdictional element—language limiting the statute to conduct connected to or affecting interstate commerce—"may establish that the enactment is in pursuance of Congress' regulation of interstate commerce."[36] Some federal criminal statutes enacted pursuant to Congress's commerce authority refer to the jurisdictional basis in just a few words.[37] For example, a federal threat statute imposes criminal penalties on "whoever transmits *in interstate or foreign commerce* any communication containing any demand or request for a ransom or reward for the release of any kidnapped person . . . ."[38] Courts have generally concluded that the threat statute's jurisdictional requirement may be satisfied where "a communication actually crosses state lines, however briefly."[39] Such an event could occur, for example, when a threatening communication, such as a phone call, is made from one state to a recipient located in another.[40] Alternatively, the requirement may be satisfied when the recipient is located in the same state as the person making the threat if, for example, the threatening communication is conveyed by a phone call or instant message routed through equipment or computers located in a different state.[41]

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[33] *Morrison*, 529 U.S. at 612 (quoting *Lopez*, 514 U.S. at 562).

[34] *Roof*, 225 F. Supp. 3d at 454.

[35] *Morrison*, 529 U.S. at 612.

[36] *Id*. For example, in *Lopez*, the Supreme Court concluded that Congress exceeded its Commerce Clause authority in enacting a law that made it a crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." *Lopez*, 514 U.S. at 551 (quoting 18 U.S.C. § 922(q)(1)(A)). According to the Court, one issue with the statute was its lack of "a requirement that the possession be connected in any way to interstate commerce." *Id*. Congress subsequently amended the provision to apply only to firearms that had moved in or otherwise affected interstate of foreign commerce, and federal courts "have generally upheld it on the basis of the added textual link to commerce." CRS Report R45629, *Federal Firearms Laws: Overview and Selected Legal Issues for the 116th Congress*, by Michael A. Foster, at 16 (2019). For instance, one federal court explained that because the revised provision "contains an interstate-commerce requirement, i.e., the firearm in question must have been shipped or transported in interstate commerce, the statute ensures through case-by-case inquiry that the firearm in question affects interstate commerce." United States v. Danks, 221 F.3d 1037, 1039 (8th Cir. 1999).

[37] *See, e.g.*, 18 U.S.C. § 39(a)(1) ("Whoever, in or affecting interstate or foreign commerce, knowingly sells a traffic signal preemption transmitter to a nonqualifying user shall be fined under this title, or imprisoned not more than 1 year, or both."); *id.* § 1231 ("Whoever willfully transports in interstate or foreign commerce any person . . . ."); *id.* § 2421A ("Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce . . . .").

[38] 18 U.S.C. § 875 (emphasis added).

[39] United States v. Nissen, 432 F. Supp. 3d 1298, 1321 (D.N.M. 2020).

[40] *E.g.*, United States v. Li, 537 F. Supp. 2d 431, 435 (N.D.N.Y. 2008).

[41] *See* United States v. Kammersell, 196 F.3d 1137, 1138–39 (10th Cir. 1999) (affirming § 875(c) conviction where threat was sent via interstate message from Utah to a computer in Utah, through an AOL server in Virginia); *Nissen*, 432 F. Supp. 3d at 1321 (rejecting motion to dismiss on jurisdictional grounds an indictment charging § 875(c) in light of evidence that a call made from cellphone in New Mexico to a recipient in New Mexico was routed to a switch in Texas). At least one federal appellate court has examined whether use of the internet without proof that the message crossed state lines could suffice for § 875(c) purposes given the inherent "cross-border nature" of the internet, but it declined to resolve the issue, which it observed has divided other circuits in related contexts. United States v. Haas, 37 F.4th 1256, 1264–65 (7th Cir. 2022).

As another example, 18 U.S.C. § 247(a)(1) makes it a crime to "intentionally deface[], damage[], or destroy[] any religious real property[42] . . . or attempt[] to do so" if that conduct is "in or affects interstate or foreign commerce."[43] As an example of when this jurisdictional requirement is satisfied in the context of § 247, a court concluded that § 247 encompassed the conduct of a defendant who set several churches ablaze in different states.[44] Although each church burning occurred in a single state, the defendant's conduct still affected interstate commerce because it "entailed weeks of travel in a van (an instrumentality of commerce) along interstate highways (a channel of commerce) and at least six separate interstate border crossings, all for the specific purpose of spreading the evil of church burning through four different states."[45]

Other federal criminal statutes also prohibit specified conduct when certain circumstances implicating interstate or foreign commerce are present.[46] For example, 18 U.S.C. § 116 criminalizes female genital mutilation[47] if it occurs in one of several circumstances, including when

- the defendant or victim travels in interstate or foreign commerce in connection with the offense;
- the defendant transmits a communication related to the offense in interstate or foreign commerce; or
- a payment is made in interstate commerce in connection with the underlying offense.[48]

Crimes Involving the U.S. Mail

Some federal criminal statutes criminalize conduct targeting or involving the U.S. mail. See, e.g., 18 U.S.C. § 1701 (criminalizing knowing and willful obstruction of the mail); *id.* § 1706 (authorizing criminal penalties for certain act of damage to mail bags); *id.* § 2115 (prohibiting burglary of post offices). Federal criminal laws protecting the mail are likely rooted in Congress's power to "establish Post Offices and post Roads" under Article I, Section 8, clause 7 of the Constitution, in conjunction with its authority under the Necessary and Proper Clause. For example, in *U.S. v. Dittrich*, the U.S. Court of Appeals for the Eighth Circuit relied on these provisions to reject a constitutional challenge to 18 U.S.C. § 2114—a statute criminalizing robbery of the mail, among other things. 100 F.3d 84, 85 (8th Cir. 1996). The *Dittrich* court held that "a law making it a crime to steal property from a Post Office is well within even the narrowest construction of the Necessary and Proper Clause." *Id.* at 87.

[42] In general, *real property* includes "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land." *Property*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[43] 18 U.S.C. § 247(a)(1), (b).

[44] *See, e.g.*, United States v. Ballinger, 395 F.3d 1218, 1226 (11th Cir. 2005) ("Congress'[s] power to regulate activities that 'affect' commerce enables it to reach wholly intrastate conduct—that is, conduct that utilizes neither the channels nor the instrumentalities of interstate commerce—but *only* when it has 'a substantial relation to' (meaning it 'substantially affect[s]') interstate commerce." (brackets in original) (quoting United States v. Lopez, 514 U.S. 549, 558–59 (1995)).

[45] *Id.* at 1228.; *see also* United States v. Doggart, 947 F.3d 879, 887 (6th Cir. 2020) (observing that if he had raised interstate commerce challenge, defendant's conduct would have implicated interstate commerce for § 247 purposes "[b]ecause [defendant] planned an attack in New York from his home in Tennessee and planned to use instrumentalities of interstate commerce to make the attack").

[46] *E.g.*, 18 U.S.C. § 249(a)(2)(B).

[47] For a discussion of the substantive scope of this statute, see generally CRS Legal Sidebar LSB10313, *Congressional Authority to Enact Criminal Law: Female Genital Mutilation (FGM)*, by Michael A. Foster (2019).

[48] 18 U.S.C. § 116(d).

Special Maritime and Territorial Jurisdiction

Another common jurisdictional basis for federal criminal statutes is conduct occurring in the special maritime and territorial jurisdiction of the United States (SMTJ).[49] As one federal appellate court has explained, SMTJ generally includes "areas where American citizens and property need protection, yet no other government effectively safeguards those interests."[50] One quintessential example is the "high seas,"[51] which are included in the definition of SMTJ in 18 U.S.C. § 7, along with certain international waterways, federal lands, particular islands containing deposits of bird guano,[52] domestic aircrafts in flight,[53] and in some instances even outer space.[54]

The constitutional source of authority for different areas included in SMTJ varies by type.[55] For example, 18 U.S.C. § 7(3) defines SMTJ to include "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."[56] The constitutional grounding for much of this provision is Article I, Section 8, clause 17,[57] sometimes referred to as the Enclave Clause,[58] which grants Congress legislative power over, among other things, "all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."[59] The Enclave Clause "has been broadly construed" and extends beyond properties "itemized" in the provision.[60]

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[49] *See infra* "Select Examples of SMTJ as Jurisdictional Basis."

[50] United States v. Corey, 232 F.3d 1166, 1171 (9th Cir. 2000). This is not to say that another government may not also have laid claim to the territory or area in question. *See* United States v. Corey, 232 F.3d 1166, 1175 (9th Cir. 2000) ("[T]he United States at times did assert criminal jurisdiction over territories claimed by another sovereign.").

[51] In general terms, the *high seas* are sometimes described as "[t]he ocean waters beyond the jurisdiction of any country." *Sea*, BLACK'S LAW DICTIONARY (12th ed. 2024). There is little case law examining the precise meaning of *high seas* as used in the statutory SMTJ definition. *See* United States v. Zenon-Encarnacion, 185 F. Supp. 2d 127, 134 (D.P.R. 2001) ("Few cases have interpreted 18 U.S.C. § 7(1).").

[52] For a historical perspective on federal criminal jurisdiction over islands containing bird guano, see generally Christina D. Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57 AM. Q. 779 (2005); *see also* United States v. Corey, 232 F.3d 1166, 1174–75 (9th Cir. 2000) (discussing caselaw on whether "a murder on the guano island of Navassa was . . . under U.S. jurisdiction").

[53] 18 U.S.C. § 7.

[54] *See generally* CRS Legal Sidebar LSB10869, *If You Do the Space Crime, You May Do the Space Time*, coordinated by Peter G. Berris (2022); CRS Report WPD00038, *Space Crime: Federal Jurisdiction in the "Final Frontier,"* by Peter G. Berris and Michael A. Foster (2022).

[55] *See generally* BARBARA E. BERGMAN, THERESA M. DUNCAN, AND MARLO CADEDDU, 1 WHARTON'S CRIMINAL PROCEDURE § 2:8 (14th ed. 2023).

[56] 18 U.S.C. § 7(3).

[57] United States v. Gilbert, 94 F. Supp. 2d 157, 159 (D. Mass. 2000) (citing Bowen v. Johnston, 306 U.S. 19, 22, (1939)).

[58] Courts sometimes refer to the provision as the Federal Enclave Clause—for example, United States v. Gabrion, 517 F.3d 839, 854 (2008); or simply the Enclave Clause—for example, United States v. Alaska, 521 U.S. 1, 41 (1997).

[59] U.S. CONST. art. I, § 8, cl. 17. "Absent consent by the state, the United States does not take jurisdiction over the property. Instead it is simply an ordinary proprietor of the property." *Gilbert*, 94 F. Supp. 2d at 160; *accord* BERGMAN, ET AL., *supra* note 55, at § 2:8 (similar).

[60] *Gabrion*, 517 F.3d at 847 (quoting Kleppe v. New Mexico, 426 U.S. 529, 542 n.11 (1976).

The Enclave Clause also has language relevant to regulating crime in the District of Columbia, giving Congress "[p]ower . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government (continued...)

Another source of constitutional authority for portions of the SMTJ definition is Congress's power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" under Article IV, Section 3, clause 2,[61] also known as the Property Clause.[62] As the U.S. Court of Appeals for the Sixth Circuit[63] has explained, "[t]he Supreme Court has given this Clause an 'expansive' reading and stated, unequivocally, that the federal government 'doubtless has a power over its own property analogous to the police power of the several States.'"[64]

Select Examples of SMTJ as Jurisdictional Basis

Numerous federal criminal statutes expressly apply to conduct when it occurs in SMTJ. For example, 18 U.S.C. § 81, among other things, imposes criminal penalties on whoever "within the special maritime and territorial jurisdiction of the United States, willfully and maliciously sets fire to or burns any building, structure or vessel, any machinery or building materials or supplies, military or naval stores, munitions of war, or any structural aids or appliances for navigation or shipping."[65] Other statutes that employ similar language referencing SMTJ include laws governing assault,[66] theft,[67] sexual abuse,[68] robbery,[69] and kidnapping.[70]

Federal Property as Jurisdictional Basis

A number of federal criminal laws regulate particular activities when they occur on, or target, federal buildings or land, such as military installations.[71] As another example, 40 U.S.C. § 5104 authorizes various criminal penalties for a range of conduct and activities (such as acts of physical violence and vandalism) on Capitol grounds or in Capitol buildings.[72] Numerous other federal criminal laws apply to particular national parks or federally protected lands.[73] Congress

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of the United States." U.S. CONST. art. I, § 8, cl. 17. As one federal appellate court has explained, pursuant to the Enclave Clause, "[w]hen Congress legislates with respect to the District of Columbia . . . it acts as a state government with all the powers of a state government." United States v. Jenkins, 734 F.2d 1322, 1325 (9th Cir. 1983).

[61] U.S. CONST. art. IV, § 3, cl. 2.

[62] *Gabrion*, 517 F.3d at 846.

[63] This report references decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (*e.g.*, the Sixth Circuit) refer to the U.S. Court of Appeals for that particular circuit (*e.g.*, the U.S. Court of Appeals for the Sixth Circuit).

[64] *Gabrion*, 517 F.3d at 846 (quoting *Kleppe*, 426 U.S. at 539–40).

[65] 18 U.S.C. § 81.

[66] *Id.* § 113.

[67] *Id.* § 661.

[68] *Id.* § 2242.

[69] *Id.* § 2111.

[70] *Id.* § 1201(a)(2).

[71] *E.g.*, *id.* § 1382 ("Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation . . . Shall be fined under this title or imprisoned not more than six months, or both.").

[72] 40 U.S.C. § 5104. For more information on § 5104, see generally CRS Report R46829, *Domestic Terrorism: Overview of Federal Criminal Law and Constitutional Issues*, by Peter G. Berris, Michael A. Foster, and Jonathan M. Gaffney (2021); CRS Legal Sidebar LSB10564, *Federal Criminal Law: January 6, 2021, Unrest at the Capitol*, by Michael A. Foster and Peter G. Berris (2021).

[73] *See, e.g.*, 16 U.S.C. § 146 (criminalizing certain intrusions onto, or appropriation from, public lands at Wind Cave National Park); *id.* § 256b (restricting hunting and fishing in Olympic National Park and authorizing criminal penalties for violations); *id.* § 371 (authorizing fines and imprisonment for lying about eligibility for bathing in the Hot Springs (continued...)

may be able to rely on multiple sources of constitutional authority to enact or amend criminal laws governing conduct on, or targeting, federal buildings and land, such as the Property and Enclave Clauses, discussed above.[74]

Not all federal criminal statutes protecting federal property are focused on land and buildings.[75] One example is 18 U.S.C. § 641, which makes it a crime to steal "any record, voucher, money, or thing of value of the United States or of any department or agency thereof."[76] In *United States v. Von Stephens*, the Ninth Circuit rejected an argument that § 641 exceeded Congress's powers under the Constitution as applied to the defendant.[77] *Von Stephens* involved the theft of government funds that were part of an aid program.[78] The court concluded that the underlying aid program was a valid exercise of congressional authority to "provide for the general welfare of the United States" under Article 1, Section 8, clause 1 of the Constitution.[79] According to the court, the application of § 641 to theft from the aid program was necessary and proper for carrying out that underlying power.[80] The court indicated that in "protecting the government from theft," the statute facilitates the aid program by "helping to assure that federal funds will reach intended [aid program] recipients."[81] *Von Stephens* illustrates how congressional authority to protect federal property through criminal legislation may be premised on a combination of the underlying source of constitutional authority relevant to the particular type of property and the Necessary and Proper Clause.[82]

National Park); *id.* § 460n-5 (setting criminal penalties for violations of rules and regulations governing Lake Mead National Recreation Area).

[74] *See supra* notes 57–64 and accompanying text.

[75] Some federal statutes do not specify the type of property to which they apply but in practice are often used to prosecute conduct targeting federal buildings. One example is 18 U.S.C. § 1361, which authorizes various fines and prison terms for willful injury of federal property and has been used in prosecutions for damage to government buildings. *See, e.g.*, United States v. N.B., No. 22-2492, 2023 WL 4881451, at *1 (8th Cir. Aug. 1, 2023) (per curiam) (discussing § 1361 prosecution for damaging buildings managed by the Bureau of Land Management); United States v. Lozano, No. 21-51076, 2022 WL 2713233, at *1 (5th Cir. July 13, 2022) (describing guilty plea under § 1361 by defendant for "spray painting graffiti onto a federal building in El Paso, Texas"). That statute can also be used to prosecute conduct targeting other types of government property. *See* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 1663, https://www.justice.gov/archives/jm/criminal-resource-manual-1663-protection-government-property-protection-public-records-and (explaining that the destruction of public records may violate § 1361); *see also* United States v. Krause, 914 F.3d 1122, 1124–26 (8th Cir. 2019) (analyzing § 1361 as applied to incident that resulted in destruction of an antenna array owned by the Federal Aviation Administration).

[76] 18 U.S.C. § 641.

[77] 774 F.2d 1411, 1413 (9th Cir. 1985) (per curiam).

[78] *Id.* at 1412.

[79] *Id.* at 1413. The authority to provide for the general welfare, described by the Ninth Circuit, has generally been interpreted not as an independent power but rather as qualifying the power to tax and spend. *See* CRS Report R44729, *Constitutional Authority Statements and the Powers of Congress: An Overview*, by Whitney K. Novak, at 14 (2023) ("Importantly, the phrase general Welfare does not exist in isolation in the clause but is instead tied to the preceding language in the clause regarding the raising of revenue."); *see also* United States v. Butler, 297 U.S. 1, 64 (1936) ("The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted.").

[80] *Von Stephens*, 774 F.2d at 1413.

[81] *Id.*

[82] Another illustration may be found in *Sabri v. United States*, a Supreme Court case involving a federal provision "proscribing bribery of state, local, and tribal officials [or] entities that receive at least $10,000 in federal funds." 541 U.S. 600, 602 (2004). The Court explained that "Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt (continued...)

Federal Personnel as Jurisdictional Basis

The protection of federal personnel serves as a jurisdictional basis underpinning a number of federal criminal statutes.[83] The constitutional grounding of such laws is generally the Necessary and Proper Clause in conjunction with an underlying function belonging to the federal government under the Constitution.[84] For example, in *United States v. Peltier*, the Eighth Circuit rejected a constitutional challenge to 18 U.S.C. § 1114, which prohibits the unlawful killing of certain federal officers and employees.[85] Addressing the Necessary and Proper Clause, the court explained that "killing a federal officer engaged in his or her official duties affects the federal government's ability to execute its laws" and held that a "statute like § 1114 is 'necessary in order to insure uniformly vigorous protection of federal personnel.'"[86] More broadly, the Supreme Court observed as early as 1892 that "no one doubts the power of [C]ongress to provide for the punishment of all crimes and offenses against the United States, whether committed within one of the states of the Union or within territory over which [C]ongress has plenary and exclusive jurisdiction."[87] Crimes targeting federal personnel in the course of their duties almost certainly qualify as crimes against the United States.[88]

Select Examples of Federal Personnel as Jurisdictional Basis

A variety of federal criminal statutes protect federal personnel, including the following examples:

- **18 U.S.C. § 111** authorizes various prison terms for (among other things) forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering with certain federal officers or employees.[89]
- **18 U.S.C. § 351** prohibits assassinating or kidnapping Members of Congress, certain Cabinet officials, and Supreme Court Justices, among other things.[90]
- **18 U.S.C. § 1751** criminalizes assassinating or kidnapping the President or Vice President of the United States.[91]

public officers are derelict about demanding value for dollars." *Id.* at 605. Thus, the Court held that the federal bribery provision at issue was a "valid exercise of congressional authority under Article I of the Constitution." *Id.* at 602.

[83] *See infra* "Select Examples of Federal Personnel as Jurisdictional Basis."

[84] *See* United States v. Peltier, 446 F.3d 911, 914 (8th Cir. 2006).

[85] *Id.*

[86] *Id.* (quoting United States v. Feola, 420 U.S. 671, 684 (1975)); *accord* Hinkson v. United States, No. 1:04-CR-127-RCT, 2012 WL 3776023, at *14 (D. Idaho Aug. 28, 2012) (similar).

[87] Logan v. United States, 144 U.S. 263, 283 (1892), *abrogated on other grounds*, Witherspoon v. State of Ill., 391 U.S. 510 (1968).

[88] *See Peltier*, 446 F.3d at 914 ("Killing a federal officer engaged in his or her official duties affects the federal government's ability to execute its laws and is thus an offense that the United States can punish."); *Hinkson*, No. 1:04-CR-127-RCT, 2012 WL 3776023, at *14 ("The murder of an officer of the United States engaged in the performance of official duties is undoubtedly a crime against the United States wherever committed.").

[89] 18 U.S.C. § 111(a)(1). For more information on this statute, see generally Berris, Foster, and Gaffney, *supra* note 72 at 23–24. The same government officers and officials protected by Section 111 also fall within the scope of Section 1114 of Title 18 of the *U.S. Code*, which criminalizes the attempted or actual killing of such individuals. 18 U.S.C. § 1114.

[90] 18 U.S.C. § 351.

[91] *Id.* § 1751.

Reconstruction-Era Amendments

The Thirteenth, Fourteenth, and Fifteenth Amendments were ratified in the Reconstruction Era following the Civil War. Each amendment announces certain rights (e.g., that the government may not deprive individuals of the equal protection of the law) and authorizes Congress to enforce these rights "by appropriate legislation."[92] Congress appears to have used these enforcement authorities in the criminal law context (typically in conjunction with other powers).[93]

The Thirteenth Amendment

The Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction," and grants Congress the power to enforce this guarantee "by appropriate legislation."[94] The Thirteenth Amendment does not contain language limiting its prohibition of slavery or involuntary servitude to a particular race.[95] The Supreme Court has interpreted the Thirteenth Amendment as a "denunciation" of the condition of slavery in general—"not a declaration in favor of a particular people"—and therefore it "reaches every race and every individual."[96]

The Supreme Court has also held that the Thirteenth Amendment permits Congress to pass laws necessary to abolish not only the institution of slavery itself, but also "all badges and incidents of slavery in the United State[s]."[97] According to the Court, Congress has the authority to rationally "determine what are the badges and the incidents of slavery" and to legislate accordingly.[98] As a result, courts generally defer to Congress's determinations regarding the scope of badges and incidents of slavery, so long as legislation "bears a rational relationship to the subject matter of the Amendment."[99] Courts have concluded that badges and incidents of slavery include "most forms of racial discrimination."[100]

The Thirteenth Amendment is "unique among Reconstruction Era amendments" in that its "Enforcement Clause lacks a state-action[101] provision, instead empowering Congress to directly regulate private conduct."[102] The types of criminal provisions premised on Congress's Thirteenth

[92] *See generally* CRS Report R47060, *Overview of Federal Hate Crime Laws*, by Peter G. Berris, at 46–50 (2022).

[93] For additional information, see generally Hickey, *supra* note 17.

[94] U.S. CONST. amend. XIII, §§ 1, 2.

[95] *Id.*; *see also* WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW, § 18:1 (3rd ed. 2023) ("Although originally enacted to abolish slavery of African Americans, the Amendment uses more inclusive language.").

[96] *See* Hodges v. United States, 203 U.S. 1, 16–17 (1906), *overruled in part by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); *accord* United States v. Hatch, 722 F.3d 1193, 1208 (10th Cir. 2013) (quoting this language in support of proposition that Thirteenth Amendment protects all races).

[97] Civil Rights Cases, 109 U.S. 3, 20 (1883).

[98] *Jones*, 392 U.S. at 440.

[99] RICH, *supra* note 95, at § 18:10; *accord Jones*, 392 U.S. at 440 ("Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."); United States v. Cannon, 750 F.3d 492, 500 (5th Cir. 2014) ("The Supreme Court explained that courts should only invalidate legislation enacted under the Thirteenth Amendment if they conclude that Congress made an irrational determination in deciding what constitutes 'badges' and 'incidents' of slavery in passing legislation to address them.").

[100] *Hatch*, 722 F.3d at 1200, 1208. *See also* United States v. Nelson, 277 F.3d 164, 178 (2d Cir. 2002) ("[T]he Thirteenth Amendment . . . extend[s] to protect the Jewish 'race.'").

[101] For a discussion of state action, *see infra* notes 120–129.

[102] United States v. Diggins, 36 F.4th 302, 306–07 (1st Cir.), *cert. denied*, 143 S. Ct. 383 (2022).

Amendment authority illustrate the importance of this distinction, as discussed in the examples below.[103]

Select Examples of the Thirteenth Amendment as a Jurisdictional Basis in Federal Criminal Statutes

A number of hate crime statutes appear to be premised at least in part on Congress's authority to enact legislation under the Thirteenth Amendment.[104] For example, in *United States v. Hatch*, the Tenth Circuit rejected a challenge to Congress's authority to enact 18 U.S.C. § 249(a)(1),[105] which among other things prohibits violence motivated by racial bias.[106] The Tenth Circuit focused on three "connected considerations" in concluding that § 249(a)(1) fit within Congress's Thirteenth Amendment authority to eliminate badges and incidents of slavery.[107] First, the court emphasized that § 249(a)(1) is "confined" to "aspects of race as understood in the 1860s when the Thirteenth Amendment was adopted," namely race, color, religion, or national origin.[108] The Tenth Circuit drew support for that conclusion in part from congressional findings buttressing the statute, such as one finding that "members of certain religious and national origin groups were [historically] . . . perceived to be distinct 'races.'"[109] Further, the court inferred additional support for this conclusion from the fact that "Congress placed non-racial classifications—gender, sexual orientation, gender identity, and disability," which fall outside the scope of the Thirteenth Amendment, in a separate paragraph of § 249.[110] Second, the court noted that Congress "did not seek to punish all violence against those who embody a trait that equates to 'race,'" but "only those who act 'because of the [victim's] actual or perceived race.'"[111] According to the court, this limitation "further confines the statute's reach."[112] Third, the court, surveying the historical relationship between violence and slavery, held that "Congress could rationally conclude that physically attacking a person of a particular race because of animus toward or a desire to assert superiority over that race is a badge or incident of slavery."[113] Other courts have employed similar reasoning to reach the same conclusion with respect to § 249(a)(1)[114] and other federal hate crime

[103] *See infra* "Select Examples of the Thirteenth Amendment as a Jurisdictional Basis in Federal Criminal Statutes."

[104] *See, e.g.*, Church Arson Prevention Act of 1996, Pub. L. No. 104–155, § 2, 110 Stat 1392 (codified at 18 U.S.C. § 247) ("Congress has authority, pursuant to section 2 of the 13th amendment to the Constitution, to make actions of private citizens motivated by race, color, or ethnicity that interfere with the ability of citizens to hold or use religious property without fear of attack, violations of Federal criminal law."); *Cannon*, 750 F.3d at 498 ("[Section] 249(a)(1) rests solely on Congress's authority under § 2 of the Thirteenth Amendment."); *Hatch*, 722 F.3d at 1196 ("The portion of the Hate Crimes Act under which Hatch was charged and convicted—18 U.S.C. § 249(a)(1)—is a lawful exercise of the powers granted to Congress by Section 2 of the Thirteenth Amendment.").

[105] 722 F.3d at 1206.

[106] 18 U.S.C. § 249.

[107] *Hatch*, 722 F.3d at 1202, 1205.

[108] *Id.* at 1205.

[109] *Id.* (quoting 18 U.S.C. § 249 note (reprinting Pub. L. No. 111–84, § 4702(8))).

[110] *Id.* (noting that Congress's placed nonracial classifications in a paragraph that "explicitly linked those classifications to the Commerce Clause or Congress's power over federal territories").

[111] *Id.* at 1206 (quoting 18 U.S.C. § 249(a)(1)).

[112] *Id.*

[113] *Id.*

[114] United States v. Metcalf, 881 F.3d 641, 645 (8th Cir. 2018) (citing *Hatch* with approval and concluding that with § 249(a)(1), "Congress rationally determined that racially motivated violence constitutes a badge and incident of slavery"); United States v. Cannon, 750 F.3d 492, 502 (5th Cir. 2014) (reviewing congressional findings supporting § 249, observing that "racially motivated violence was essential to the enslavement of African–Americans and was (continued...)

statutes.[115] For instance, the Second Circuit held that § 245(b)(2)(B) "falls comfortably" within Congress's Thirteenth Amendment power to determine the badges and incidents of slavery since it prohibits racially motivated violence, which has a "long and intimate historical association with slavery and its cognate institutions."[116]

The Fourteenth Amendment

In relevant part, the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[117] Section Five of the Fourteenth Amendment grants Congress the power to "enforce, by appropriate legislation, the provisions of this article."[118]

There are two important limits to Congress's Section Five power.[119] First, the Supreme Court has indicated that "the Fourteenth Amendment, by its very terms, prohibits only state action."[120] Accordingly, Congress's power to enact legislation under Section 5 is limited to legislation addressed at remedying state action.[121] State action may come in a number of forms[122] Perhaps most relevant to the criminal law context, the state action requirement may be satisfied where an individual acts under color of law.[123] Generally, an individual's actions are under color of law if

widely employed after the Civil War in an attempt to return African–Americans to a position of de facto enslavement," and holding that in "light of these facts, we cannot say that Congress was irrational in determining that racially motivated violence is a badge or incident of slavery"); United States v. Earnest, 536 F. Supp. 3d 688, 717 (S.D. Cal. 2021) (citing *Hatch* with approval, reviewing congressional findings, and joining "the other courts in concluding that Congress rationally determined racially motivated violence is a badge and incident of slavery, and translated that determination into the HCPA pursuant to its powers under Section 2 of the Thirteenth Amendment").

[115] *See, e.g.*, United States v. Allen, 341 F.3d 870, 884 (9th Cir. 2003) (collecting cases holding that "the enactment of § 245(b)(2)(B) was a constitutional exercise of Congress's authority under the Thirteenth Amendment" and agreeing); United States v. Nelson, 277 F.3d 164, 178, n.14 (2d Cir. 2002) ("Congress'[s] power to enforce the Thirteenth Amendment by enacting § 241 . . . is clear and undisputed.").

[116] *Nelson*, 277 F.3d at 189–90.

[117] U.S. CONST. amend. XIV, § 1.

[118] *Id.* § 5.

[119] For more information on Section Five of the Fourteenth Amendment *see* Hickey, *supra* note 17 at 17–22.

[120] United States v. Morrison, 529 U.S. 598, 621 (2000). *Compare* Civil Rights Cases, 109 U.S. 3, 11 (1883) (rejecting the power of Congress to regulate private conduct under the Fourteenth Amendment and concluding that the Amendment governs only State action), *with* United States v. Guest, 383 U.S. 745, 782 (1966) (Brennan, J., concurring) ("A majority of the members of the Court expresses the view today that [Section 5 of the Fourteenth Amendment] empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy.") (footnote omitted). For an examination of the development of the Court's Fourteenth Amendment precedent, see generally *Morrison*, 529 U.S. at 620–27.

[121] *Morrison*, 529 U.S. at 621–22; *see generally* Cong. Rsch. Serv., *Amdt14.S5.2 Who Congress May Regulate*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S5-2/ALDE_00000851/ (last visited Sept. 9, 2024).

[122] For example, official state conduct, such as the enactment of legislation, qualifies. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493, 495 (1954), *supplemented by* 349 U.S. 294 (1955) (holding that state-mandated school segregation violated the Fourteenth Amendment); *see also* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW-SUBSTANCE & PROCEDURE § 16.1(a) (July 2024 Update) ("When a legislature, executive officer, or a court takes some official action against an individual, that action is subjected to review under the Constitution, for the official act of any governmental agency is direct governmental action and therefore subject to the restraints of the Constitution.").

[123] *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982) (explaining that in the context of civil lawsuits brought against state officials pursuant to a federal statute, "the statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical.").

their conduct involves "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[124] Typically, individuals acting under color of law will be government employees or officials.[125] There are also some instances in which the conduct of private individuals or entities may be attributed to the state itself,[126] although determining whether that is the case is a "necessarily fact-bound inquiry."[127] The Supreme Court has said[128] that there must be a "'close nexus between the State and the challenged action' [so] that seemingly private behavior 'may be fairly treated as that of the State itself.'"[129]

Second, there is a significant distinction between Congress legislating to remedy actual constitutional violations and Congress legislating to regulate conduct that may not be forbidden by the substantive scope of the Fourteenth Amendment. Section Five enforcement authority does not grant Congress the "power to decree the substance of the Fourteenth Amendment."[130] Rather, Section Five authorizes it to enact laws to "remedy or prevent unconstitutional actions."[131] In other words, Congress may use Section Five to enforce the rights guaranteed by the Fourteenth Amendment; however, it may not alter the substantive scope of the rights themselves.[132] The Supreme Court has acknowledged that the line between laws that remedy unconstitutional actions and laws that make a substantive change to the Fourteenth Amendment is "not easy to discern,"[133] but ordinarily legislation is remedial under Section Five of the Fourteenth Amendment when there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[134] Relevant factors in determining whether Fourteenth Amendment legislation is congruent and proportional include (1) the scope of the constitutional right at issue in the legislation; (2) whether Congress has identified a historical pattern of the states violating

[124] Screws v. United States, 325 U.S. 91, 109 (1945) (plurality opinion) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

[125] *See infra* note 149 and accompanying text. Federal courts have held that some criminal laws that encompass conduct committed under color of law can apply to federal officials and employees as well as state ones. *See Screws*, 325 U.S. at 108 (explaining in context of federal criminal law prohibiting deprivation of civil rights under color of law that one "who acts under 'color' of law may be a federal officer or a state officer" and "may act under 'color' of federal law or of state law"); United States v. Otherson, 637 F.2d 1276, 1278 (9th Cir. 1980) (similar). As a general matter, Congress has much greater leeway to regulate the conduct of federal officials and employees than it does with state officials and employees. *See* CRS Report R46530, *Police Reform and the 116th Congress: Selected Legal Issues*, by April J. Anderson, Joanna R. Lampe, and Whitney K. Novak, at 1 (2020) (describing Congress's "plenary authority to regulate *federal* law enforcement officers and agencies").

[126] Burton v. Wilmington Parking Auth., 365 U.S. 715, 716 (1961) (holding that state action occurred within the context of the Fourteenth Amendment when a private coffee shop refused to serve an African American customer, and that coffee shop was situated in a government-run parking garage, and a lessee of a government authority).

[127] *Lugar*, 457 U.S. at 939.

[128] The Court has used several different tests to determine whether a private entity qualifies as a state actor. *See* Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 809 (2019) (collecting caselaw and describing tests).

[129] Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)); *see also* Hickey, *supra* note 17 at 17–18 (surveying caselaw on determining whether there is sufficiently close nexus between state and private individual to amount to state action for Fourteenth Amendment purposes).

[130] City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

[131] *Id.* at 519.

[132] *Id*. (observing Congress has been given "the power 'to enforce,' not the power to determine what constitutes a constitutional violation").

[133] *Id.*

[134] *Id.* at 520; RICH, *supra* note 95, at § 35:84 ("In *City of Boerne v. Flores*, the Supreme Court distinguished between the remedial and substantive scope of the Fourteenth Amendment, ruling that Congress had power to determine the former, but not the latter." (footnote omitted)).

the particular right; and (3) whether the right at issue and the purported violations are "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[135]

The congruence and proportionality requirement does not apply when legislation enforces actual violations of the Fourteenth Amendment—for example, where those violations must be proven and vindicated in court.[136] One example of this type of enforcement legislation is 18 U.S.C. § 242—criminalizing deprivation of constitutional rights under color of law[137]—discussed in more detail below.[138]

Select Examples of the Fourteenth Amendment as a Jurisdictional Basis in Federal Criminal Statutes

As with the Thirteenth Amendment, hate crime laws are one area where Congress has appeared to invoke its authority under Section Five of the Fourteenth Amendment (sometimes in conjunction with other sources of authority).[139] Case law examining the limits of Congress's Fourteenth Amendment power in the context of these statutes is scarce, however.[140] Federal courts have

[135] Hickey, *supra* note 17 at 19 (collecting cases and quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86 (2000)).

[136] Hickey, *supra* note 17 at 21; *see also* United States v. Georgia, 546 U.S. 151, 158–59 (2006) (discussing congressional authority to legislate to enforce actual violations of the Fourteenth Amendment).

[137] Section 242 refers to "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 18 U.S.C. § 242. The Supreme Court has construed that language as limited to the "deprivation of a constitutional right" where that right "has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." United States v. Lanier, 520 U.S. 259, 267, 271–72 (1997) (quoting Screws v. United States, 325 U.S. 91, 104 (1945) (plurality opinion)). In practice, according to one observer, "[t]he vast majority of cases under Section 242 have involved deprivation of the Fourteenth Amendment right to due process of law." ZACHARY J. WOLFE, HATE CRIMES LAW, § 6:18 (2024).

[138] See infra "Select Examples of the Fourteenth Amendment as a Jurisdictional Basis in Federal Criminal Statutes."

[139] *See, e.g.*, *Screws*, 325 U.S. at 98 (explaining that predecessor to § 242 "was enacted to enforce the Fourteenth Amendment"); CRS Legal Sidebar LSB10495, *Federal Police Oversight: Criminal Civil Rights Violations Under 18 U.S.C. § 242*, by Joanna R. Lampe, at 1 (2020) (discussing origins of § 242); S. REP. NO. 90-721, at 6–8 (1967) (discussing sources of constitutional authority for § 245); *see also* United States v. Price, 383 U.S. 787, 805 (1966) ("We cannot doubt that the purpose and effect of § 241 was to reach assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth and Fifteenth Amendments, and not merely under part of it.").

[140] *But see, e.g.*, United States v. Glover, 672 F. Supp. 3d 1072, 1081 (D. Or. 2023) ("The Court concludes that [18 U.S.C.] § 242 was a constitutional exercise of Congress's § 5 enforcement power."); United States v. Cooney, 217 F. Supp. 417, 419 (D. Colo. 1963) (similar).

As of July 22, 2024, targeted searches yielded little relevant material on this issue. For example, with respect to 18 U.S.C. § 245 these searches entailed searching within results on Westlaw of federal cases citing to § 245 for the following terms and connector searches: TI(United States) AND (245 /p fourteenth /p congress); TI(United States) AND (245 /p fourteenth /p enact!); TI(United States) AND (245 /p fourteenth /p legislat!). Equivalent searches were conducted for 247, 249 and 42 U.S.C. § 3631. For 18 U.S.C. §§ 241 and 242—where there is a larger body of caselaw in general—equivalent searches were conducted of reported federal cases only.

When discussing the substantive scope of § 241, which criminalizes conspiracies against civil rights, the Supreme Court in *United States v. Price* held that the provision protected against violations of Fourteenth Amendment rights, although there was no state action issue in that case, which involved the indictments of several municipal police officers in connection with official actions. 383 U.S. at 790, 799–800, 804; *see also* United States v. Guest, 383 U.S. 745, 755–56 (1966) (cautioning that the Fourteenth Amendment reaches only state action, but determining that there were sufficient state action allegations in § 241 indictment at issue).

Before the Supreme Court's opinion in *Morrison*, which expressly restricted the Fourteenth Amendment to state action, *supra* note 120 and accompanying text, the Eighth Circuit had concluded in *United States v. Bledsoe* that hate crime statutes reaching private action could be premised at least in part on the Fourteenth Amendment.728 F.2d 1094, 1097 (8th Cir. 1984) (examining the Thirteenth and Fourteenth Amendments as sources of authority for § 245). Post-
(continued...)

sometimes declined to address Fourteenth Amendment challenges to hate crime statutes and have instead resolved them under other constitutional provisions such as the Thirteenth Amendment.[141] The government has also sometimes declined to rely on the Fourteenth Amendment in defending federal hate crime statutes against constitutional challenges, seemingly due to the difficulty of satisfying the state action requirement with respect to conduct undertaken by private individuals.[142]

One exception is 18 U.S.C. § 242,[143] which some federal courts have described as grounded in Congress's Section Five power.[144] The provision, which can be traced back to the Reconstruction Era,[145] criminalizes the willful deprivation of federally protected rights under color of law.[146] In general terms, an action is taken "under color of law" when it involves the misuse of power by an individual "clothed" with legal authority,[147] a requirement that may often overlap with the concept of state action.[148] In practice, those acting under color of law for § 242 purposes are

Morrison, in an unreported order, one federal district court interpreted *Bledsoe* and noted that the Eighth Circuit had also separately grounded its holding in that case on the Thirteenth Amendment, which can reach private action. United States v. Maybee, No. 11-30006, 2011 WL 2784446, at *4 (W.D. Ark. July 15, 2011), *aff'd*, 687 F.3d 1026 (8th Cir. 2012).

There are also a number of federal cases declining to extend *City of Boerne*'s congruence and proportionality requirement to the Thirteenth Amendment in the context of federal hate crime statutes. *See, e.g.*, United States v. Hougen, 76 F.4th 805, 815 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 1121 (2024), *and cert. denied*, 144 S. Ct. 1121 (2024) (collecting cases); United States v. Diggins, 36 F.4th 302 (1st Cir.), *cert. denied*, 143 S. Ct. 383 (2022).

[141] *See, e.g.*, United States v. Sandstrom, 594 F.3d 634, 660 (8th Cir. 2010) ("Because we hold that § 245 is a valid exercise of Congress's power under the Thirteenth Amendment, we need not address the remaining constitutional challenges to § 245."); *see also* United States v. Beebe, 807 F. Supp. 2d 1045, 1059 (D.N.M. 2011) (resolving constitutional challenge to 18 U.S.C. § 249(a)(1) on Thirteenth Amendment grounds and therefore not reaching defendant's Fourteenth Amendment challenge to the provision), *aff'd sub nom.* United States v. Hatch, 722 F.3d 1193 (10th Cir. 2013); United States v. Furrow, 125 F. Supp. 2d 1178, 1180 (C.D. Cal. 2000) (declining to discuss Fourteenth Amendment challenge to § 245 and instead resolving challenge with respect to commerce power).

To illustrate, in *United States v. Lane*, the Tenth Circuit examined the jurisdictional basis for § 245(b)(2)(C), which criminalizes violently interfering with a person because of a protected characteristic such as race and because of that person's enjoyment of certain employment or labor-related rights. 883 F.2d 1484, 1487 (10th Cir. 1989). The defendants argued that Congress enacted the provision solely under its Fourteenth Amendment authority, but the government instead defended the provision as based on the Commerce Clause. *Id.* The Court agreed with the government and therefore did not decide whether § 245(b)(2)(C) was also rooted in the Fourteenth Amendment, an issue it found "less clear" based on legislative history. *Id.* at 1492.

[142] *See, e.g.*, United States v. Nelson, 277 F.3d 164, 174 (2d Cir. 2002) (acknowledging that the government declined to pursue argument under the Fourteenth Amendment and speculating on its reasoning).

[143] Section 242 has been used by prosecutors to charge individuals with bias-motivated crimes, although its reach is not limited to that context. *See* Berris, *supra* note 92, at 18.

[144] *See, e.g.*, United States v. Glover, 672 F. Supp. 3d 1072, 1081 (D. Or. 2023) ("The Court concludes that [18 U.S.C.] § 242 was a constitutional exercise of Congress's § 5 enforcement power."); United States v. Cooney, 217 F. Supp. 417, 419 (D. Colo. 1963) (Similar).

[145] Berris, *supra* note 92, at 18. For a discussion of additional caselaw interpreting this requirement, see Berris, *supra* note 92, at 18–19.

[146] 18 U.S.C. § 242.

[147] United States v. Classic, 313 U.S. 299, 326 (1941).

[148] One federal appellate court has treated the Fourteenth Amendment state action requirement and the "under color of law" requirement of § 242 as "coextensive." United States v. Davis, 971 F.3d 524, 529 n.2 (5th Cir. 2020). For example, in one case the Fifth Circuit rejected an appeal from defendants convicted under 18 U.S.C. §§ 241 and 242. United States v. Causey, 185 F.3d 407, 416 (5th Cir. 1999). Although § 241 lacks an "under color of law" requirement, the Fifth Circuit had previously interpreted it to require proof of state action. *Id.* at 413. The Fifth Circuit treated that requirement similarly to the "under color of law" requirement of § 242 and analyzed the convictions under both statutes through the lens of whether the defendants had acted under color of law. *Id.* at 413–16.

typically law enforcement officers and corrections personnel,[149] but can also include other public officials and potentially private persons when acting in conjunction with government personnel.[150]

The Fifteenth Amendment

The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[151] Section Two of the Fifteenth Amendment grants Congress the "power to enforce this article by appropriate legislation."[152] Much of the jurisprudence on the scope of Congress's Section Two authority involves broad voting rights legislation focused on state policies such as the use of literacy tests as a limitation on voting eligibility.[153] There, the Supreme Court has said that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting,"[154] although the Court has subsequently recognized additional limitations.[155]

There is some indication that Congress has invoked the Fifteenth Amendment as at least a partial jurisdictional basis for some federal criminal provisions as discussed below,[156] but a dearth of caselaw examining the constitutionality of these laws in the context of the Fifteenth Amendment means that it is difficult to ascertain the exact contours of Congress's Section Two authority in the criminal law arena.[157] One limitation appears certain: the Fifteenth Amendment has traditionally been limited to state action.[158] Accordingly, a law prohibiting interference by

[149] *Cf. Statutes Enforced by the Criminal Section*, U.S. DEP'T OF JUST. (Aug. 15, 2023), https://www.justice.gov/crt/statutes-enforced-criminal-section ("Those prosecuted under the statute typically include police officers, sheriff's deputies, and prison guards.").

[150] Berris, *supra* note 92, at 19–20.

[151] U.S. CONST. amend. XV, § 1.

[152] *Id.* § 2. Other provisions of the Constitution authorize Congress to protect primary and general elections for federal positions, including through criminal laws. *See, e.g.*, United States v. Classic, 313 U.S. 299, 320 (1941) (holding that the necessary and proper clause—in conjunction with Article I, Section 4, of the Constitution authorizing Congress to enact laws governing the "manner of holding elections"—made permissible the enactment of a federal criminal law securing certain voting rights as well as its application in context of interference by individuals with a primary election); *see also, generally* RICH, *supra* note 95, at § 35:78 ("[I]t has been settled that Congress has complete constitutional power to provide civil and criminal remedies when a person is unlawfully denied the right to vote in federal elections, including primaries.").

[153] *See generally* Cong. Rsch. Serv., *Amdt14.S2.2 Federal Remedial Legislation*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt15-S2-2/ALDE_00013501/#ALDF_00025012 (last visited Sept. 9, 2024).

[154] South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

[155] *See* Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 553 (2013) (holding in the context of the Fifteenth Amendment that "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions"). For more information on this topic, see generally CRS Legal Sidebar LSB10954, *Recent Developments in the Rights of Private Individuals to Enforce Section 2 of the Voting Rights Act*, by L. Paige Whitaker (2024); CRS Legal Sidebar LSB11002, *Allen v. Milligan: Supreme Court Holds That Alabama Redistricting Map Likely Violated Section 2 of the Voting Rights Act*, by L. Paige Whitaker (2023); CRS Testimony TE10033, *History and Enforcement of the Voting Rights Act of 1965*, by L. Paige Whitaker (2019).

[156] *See infra* "Select Examples of the Fifteenth Amendment as a Jurisdictional Basis."

[157] *See, e.g.*, United States v. Sandstrom, 594 F.3d 634, 659–60 (8th Cir. 2010) (declining to consider whether Congress exceeded its authority under the Fifteenth Amendment to enact 18 U.S.C. § 245 and instead resolving the dispute on Thirteenth Amendment grounds).

[158] *See, e.g.*, James v. Bowman, 190 U.S. 127, 139 (1903) ("These authorities show that a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the 15th (continued...)

government actors with voting would be state action and be valid under the Fifteenth Amendment.[159] As discussed above, private conduct may also be considered state action for purposes of the Fifteenth Amendment in certain circumstances.[160] For example, the Supreme Court has found state action present in the "exercise by a private entity of powers traditionally exclusively reserved to the State."[161] One such power recognized by the Court includes the administration of elections.[162] In *Terry v. Adams*, a three-Justice plurality of the Supreme Court ruled that the exclusion of African Americans from a primary election violated the Fifteenth Amendment, although the primary was unofficial, unregulated by state government, and run by a "self-governing voluntary club."[163] According to the plurality, the primary contravened the Fifteenth Amendment because it was still integral to the elective process and the outcome of the general election.[164]

Select Examples of the Fifteenth Amendment as a Jurisdictional Basis in Federal Criminal Statutes

Some federal caselaw suggests that various federal hate crime provisions may be grounded in part in the Fifteenth Amendment.[165] For example, in a 1966 opinion, the Supreme Court examined the application of 18 U.S.C. § 241—a statute prohibiting conspiracies to interfere with civil rights[166]—to several Mississippi law enforcement officers in connection with the murders of three civil rights workers.[167] Although decided on Fourteenth Amendment grounds, the Court seemed to view the statute as grounded at least partially in the Fifteenth Amendment, observing, "We cannot doubt that the purpose and effect of [§ 241] was to reach assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth and Fifteenth Amendments, and not

Amendment upon Congress to prevent action by the state through some one or more of its official representatives."); *accord* RICH, *supra* note 95, at § 12:20 ("The Fifteenth Amendment was, by traditional construction, limited to state action.").

[159] *See* United States v. Raines, 362 U.S. 17, 25 (1960) ("[W]hatever precisely may be the reach of the Fifteenth Amendment, it is enough to say that the conduct charged—discrimination by state officials, within the course of their official duties, against the voting rights of United States citizens, on grounds of race or color—is certainly, as 'state action' and the clearest form of it, subject to the ban of that Amendment, and that legislation designed to deal with such discrimination is 'appropriate legislation' under it.").

In one opinion stemming from a hate crime prosecution, the Court recounted the 1870 remarks of Sen. Pool regarding the enactment of what is now 18 U.S.C. § 241 (prohibiting conspiracies against civil rights). United States v. Price, 383 U.S. 787, 805 (1966). The Court explained that Sen. Pool viewed the purpose of § 241 as punishing violations of the Fourteenth and Fifteenth Amendments, including by individuals. *Id.* In that case, the Court approved of the application of § 241 in the prosecution of several law enforcement officers, although it resolved the issue on Fourteenth Amendment grounds. *Id.*

[160] *See* Terry v. Adams, 345 U.S. 461, 462–63 (1953) (plurality opinion).

[161] Jackson v. Metro Edison Co., 419 U.S. 345, 352 (1974).

[162] *See id.* (citing Nixon v. Condon, 286 U.S. 73 (1932)).

[163] *Id.* at 463, 470.

[164] *Id.* at 469 (discussing how private primary relates to official primary and general election overseen by government).

[165] *See*, *e.g.*, United States v. Comstock, 560 U.S. 126, 136 (2010) (citing *Ex parte* Yarbrough, 110 U.S. 651 (1884)); *see also* United States v. Otherson, 637 F.2d 1276, 1280 (9th Cir. 1980) (chronicling historical relationship between § 242 and the Fifteenth Amendment); United States v. Boone, 110 F. Supp. 3d 909, 916–17 (S.D. Iowa 2015) (describing origins of § 242 and its relationship to the Fifteenth Amendment); United States v. Solomon, 419 F. Supp. 358, 368 (D. Md. 1976) (explaining that "[p]ursuant to its power to regulate interstate commerce and to enforce, by appropriate legislation, the provisions of the thirteenth, fourteenth, and fifteenth amendments, Congress has enacted numerous enforcement schemes involving the Attorney General" and listing 18 U.S.C. § 242 as an example).

[166] CRS In Focus IF12333, *Hate Crimes: Key Federal Statutes*, by Peter G. Berris, at 1 (2023).

[167] Berris, *supra* note 92, at 18.

merely under part of it."[168] Some legislative history also suggests that Congress invoked its Fifteenth Amendment authority (along with other powers) to enact at least parts of 18 U.S.C. § 245.[169] Among other things, § 245 prohibits interference with any person affording others an opportunity to vote without discrimination on account of race.[170] That prohibition encompasses violations by state actors.[171] These aspects of § 245 seem to track the contours of the Fifteenth Amendment in that the offense could cover interference with voting rights by a state actor motivated by racial animus. However, caselaw examining the Fifteenth Amendment in the context of § 245 is scarce—constitutional challenges to the statute tend to be resolved on other grounds than the Fifteenth Amendment.[172] For instance, in one case involving a fatal racially motivated shooting, the defendants appealed their convictions under § 245 on the grounds that "Congress lacked the authority to enact it pursuant to its Commerce Clause powers, the Thirteenth Amendment, the Fourteenth Amendment, or the Fifteenth Amendment."[173] The Tenth Circuit upheld the convictions but resolved the challenge on Thirteenth Amendment grounds and did not reach the question of whether the statute could be viewed as grounded in the Fifteenth Amendment.[174]

Prohibited Conduct (*Actus Reus*)

Another core component of a federal criminal law is an *actus reus* or "forbidden act"[175]—"[t]he wrongful deed that comprises the physical components of a crime."[176] Without an *actus reus,* a criminal law will almost certainly be held invalid.[177] A number of considerations underlie this aspect of criminal law, including the difficulty of proving thoughts without physical manifestations and "the notion that the criminal law should not be so broadly defined to reach those who entertain criminal schemes but never let their thoughts govern their conduct."[178]

[168] United States v. Price, 383 U.S. 787, 805 (1966).

[169] S. REP. NO. 90-721, at 6–8 (1967).

[170] 18 U.S.C. § 245(b)(4)(B).

[171] Section 245 covers violations regardless of whether they were committed "under color of law." *Id.* § 245(b).

[172] As of July 22, 2024, a search on Westlaw of reported federal cases citing to 18 U.S.C. § 245 yields only two examples that reference the "Fifteenth Amendment" in the same paragraph as a citation to § 245.

[173] United States v. Sandstrom, 594 F.3d 634, 659 (8th Cir. 2010).

[174] *Id.* at 660.

[175] United States v. Apfelbaum, 445 U.S. 115, 131 (1980) ("In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur."); *see also* MODEL PENAL CODE § 2.01 explanatory note at 213 (AM. L. INST. 1985) (calling requirement that "the guilt of the defendant be based upon conduct, and that the conduct include a voluntary act or an omission to perform an act" a "fundamental predicate for all criminal liability").

[176] *Actus Reus*, BLACK'S LAW DICTIONARY (12th ed. 2024); *see also* United States v. Gumbs, 283 F.3d 128, 132 n.3 (3d Cir. 2002) (same).

[177] United States v. Zayac, 765 F.3d 112, 120 (2d Cir. 2014) ("Criminal liability ordinarily requires the 'concurrence of an evil-meaning mind with an evildoing hand.'" (quoting Morissette v. United States, 342 U.S. 246, 251 (1952)); *see also Apfelbaum*, 445 U.S. at 131 (discussing requirement of *mens rea* and *actus reus*); United States v. Ayon-Brito, 981 F.3d 265, 270 (4th Cir. 2020) ("It has been long established 'that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*.'" (quoting United States v. Ayala, 35 F.3d 423, 426 (9th Cir. 1994))).

[178] *See* LAFAVE, *supra* note 5, at § 6.1(b).

The terminology and formulations used to describe and characterize *actus reus* vary.[179] This report uses the term *prohibited conduct* to capture the act or omission comprising a criminal offense, as well as other external circumstances and consequences that are elements of the offense.[180] For example, if a statute criminalizes killing a federal official,[181] this report would refer to the prohibited conduct as including the physical action taken (such as squeezing the trigger or thrusting the knife) as well as the victim's status (being a federal official) and the result (death of the victim).[182]

The exact issues that will arise when identifying and describing prohibited conduct may vary based on subject matter. Federal criminal laws are often enacted in response to an issue of societal concern, which lawmakers conclude merits prosecution and punishment.[183] For example, Congress enacted the mail fraud statute (18 U.S.C. § 1341) in the late 1800s at least in part to counteract the potential use of the mail for financial deceit targeting rural Americans.[184] Congressional concern about racially motivated violence prompted the enactment of hate crime statutes like 18 U.S.C. § 245 in the 1960s.[185] Growing fears about the dangers of computer hacking motivated the creation of the Computer Fraud and Abuse Act in the 1980s.[186] Identifying the underlying issue motivating a legislative effort may be relatively straightforward (e.g., fraud, racial violence, computer hacking), but translating the issue into specific conduct that is prohibited in a federal criminal statute potentially implicates a number of nuanced legal questions.

As a hypothetical, consider the issue of fraud associated with fertility treatments.[187] Legislation criminalizing fertility fraud could raise a number of legal and conceptual questions that inform the scope of the prohibited conduct. For instance, what does it mean to commit fertility fraud? Does fertility fraud refer to deceptive advertising or promises with respect to the outcomes of relevant medical services, the act of inseminating a patient with biological material other than that material consented to by the patient, the omission of relevant information to a patient, or

[179] *Compare*, *e.g.*, State v. Paule, 2024 UT 2, ¶ 29 2024 WL 371416 (Utah Feb. 1, 2024) ("Actus reus refers to the 'physical components of a crime,' which include '[t]he voluntary act or omission' and 'the attendant circumstances' of a crime." (*quoting actus reus*, BLACK'S LAW DICTIONARY (11th ed. 2019))), *with*, *e.g.*, Cruz v. Blair, 255 Ariz. 335, 532 P.3d 327, 334 (2023) ("Thus, actus reus is the performance of conduct which can be either: (1) performance of a voluntary act, or (2) failure to perform a duty imposed by law which the person is physically capable of performing."); *see also see* LAFAVE, *supra* note 5, at § 6.1(a) (discussing act requirement and different definitions of *act*).

[180] This construction diverges somewhat from other models. *See*, *e.g.*, MODEL PENAL CODE § 1.13(5) (AM. L. INST. 1985) ("'conduct' means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions"). This report breaks out mental state as a separate element below. *See infra* "Mental State."

[181] *E.g.*, 18 U.S.C. § 351.

[182] Rather than including them in the definition of "conduct," other models would treat separately (1) the victim's status as a federal official and (2) the killing. For such models, these would be a circumstance and a result, respectively—both elements of the offense. § 1.13. General Definitions., MODEL PENAL CODE § 1.13(9) (AM. L. INST. 1985) (defining "element of an offense"); *but see* LAFAVE, *supra* note 5, at § 6.1(a) (discussing some approaches that treat acts (or omissions), results, and circumstances as part of the prohibited conduct).

[183] *But see*, *e.g.*, note 1 and accompanying text (describing origin of the federal treason statute).

[184] CRS Report R41930, *Mail and Wire Fraud: A Brief Overview of Federal Criminal Law*, by Charles Doyle, at 1 (2019).

[185] Berris, *supra* note 92, at 21.

[186] CRS Report R47557, *Cybercrime and the Law: Primer on the Computer Fraud and Abuse Act and Related Statutes*, by Peter G. Berris, at 3–4 (2023).

[187] For a short primer on this topic, see generally CRS In Focus IF12168, *Fertility Fraud: Federal Criminal Law Issues*, by Peter G. Berris (2022).

something else?[188] Can any person be responsible for a violation or only a certain subset of individuals, such as a donor or medical provider?[189] Is there a jurisdictional basis for federal legislation, as discussed above?[190] The answers to these questions may all shape the contours of the prohibited conduct in a fertility fraud bill.

This section provides an overview of some of the legal considerations associated with translating a matter of societal concern into prohibited conduct in federal criminal legislation.

Requirement of a Voluntary Act

For a criminal law to be valid, the prohibited conduct must generally involve a voluntary act by the defendant,[191] and in practice "[m]ost crimes are committed by [an] affirmative action rather

[188] Two bills introduced in the 118th Congress illustrate some of the potential variety. For example, the Protecting Families from Fertility Fraud Act of 2023 would prohibit "misrepresent[ing] the nature or source of DNA used in assisted reproductive technology . . . or assisted insemination . . . ." H.R. 451, 118th Cong. (2023). In contrast, the Fighting Fertility Fraud Act of 2023 would criminalize "provid[ing] materially false or misleading information relating to assisted reproduction, including—(1) the human reproductive material provided or used for assisted reproduction; (2) the identifying information of the gamete provider including their name, birth date, or address at the time of gamete provision; or (3) a gamete provider's medical history including any known physical and mental health illness, the social, genetic, family medical history of the gamete provider, or the gamete provider's educational level, ethnicity, religious background." H.R. 3710, 118th Cong. (2023). H.R. 3710 would also criminalize providing "(A) human reproductive material for assisted reproduction other than the selected human reproductive material for which patient gave consent in writing to use; or (B) a patient with human reproductive material in assisted reproduction without the gamete provider's consent or in a manner or to an extent other than that to which the gamete provider consented to." *Id.*

[189] The two fertility fraud bills discussed above, *see supra* note 188, illustrate two different possibilities. The Protecting Families from Fertility Fraud Act of 2023 would apply to "whoever" engages in the prohibited conduct, H.R. 451, 118th Cong. (2023), whereas The Fighting Fertility Fraud Act of 2023 has one provision that would apply to a "person, health professional, or health facility" and one that would encompass only violations committed by "a health care professional or health facility." H.R. 3710, 118th Cong. (2023).

[190] *See supra* "Jurisdictional Basis." The two fertility fraud bills discussed above, *see supra* note 188, each include sections that would limit their applicability to circumstances implicating commerce or the SMTJ. The Protecting Families from Fertility Fraud Act of 2023, H.R. 451, 118th Cong. (2023); The Fighting Fertility Fraud Act of 2023, H.R. 3710, 118th Cong. (2023).

[191] *See* LAFAVE, *supra* note 5, at § 6.1 ("A bodily movement, to qualify as an act forming the basis of criminal liability, must be voluntary."). For example, the Model Penal Code (discussed below) states that "[a] person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable." MODEL PENAL CODE § 2.01(1) (AM. L. INST. 1985). Similar statements appear frequently in state jurisprudence. *See, e.g.*, State v. Pena, 178 N.J. 297, 304 (2004) (describing as "bedrock" the "accepted requirements for criminal liability: proof of 'a voluntary act and a culpable state of mind [are] the minimum conditions' for imposing criminal liability." (quoting State v. Sexton, 160 N.J. 93, 98 (1999))); State v. Armstard, 43,333 (La. App. 2 Cir. 8/13/08), 991 So. 2d 116, 123, *writ denied*, 2008-2440 (La. 1/16/09), 998 So. 2d 89 ("In order for there to be criminal conduct, even criminal negligence, there must be an act or failure to act, where 'act' refers to an external manifestation of will through voluntary muscular movement which produces consequences."). Federal jurisprudence more typically refers broadly to the requirement of an *actus reus* to trigger criminal liability, without necessarily addressing the underlying need for a voluntary act. *See, e.g.*, United States v. Apfelbaum, 445 U.S. 115, 131 (1980) ("In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur."); United States v. Ayon-Brito, 981 F.3d 265, 270 (4th Cir. 2020) ("It has been long established 'that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*.'" (quoting United States v. Ayala, 35 F.3d 423, 426 (9th Cir. 1994))); *but c.f.* Hill v. Murphy, 785 F.3d 242, 247 (7th Cir. 2015) (describing *actus reus* as "the guilty act" and explaining that an act is a "voluntary muscular contraction" (quoting O.W. HOLMES, JR., THE COMMON LAW 91 (1881)); United States v. Herrera Garcia, No. 23-CR-504 (JSR), 2024 WL 1667661, at *4 (S.D.N.Y. Apr. 18, 2024) ("[A] fundamental principle of criminal law: that a defendant is only guilty of a crime if a defendant commits an *actus reus* (a conscious, volitional act) with the requisite *mens rea* (a guilty mind).").

The voluntariness requirement reflects a judgment that "[t]he deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be deterred." LAFAVE, *supra* note 5, at § 6.1(c).

than by [a] non-action."[192] Here the term *act* is generally construed fairly narrowly, although formulations vary.[193] For example, one construction may be found in the influential Model Penal Code (MPC), a major work of legal scholarship first produced by the American Law Institute in 1962, which was intended to establish a comprehensive model statute that American jurisdictions could use to revise their criminal codes.[194] The MPC defines an *act* as a "bodily movement whether voluntary or involuntary,"[195] but involuntary acts may not create criminal liability under the MPC.[196] Examples of involuntary acts under the MPC include "(a) a reflex or convulsion; (b) a bodily movement during unconsciousness or sleep; (c) conduct during hypnosis or resulting from hypnotic suggestion; (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual."[197]

Omission and Possession

There are at least two categories of offenses that satisfy the act requirement even though they do not necessarily involve an act (if *act* is narrowly defined to refer to a bodily movement). The first of these categories includes statutes imposing criminal liability for "an omission to act where there is a legal duty" to do so.[198] The MPC, for example, defines an *omission* as a "failure to act."[199] To illustrate with a federal statute, 18 U.S.C. § 2258 imposes criminal liability for failure to report child abuse where mandated by law.[200]

The second category comprises statutes imposing criminal liability for possession.[201] Possession, as one legal scholar has explained, "is not, strictly speaking, an act (bodily movement) or an omission to act."[202] Regardless, numerous federal statutes criminalize possession,[203] and such statutes have been upheld by courts.[204]

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[192] *See* LAFAVE, *supra* note 5, at § 6.1(a) ("There are analytical difficulties in calling an omission an act, and thus it is better simply to acknowledge that either an act or an omission to act contrary to a legal duty suffices."); *id.* at § 6.1(e) ("Though possession is not, strictly speaking, an act (bodily movement) or an omission to act, crimes based upon possession are generally upheld.").

[193] *Id.* at § 6.1(a).

[194] *See* David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. L. 281, 284–85 (1981) (describing MPC as "model for" reforming common-law *mens rea* principles reflected in statutes of the time).

[195] MODEL PENAL CODE § 1.13(2) (AM. L. INST. 1985).

[196] *Id.* § 2.01.

[197] *Id.*

[198] LAFAVE, *supra* note 5, at § 6.1.

[199] MODEL PENAL CODE § 1.13(4) (AM. L. INST. 1985).

[200] *E.g.*, 18 U.S.C. § 2258.

[201] *See, e.g.*, United States v. Abdulle, 564 F.3d 119, 127 (2d Cir. 2009) ("The actus reus element for the possession charge required the government to then prove that Mohamed in fact possessed cathinone . . . ."); United States v. Planck, 493 F.3d 501, 505 (5th Cir. 2007) ("For the possession statute in issue, however, the *actus reus* is the possession of child pornography; the Government need only prove the defendant possessed the contraband at a single place and time to establish a single act of possession and, therefore, a single crime."); United States v. Rodriguez, 961 F.2d 1089, 1092 (3d Cir. 1992) ("[T]he *actus reus* for this offense is possession . . . .").

[202] LAFAVE, *supra* note 5, at § 6.1(e).

[203] *See, e.g.*, 18 U.S.C. § 487 (criminalizing possession of counterfeit dies for coins); 18 U.S.C. § 931 (prohibiting possession of body armor by violent felons); 21 U.S.C. § 844 (covering possession of controlled substances).

[204] *See, e.g.*, Baender v. Barnett, 255 U.S. 224, 225 (1921) (rejecting challenge to statute criminalizing possession of counterfeit dies); *accord* LAFAVE, *supra* note 5, at § 6.1(e) ("[C]rimes based upon possession are generally upheld.").

Status Offenses

Status offenses comprise one category that may pose a particular issue with respect to the act requirement. As one legal scholar has explained, status offenses are crimes such as vagrancy, which are "often defined in such a way as to punish status (e.g., being a vagrant) rather than to punish specific action or omission to act."[205] On a number of occasions, examples of which follow, the Supreme Court has invalidated laws establishing status offenses.

In its 1957 opinion in *Lambert v. California*,[206] the Court reversed a conviction under an ordinance that made it "unlawful for 'any convicted person' to be or remain in Los Angeles for a period of more than five days without registering" and required "any person having a place of abode outside the city to register if he comes into the city on five occasions or more during a 30-day period."[207] The Court explained that the law criminalized "conduct that is wholly passive—mere failure to register," which it viewed as "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed."[208] As a result, the Court held that the ordinance violated the defendant's due process right to notice.[209] Following *Lambert*, however, a number of mandatory registration laws have survived constitutional challenges.[210] For instance, in examining an indictment for a violation of the federal Sex Offender Registration and Notification Act (SORNA), the Ninth Circuit agreed with the government that "*Lambert* is inapplicable because convicted sex offenders are generally subject to registration requirements in all fifty states, and [the defendant] was aware that he was obligated to register as a sex offender."[211]

In a 1962 opinion in *Robinson v. California*,[212] the Court reversed a conviction under a state law that criminalized addiction to narcotics without requiring any additional act by the defendant. According to the Court, the statute was distinguishable from "one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration," since it instead made "the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.'"[213] The Court held that the law, "which imprisons a person . . . afflicted [by narcotics addiction] as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment" in violation of the Eighth Amendment, as incorporated against the states through the Fourteenth Amendment.[214]

Status offenses can often be "reformulated and redrafted to conform to basic principles of criminal justice."[215] For instance, if a "statute that penalizes being an alcoholic or drug addict is impermissible," a "statute that penalizes appearing in public in an intoxicated state" may be

[205] LAFAVE, *supra* note 5, at § 6.1(d).

[206] 355 U.S. 225 (1957).

[207] *Id.* at 226.

[208] *Id.* at 228.

[209] *Id.* at 228–30.

[210] *See* CRS Report R42692, *SORNA: A Legal Analysis of 18 U.S.C. § 2250 (Failure to Register as a Sex Offender)*, by Charles Doyle, at 24 (2021) (surveying cases).

[211] United States v. Elkins, 683 F.3d 1039, 1049 (9th Cir. 2012).

[212] 370 U.S. 660 (1962).

[213] *Id.* at 666.

[214] *Id.* at 667–68. For a discussion of incorporation under the Fourteenth Amendment see generally Cong. Rsch. Serv., *Amdt14.S1.4.3 Modern Doctrine on Selective Incorporation of Bill of Rights*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-4-3/ALDE_00013746/ (last visited Sept. 9, 2024).

[215] LAFAVE, *supra* note 5, at § 6.1(d).

permissible.[216] The Supreme Court's 1968 opinion in *Powell v. Texas*[217] illustrates this distinction. *Powell* stemmed from the conviction of a defendant under a state law making it a crime to "get drunk or be found in a state of intoxication in any public place, or at any private house except [a person's] own."[218] The defendant argued that he had a compulsion to drink and that the law amounted to cruel and unusual punishment pursuant to *Robinson*.[219] A four-Justice plurality of the Court disagreed and explained that the defendant was convicted "not for being a chronic alcoholic, but for being in public while drunk on a particular occasion."[220] In other words, the plurality concluded that the law did not seek "to punish a mere status" as the law at issue in *Robinson* did, but instead punished a voluntary act, being in public while intoxicated.[221] In a concurring opinion, Justice White said that the result would have been different if the public intoxication were an unavoidable result of chronic alcoholism.[222] For example, according to Justice White, the Eighth Amendment would prohibit criminalizing public intoxication for chronic alcoholics who are homeless because "they have no place else to go and no place else to be when they are drinking."[223] Four dissenting Justices would have agreed with that conclusion.[224] The primary point of departure between Justice White and the dissenting Justices was over the record in *Powell*—Justice White agreed with the ultimate result in *Powell* because "nothing in the record indicates that [the defendant] could not have done his drinking in private or that he was so inebriated at the time that he had lost control of his movements and wandered into the public street."[225] The dissenting Justices concluded, however, that the "appellant is a 'chronic alcoholic' who, according to the trier of fact, cannot resist the 'constant excessive consumption of alcohol' and does not appear in public by his own volition but under a compulsion' which is part of his condition."[226]Another example of the distinction between an impermissible status offense and a seemingly permissible conduct-based offense may be found in 8 U.S.C. § 1326, which in relevant part provides that "any alien who (1) has been arrested and deported or excluded and deported, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States . . . [without the consent of the Attorney General] shall be fined . . . or imprisoned . . . or both."[227] Some federal appellate courts have rejected the argument that "the 'found in' provision of § 1326 impermissibly punishes aliens for their 'status' of being found in the United States."[228] In *United States v. Ayala*, the Ninth Circuit distinguished § 1326 from the law at issue in *Robinson*, explaining that "[a] conviction under § 1326 for being 'found in' the United States necessarily

[216] *Id.*; *see also* Powell v. State of Tex., 392 U.S. 514, 517 (1968) (plurality opinion).

[217] *Powell*, 392 U.S. at 517.

[218] *Id.* (quoting Vernon's Ann. Texas Penal Code, Art. 477 (1952)).

[219] *Id.* at 532.

[220] *Id.*

[221] *Id.*

[222] *Id.* at 551–52 (1968) (White, J., concurring).

[223] *Id.*

[224] *Id.* at 570 (Fortas, J., dissenting).

[225] *Id.* at 553 (1968) (White, J., concurring).

[226] Id. at 570 (Fortas, J., dissenting).

[227] United States v. Ayala, 35 F.3d 423, 424 (9th Cir. 1994) (quoting 8 U.S.C. § 1326). For more information on § 1326, see generally CRS In Focus IF11410, *Immigration-Related Criminal Offenses*, by Kelsey Y. Santamaria (2023).

[228] *Ayala*, 35 F.3d at 425–26; *accord* United States v. Tovias-Marroquin, 218 F.3d 455, 457 (5th Cir. 2000).

requires that a defendant commit an act: he must re-enter the United States without permission within five years after being deported."[229]

Federal appellate courts had split on the issue of whether the *Robinson* and *Powell* distinction between impermissible status offenses and permissible conduct-based offenses allowed "criminalizing conduct that is an unavoidable consequence of one's status."[230] In the 2024 opinion *City of Grants Pass v. Johnson*, the Supreme Court examined this issue in the context of a municipal ordinance criminalizing sleeping or camping in public.[231] In a divided opinion, the Ninth Circuit concluded that the ordinance constituted cruel and unusual punishment, citing to *Powell*'s concurrence and dissent for the proposition that "a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status."[232] The Ninth Circuit observed that this would be the inevitable outcome for some of the involuntary homeless population in Grants Pass, which exceeded the available shelter space in the jurisdiction.[233]

The Supreme Court disagreed, concluding that the camping ordinance was not a status offense of the type barred in *Robinson* (which lacked a mental state or act requirement), because the ordinance in *Grants Pass* required "actions like 'occupy[ing] a campsite' on public property 'for the purpose of maintaining a temporary place to live.'"[234] The Court likened the facts of *Grants Pass* to those of *Powell* and relied on the *Powell* plurality's distinction between laws criminalizing status and those criminalizing acts, even if on some level those acts may be an involuntary result of the underlying status.[235] Although the Court did not reconsider *Robinson*, it reiterated that the Cruel and Unusual Punishments Clause of the Eighth Amendment focuses on the method or kind of punishment a government may impose, rather than on the question of what a government may criminalize.[236] Additional analysis of *Grants Pass* and its broader implications for status offenses and homelessness laws may be found in other CRS products.[237]

Inchoate Offenses

The prohibited conduct in a federal criminal statute need not be *completed* conduct (e.g., causing bodily injury to another)[238] but can also include attempt (e.g., intending to cause bodily injury to

[229] *Ayala*, 35 F.3d at 426; *accord Tovias-Marroquin*, 218 F.3d at 457; *see also* United States v. Ayon-Brito, 981 F.3d 265, 270 (4th Cir. 2020) ("In short, the conduct element of a § 1326 violation is 'entry' (or 'attempted entry'), not 'found.'").

[230] CRS Legal Sidebar LSB11203, *The Eighth Amendment and Homelessness: Supreme Court Upholds Camping Ordinances in City of Grants Pass v. Johnson*, by Whitney K. Novak and Dave S. Sidhu, at 1 (2024).

[231] City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2213 (2024).

[232] Johnson v. City of Grants Pass, 72 F.4th 868, 893 (9th Cir. 2023), *cert. granted sub nom.* City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 679 (2024), *and rev'd and remanded sub nom.* City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202 (2024).

[233] *Id.* at 894.

[234] *Grants Pass*, 144 S. Ct. at 2216–18.

[235] *Id.* at 2220 ("This case is no different from *Powell*. Just as there, the plaintiffs here seek to expand *Robinson's* 'small intrusion 'into the substantive criminal law.' Just as there, the plaintiffs here seek to extend its rule beyond laws addressing 'mere status' to laws addressing actions that, even if undertaken with the requisite *mens rea*, might 'in some sense' qualify as 'involuntary.' And just as *Powell* could find nothing in the Eighth Amendment permitting that course, neither can we.").

[236] *Id.* at 2215.

[237] *See generally* Novak and Sidhu, *supra* note 230.

[238] *E.g.*, 18 U.S.C. § 249(a)(1).

another and taking a substantial step to do so),[239] conspiracy (e.g., agreement between two or more persons to cause bodily injury to another),[240] and solicitation (e.g., inducing someone else to cause bodily injury to another).[241] Attempt, conspiracy, and solicitation are sometimes described as *inchoate offenses*, a term that refers to "[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment."[242] The act requirement generally does not pose an issue for inchoate offenses, because the step itself involves an act.[243] For example, attempt requires proof of an "overt act qualifying as a substantial step toward completion of his goal."[244] Similarly, conspiracy generally requires proof of "an agreement between two or more persons to pursue an unlawful objective."[245] The formation of such an agreement will "require more than just a thought—some manner of concurrence with the proposal is needed,"[246] which could entail acts such as conversing[247] with or sending letters to and from co-conspirators.[248] Some federal conspiracy statutes additionally require proof of an overt act.[249] Solicitation will generally necessitate communication that involves an act such as typing messages[250] or speaking.[251] In other words, although the ultimate goal of attempt, conspiracy, or solicitation may not necessarily result, each still "requires some activity beyond the mere entertainment of the intent."[252]

Thoughts and Speech

The conduct prohibited by a criminal law must be more than mere internal thoughts, which in and of themselves cannot be criminalized.[253] In part, this is because thoughts are not an act that would

[239] *E.g.*, *id.* For an overview of federal attempt law, see generally CRS Report R42001, *Attempt: An Overview of Federal Criminal Law*, by Charles Doyle (2020).

[240] *E.g.*, 18 U.S.C. §§ 249(a)(6), 371. For an overview of federal conspiracy law, see generally CRS Report R41223, *Federal Conspiracy Law: A Brief Overview*, by Charles Doyle (2020).

[241] *E.g.*, 18 U.S.C. § 373.

[242] *Offense*, BLACK'S LAW DICTIONARY (12th ed. 2024); *see also* Doyle, *supra* note 240, at 15 ("Conspiracy and attempt are both inchoate offenses, . . . forms of introductory misconduct that the law condemns lest they result in some completed form of misconduct.").

[243] LAFAVE, *supra* note 5, at § 6.1(b).

[244] United States v. Resendiz-Ponce, 549 U.S. 102, 107 (2007).

[245] United States v. Nicholson, 961 F.3d 328, 338 (5th Cir. 2020).

[246] United States v. Ojedokun, 16 F.4th 1091, 1105 (4th Cir. 2021).

[247] *See*, *e.g.*, United States v. Fisch, 851 F.3d 402, 407 (5th Cir. 2017) (discussing conversations as evidence of entering criminal conspiracy).

[248] *See*, *e.g.*, United States v. Wardell, 591 F.3d 1279, 1288 (10th Cir. 2009) (listing letter sent by defendant as evidence of unlawful agreement to assault a witness).

[249] *Nicholson*, 961 F.3d at 338.

[250] *E.g.*, United States v. White, 698 F.3d 1005, 1008 (7th Cir. 2012) (per curiam).

[251] *E.g.*, United States v. Buckalew, 859 F.2d 1052, 1053 (1st Cir. 1988).

[252] LAFAVE, *supra* note 5, at § 6.1(b).

[253] *See* United States v. Apfelbaum, 445 U.S. 115, 131 (1980) ("In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur."); United States v. Zayac, 765 F.3d 112, 120 (2d Cir. 2014) ("Criminal liability ordinarily requires the 'concurrence of an evil-meaning mind with an evildoing hand.'" (quoting Morissette v. United States, 342 U.S. 246, 251 (1952)); *In re* Leroy T., 285 Md. 508, 513 (1979) (describing as "a basic premise of Anglo-American law" the idea "that no crime is committed by the mere harboring of evil intent not accompanied by an act, or an omission to act where there is a legal duty to act"); State v. McGrath, 574 N.W.2d 99, 101 (Minn. Ct. App. 1998) ("One basic premise of Anglo–American criminal law is that no crime can be committed by bad thoughts alone."); LAFAVE, *supra* note 5, at 6:1 ("Bad thoughts alone cannot constitute a crime; there must be an act, or an omission to act where there is a legal duty to act."). In addition to such concerns, the criminalization of mere (continued...)

satisfy the act requirement discussed above.[254] Criminalizing thought, without more, would also raise broader constitutional concerns.[255] For instance, the First Amendment bars the imposition of a criminal punishment for "abstract beliefs" alone.[256]

The articulation of thoughts in speech may satisfy the act requirement.[257] As one scholar has explained, "[m]ere thoughts must be distinguished from speech; an act sufficient for criminal liability may consist of nothing more than the movement of the tongue so as to form spoken words."[258] Even if speech may be an act for criminal law purposes, its criminalization can raise First Amendment issues, as discussed in other CRS products.[259] Nevertheless, a number of federal criminal statutes inherently prohibit conduct that may incidentally or primarily involve speech, such as those prohibiting transmitting threats in interstate commerce,[260] perpetrating certain hoaxes,[261] solicitation,[262] and possessing child sexual abuse materials.[263]

Other Elements

In addition to acts or omissions, prohibited conduct in a federal criminal law may include numerous other elements that will vary based on the focus and scope of the law. For example, the MPC lists as possible elements facts that

- are "included in the description of the forbidden conduct in the definition of the offense; or"

thought would raise serious questions about proof. *See* Diaz v. United States,144 S. Ct. 1727, 1742 (2024) (Gorsuch, J. dissenting) ("no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions" (*quoting* 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 21 (1769)).

[254] *See* United States v. Ojedokun, 16 F.4th 1091, 1104–05 (4th Cir. 2021) ("It is an axiomatic principle of the criminal law that thoughts alone may not be punished—every criminal offense must proscribe some conduct, some actus reus."); s*ee also supra* "Requirement of a Voluntary Act."

[255] *See* United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) ("[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."), *overruled in part* by Girouard v. United States, 328 U.S. 61, 66 (1946); *Cf.* United States v. Ballard, 322 U.S. 78, 86 (1944) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men.").

[256] For example, in *Dawson v. Delaware*, the Supreme Court concluded that the admission of evidence regarding the "abstract beliefs" of a defendant at a capital sentencing proceeding violated his First Amendment rights where "on the present record one is left with the feeling that the . . . evidence was employed simply because the jury would find these beliefs morally reprehensible." 503 U.S. 159, 168 (1992); *see also* United States v. Miller, 767 F.3d 585, 592 (6th Cir. 2014) (examining the "line separating constitutional regulation of conduct and unconstitutional regulation of beliefs" and interpreting a federal hate crime statute as "[r]equiring a causal connection between a defendant's biased attitudes and his impermissible actions [that] ensures that the criminal law targets conduct, not bigoted beliefs that have little connection to the crime.").

[257] LAFAVE, *supra* note 5, at § 6.1(b). For instance, speech integral to criminal conduct may generally be criminalized. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.").

[258] LAFAVE, *supra* note 5, at § 6.1(b).

[259] *E.g.*, CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion (2024) (hereinafter *Categories of Speech*); CRS In Focus IF12308, *Free Speech: When and Why Content-Based Laws Are Presumptively Unconstitutional*, by Victoria L. Killion (2023).

[260] *E.g.*, 18 U.S.C. § 875.

[261] *E.g.*, 18 U.S.C. § 1038.

[262] *E.g.*, 18 U.S.C. § 373.

[263] *See* Killion, *Categories of Speech*, *supra* note 259, at 2.

- "establish[] the required kind of culpability; or"
- "negative[] an excuse or justification for such conduct; or"
- "negative[] a defense under the statute of limitations; or"
- "establish[] jurisdiction or venue."[264]

In practice, it can be difficult to fully distinguish between categories such as these in particular federal criminal laws.[265] For example, if an offense states that the victim must be a federal employee acting in the course of their official duties, that might be both a requisite fact "included in the description of the forbidden conduct" and a requisite fact establishing jurisdiction.[266]

Circumstances

Criminal statutes may include circumstance elements.[267] Unlike offense elements proscribing actions or conduct, *circumstance elements* are sometimes defined as comprising facts in existence when the prohibited actions are performed.[268] For example, if it were "a crime to jaywalk at 2:00 p.m., the 'conduct element' would be 'jaywalking,' while the 'circumstance element' would be the time-of-day requirement."[269] In a statute criminalizing harboring a person for whom an arrest warrant has been issued,[270] the circumstance element is the issuance of an arrest warrant.[271] In federal criminal laws, many circumstance elements relate to specific characteristics of the offender or victim. For example, in a statute criminalizing "having intercourse with a person under 14 years old," the age of the victim would be the circumstance element.[272]

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[264] MODEL PENAL CODE § 1.13(9) (AM. L. INST. 1985). Conduct under the MPC also includes a mental state, which is itself therefore an element for MPC purposes. *Id.* § 1.13(4). This report addresses mental states as a separate building block. *See infra* "Mental State."

[265] MODEL PENAL CODE § 1.13 explanatory note at 211 (AM. L. INST. 1985) ("[I]n federal law . . . many factors that ought the be viewed as merely jurisdictional (*e.g.*, use of the mails or movement in interstate commerce) are often viewed as if they were of the essence of the offense involved.").

[266] For example, 18 U.S.C. §§ 111 and 1114 protect certain federal employees acting in the course of their official duties from assault or unlawful killing, among other things. Some cases describe the element requiring that the victim be a federal employee acting in the course of his or her official duties as a jurisdictional one. *See, e.g.*, United States v. Wallace, 368 F.2d 537, 538 (4th Cir. 1966) ("An attack which would constitute a common law offense of battery, for which the actor could be prosecuted and convicted in a state court, was made by the statute triable and punishable in a federal court if the victim was, in fact, a federal official engaged in the performance of his official duties."). Some cases describe the fact that the victim is a federal officer engaged in performance of official duties as affecting the scope of the statute's protections, which could be viewed as a matter of the contours of prohibited conduct. *See, e.g.*, Bennett v. United States, 285 F.2d 567, 570 (5th Cir. 1960) (examining which officers are protected by federal statutes protecting certain employees).

[267] *See* United States v. Rodriguez-Moreno, 526 U.S. 275, 280 n. 4 (1999) (describing circumstance element in statute barring certain transactions involving laundered money).

[268] *See* United States v. Brennan, 452 F. Supp. 3d 225, 234 (E.D. Pa. 2020) (differentiating between circumstance and conduct elements in the context of establishing venue for a criminal prosecution and collecting cases); *see also Circumstance*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining *attendant circumstance* as "[a] fact that is situationally relevant to a particular event or occurrence. A fact-finder often reviews the attendant circumstances of a crime to learn, for example, the perpetrator's motive or intent."). The MPC defines *element of an offense* as including attendant circumstances, but does not in turn define *attendant circumstances*. MODEL PENAL CODE § 1.13(9) (AM. L. INST. 1985).

[269] *Brennan*, 452 F. Supp. 3d at 234.

[270] 18 U.S.C. § 1071.

[271] United States v. Spivey, 956 F.3d 212, 215–16 (4th Cir. 2020).

[272] Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 235–36 (1997).

Offender or Victim Specifics

One key question in considering the scope of a federal criminal law is identifying whom it covers. Many federal criminal statutes are general in this regard.[273] For example, 18 U.S.C. § 331 applies to "*[w]hoever* fraudulently alters, defaces, mutilates, impairs, diminishes, falsifies, scales, or lightens any of the coins coined at the mints of the United States . . . ."[274] In contrast, other federal criminal provisions include language limiting their applicability to offenders based on particular characteristics.[275] For instance, 18 U.S.C. § 2251(b)—one of several federal criminal statutes prohibiting various conduct associated with child sexual abuse material—applies only to parents, legal guardians, or others with control or custody of the child.[276] As another illustration, federal law mandates reporting of child abuse in some circumstances and imposes criminal penalties for failing to make such a report,[277] with this regime applying only to foster parents, physicians, nurses, social workers, psychologists, and teachers, among other enumerated categories.[278] Such limitations are not unique to the context of child-abuse-related statutes. For instance, a federal statute criminalizes possession of biological agents or toxins in certain circumstances by restricted persons such as fugitives from justice, individuals indicted or convicted of felonies, and unlawful users of controlled substances.[279]

Relatedly, while some federal criminal statutes are generally applicable to offending conduct targeting "any person"[280] or the government,[281] some offenses apply only to conduct targeting certain types of victims.[282] Criminal laws protecting minors comprise one common category.[283] Certain criminal statutes also apply where the victims are individuals in federal custody,[284] prospective voters,[285] federal officials,[286] and foreign officials,[287] among others.[288]

Not all distinctions based on victim or offender specifics are permissible. For example, a criminal law that protects or punishes individuals of some races, colors, or national origins, but not others,

[273] *See, e.g.*, 18 U.S.C. § 37 (restricting violence at international airports when committed by "[a] person who" engages in particular behaviors); *id.* § 287 (authorizing criminal penalties for "[w]hoever makes" certain fraudulent claims); *id.* § 1301 (prohibiting importation of lottery tickets in certain circumstances and authorizing penalties for "[w]hoever" engages in prohibited conduct).

[274] *Id.* § 331 (emphasis added).

[275] *See, e.g.*, *id.* § 645 (prohibiting certain acts of embezzlement committed by a "United States marshal, clerk, receiver, referee, trustee, or other officer of a United States court, or any deputy, assistant, or employee of any such officer"); *id.* § 648 (proscribing certain acts of embezzlement committed by "an officer or other person charged by any Act of Congress with the safe-keeping of the public moneys"); *Id.* § 2381 (authorizing criminal penalties for treason committed by those "owing allegiance to the United States").

[276] *Id.* § 2251(b).

[277] *Id.* § 2258; 34 U.S.C. § 20341.

[278] 34 U.S.C. § 20341(b).

[279] 18 U.S.C. § 175b.

[280] *E.g.*, *id.* § 249(a)(1).

[281] *E.g.*, *id.* § 2384.

[282] *See infra* notes 283–288.

[283] *E.g.*, 18 U.S.C. §§ 2243(a), 2251, 2251A, 2252, 2252A.

[284] *E.g.*, *id.* § 2243(c).

[285] *E.g.*, *id.* § 594.

[286] *E.g.*, *id.* § 111.

[287] *E.g.*, *id.* § 1116.

[288] *E.g.*, *id.* § 1344 (making it a crime, to among other things "defraud a financial institution").

could run afoul of constitutional provisions mandating equal protection under the law.[289] Similarly, a statute that protects some religions but not others would raise significant constitutional questions under the First Amendment.[290]

Results

Some criminal laws authorize punishment (or increased punishment)[291] only when a particular result occurs.[292] In general, "[h]omicide offenses, personal injury offenses, and property destruction offenses" are examples of laws that "require a resulting physical harm."[293] At the federal level, laws requiring proof of particular results[294] include (as examples) an antihacking provision that applies where certain actions result in damage to a computer,[295] a hate crime law barring causing bodily injury because of particular biases,[296] and a statute authoring certain penalties for drug trafficking offenses that result in death.[297]

[289] The Equal Protection Clause of the Fourteenth Amendment bars states from depriving anyone within their jurisdiction of the equal protection of the law. U.S. CONST. amend. XIV, § 1. Although that provision expressly applies only to the states, *id.*, the Supreme Court has held that the Due Process Clause of the Fifth Amendment requires identical "[e]qual protection analysis . . . as that under the Fourteenth Amendment" with respect to the federal government. Buckley v. Valeo, 424 U.S. 1, 93 (1976); *see also* Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954), *supplemented sub nom.* Brown v. Bd. of Educ., 349 U.S. 294 (1955) (discussing interaction between the principles of due process and equal protection). In discussing equal protection requirements, the Supreme Court has expressed extreme skepticism of laws that draw distinctions "according to race" or ancestry. *E.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (explaining that at a minimum, "the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,'" and, "if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.") (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)); *see also* Bolling, 347 U.S. at 499 ("Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."). For a discussion of race-based classifications and equal protection, see generally Cong. Rsch. Serv., *Amdt14.S1.8.1.1 Overview of Race-Based Classifications*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-4-1-1/ALDE_00000816/ (last visited Sept. 9, 2024).

[290] *See* McCreary Cty., Ky. v. ACLU, 545 U.S. 844, 860 (2005) (explaining that when the government manifests "a purpose to favor one faith over another, or adherence to religion generally," it contravenes the "value of official religious neutrality" under the Establishment Clause of the First Amendment); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (striking down local ordinance on the grounds that it discriminated against specific religion in violation of the First Amendment protection of free exercise of religion); *see also generally* Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665 (2008) (evaluating the possible role of the Equal Protection Clause in the context of laws differentiating between religions). For discussion of First Amendment issues that might be relevant were a criminal statute to give preference to a particular religion, see generally Cong. Rsch. Serv., *First Amendment: Amdt1.2.1 Overview of The Religion Clauses*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-2-1/ALDE_00013267/ (last visited Sept. 9, 2024).

[291] *See infra* "Punishment."

[292] The MPC, for instance, includes results in its definition of *elements of an offense* but does not define the term. Robinson, *supra* note 272, at 235–36.

[293] *Id.* at 235.

[294] Even where results do not necessarily occur, the proscribed conduct may still sometimes be prosecuted as attempt. *See generally* Doyle, *supra* note 239.

[295] *See* Berris, *supra* note 186, at 18–21 (2023) (describing 18 U.S.C. § 1030(a)(5)).

[296] *See* Berris, *supra* note 92, at 33–38 (2022) (discussing 18 U.S.C. § 249).

[297] 21 U.S.C. § 841(b).

Jurisdiction and Venue

As discussed above, federal criminal statutes routinely contain jurisdictional elements that connect the offense to a source of constitutional authority for Congress to legislate.[298] Common examples include requirements that the offense occurs in the special maritime and territorial jurisdiction of the United States (SMTJ),[299] is committed in or affecting interstate or foreign commerce,[300] or targets federal lands or employees.[301]

Although less common, some federal criminal statutes contain provisions concerning venue—the "proper place" for a prosecution to occur or the geographical area "over which a trial court has jurisdiction."[302] For example, 40 U.S.C. § 5104 criminalizes a wide array of behavior when it occurs in U.S. Capitol buildings or on Capitol grounds.[303] A related statute, 40 U.S.C. § 5109, specifies that the venue for violations of § 5104—depending on the particular violation—is either in the U.S. District Court for the District of Columbia or the Superior Court for the District of Columbia.[304] Venue is one area where Congress's flexibility is potentially limited significantly by two constitutional provisions.[305] The first—Article III, Section 2 of the Constitution—restricts the permissible location of criminal trials, requiring that they "*be held in the State where the said Crimes shall have been committed*; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."[306] The second—the Sixth Amendment—provides among other things that a criminal defendant enjoys the right to a trial "by an impartial jury *of the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law."[307] In tandem, both provisions generally limit the permissible geographical location for a criminal trial to within the state where a given crime occurred.[308]

Void-for-Vagueness

Prohibited conduct in a criminal statute must be defined with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). The Supreme Court has emphasized that while this vagueness "doctrine focuses both on actual notice to citizens and arbitrary enforcement," the "more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Id.* at 357–58 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)). Laws that do not meet this requirement may be struck down as void-for-vagueness in violation of constitutional due process protections. For example, in *Kolender*, the Supreme Court

[298] *See supra* "Jurisdictional Basis"

[299] *See supra* "Special Maritime and Territorial Jurisdiction."

[300] *See supra* "Commerce Clause."

[301] *See supra* "Federal Property as Jurisdictional Basis," "Federal Personnel as Jurisdictional Basis."

[302] *Venue*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[303] 40 U.S.C. § 5104.

[304] *Id.* § 5109.

[305] *See infra* notes 306-307.

[306] U.S. CONST. art. III, § 2, cl. 3 (emphasis added); *see also* FED. R. CRIM. P. 18 (codifying constitutional venue provision). The Federal Rules of Criminal Procedure allow the defendant to seek a change of venue in certain circumstances. FED. R. CRIM. P. 21. Transfer of venue is mandatory "if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." *Id.* The court has discretion to "transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice." *Id.*

[307] U.S. CONST. amend. VI (emphasis added).

[308] Circumstance elements may not establish venue. *See* United States v. Bowens, 224 F.3d 302, 310 (4th Cir. 2000) ("Thus, only the essential conduct elements of an offense, not the circumstance elements, provide a basis for venue.").

considered "a facial challenge to a [state] criminal statute that require[d] persons who loiter or wander on the streets to provide a 'credible and reliable' identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under" a particular Fourth Amendment precedent. *Id.* at 353. The *Kolender* Court explained that the law contained "no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification" and therefore "vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute." *Id.* at 358. As a result, the Court held that the law was unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment. *Id.* at 353.

As a general rule, the more open-ended the prohibited conduct, the more likely it is to be vague, although where possible federal courts may avoid vagueness by employing a narrow construction of a criminal law. *See, e.g.*, Dubin v. United States, 599 U.S. 110, 129–31 (2023).

When drafting a statute, Congress may narrow its scope not only by carefully delineating the conduct prohibited, but also sometimes by requiring proof of a heightened mental state. *Compare, e.g.*, United States v. Fischer, 64 F.4th 329, 351–52 (D.C. Cir.) (Walker, J. concurring) (explaining the relationship between a mental state and an act requirement and observing the danger of a "breathtaking" scope if a statute has "a broad act element and an even broader mental state"), *cert. granted*, 144 S. Ct. 537 (2023), *and vacated and remanded*, 144 S. Ct. 2176 (2024) *with, e.g.*, *Fischer*, 64 F.4th at 382 (Katsas, J. dissenting) (disagreeing that a narrow mental state requirement could provide "meaningful limits" in an obstruction statute if its prohibited conduct is interpreted broadly). The next section of this report discusses mental states.

Mental State

As one federal appellate court has explained, a "basic tenet of criminal law provides that *actus non facit reum nisi mens sit rea*."[309] According to some legal scholars, the phrase, which means "the act is not culpable unless the mind is guilty," has been in use for "at least approximately one thousand years."[310] Embodied in the phrase is the "universal and persistent" notion that "an injury can amount to a crime only when inflicted by intention."[311] In contemporary American law, the concept of *mens rea*, or a "guilty mind," reflects this idea that a crime generally must consist of not only a "harmful act" but also a "mental element" or criminal intent sufficient to justify punishment.[312] Courts and legal scholars sometimes use a variety of phrases to describe all or part of this mental-state requirement, including "guilty mind," scienter, criminal intent, and *mens rea*.[313]

[309] United States v. Bates, 96 F.3d 964, 967 (7th Cir. 1996), *aff'd*, 522 U.S. 23 (1997); *see also* LAFAVE, *supra* note 5, at § 5.1(a) (similar).

[310] Matthew R. Ginther & Francis X. Shen, et al., *Decoding Guilty Minds: How Jurors Attribute Knowledge and Guilt*, 71 VAND. L. REV. 241, 245 n.10 (2018); *see also* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932) (stating that the phrase has been used "[f]or hundreds of years . . . with unbroken cadence").

[311] Morissette v. United States, 342 U.S. 246, 250 (1952).

[312] *Id.* at 250–51. This principle addresses broader notions of the purposes of criminal law and its effectiveness in deterring, reforming, and/or punishing, that is, what sorts of behaviors are justly proscribed and can reasonably be expected to be curtailed by the threat of criminal penalties. *See, e.g., id.* (observing that the concept of a mental element in criminal law "is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a . . . substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution"); Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL'Y 51, 61 (2003) ("If the criminal law operates by guiding the conscious actions of persons capable of understanding the rules and rationally applying them, it would be unfair and thus unjustified to punish and to inflict pain intentionally on those who did not act intentionally or who were incapable of the minimum degree of rationality required for normatively acceptable cooperative interaction.").

[313] *See, e.g.*, Elonis v. United States, 575 U.S. 723, 734 (2015) (referencing, in a single paragraph, the terms *criminal intent*, *scienter*, *mens rea*, and *guilty mind*); *see also* LAFAVE, *supra* note 5, at § 5.1 (describing mental part of crime as "variously called *mens rea* ('guilty mind') or scienter or criminal intent"). At least one legal scholar has advocated for (continued...)

This section provides a brief introduction to select mental-state issues that are likely to be of particular relevance in enacting, amending, or analyzing federal criminal legislation. Additional analysis and detail may be found in CRS Report R46836, *Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses*, by Michael A. Foster (2021).

Selecting a Mental-State Requirement

Where on a spectrum of mental culpability must someone fall to incur criminal liability, and what terminology should be used to identify that point? At the federal level, selecting a mental state that corresponds to a particular level of culpability is complicated by inconsistently interpreted, nebulous, and sometimes-overlapping terms of art.[314] To understand the development and current status of federal mental-state requirements, it is useful to trace the common-law underpinnings of such requirements and the treatment of mental states in the influential Model Penal Code (MPC).

Background on Mental-State Requirements at Common Law

As discussed, a crime traditionally has been understood to consist of the concurrence of both a proscribed act (the *actus reus*) and a "guilty mind" (or *mens rea*).[315] The concept of a mental element—*mens rea*, *scienter*, *state of mind*, *criminal intent*, or an equivalent term—being necessary for a prohibited act to be sufficiently blameworthy to justify criminal punishment has endured for hundreds of years, if not longer.[316] By the middle of the 20th century, the common-law development of particular state-of-mind requirements on a crime-by-crime basis (and their inconsistent codification, in whole or in part, in state criminal codes) led to considerable disarray and confusion.[317]

This confusion is perhaps best reflected in the development of the concepts of "general intent" and "specific intent" as a shorthand way to describe the *mens rea* classifications of common-law crimes. At a high level, many such offenses—for example, murder, battery, and larceny—can be characterized as either "specific intent" or "general intent" crimes.[318] In one formulation, "specific intent" denotes an intent to "achieve some additional consequence" or "commit some

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the use of the word fault as a more accurate descriptor of this element of criminal offenses. *See id.* ("The unadorned word 'fault' is thus a more accurate word to describe what crimes generally require in addition to their physical elements.").

[314] *See infra* "Federal Approach to Mental States."

[315] LAFAVE, *supra* note 5, at § 5.1.

[316] *See* Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 642 (1993) (tracing origins of a mental element in crime to "the earliest known legal systems" but acknowledging that "systematic *mens rea* requirements" did not exist in Anglo-Saxon law "until at least the thirteenth century").

[317] *Morissette*, 342 U.S. at 252 ("The unanimity with which [courts] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element."); *See* Treiman, *supra* note 194, at 284 ("Before 1960, most states had criminal codes that were little more than statutory versions of the common law . . . . Each crime was defined in virtual isolation from others and consequently, the meaning of terms would vary from crime to crime, with no attempt at consistent definition . . . .").

[318] United States v. Bailey, 444 U.S. 394, 403 (1980); Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. L. REV. 341, 343–43 (2001). As discussed in more detail *infra*, a third category of so-called regulatory or strict-liability offenses requires no culpable mental state at all. *See Morissette*, 342 U.S. at 252–53 (acknowledging offenses "with very different antecedents and origins" that "depend on no mental element but consist only of forbidden acts or omissions").

further act" beyond the commission of "the proscribed act."[319] For example, larceny likely would be considered a specific intent crime, as it often requires obtaining control over the property of another (the proscribed act) *with the intent* "to deprive the owner of the stolen property permanently."[320] By contrast, in the words of one federal appellate court, "a general intent crime requires only that the act was volitional (as opposed to accidental), and the defendant's state of mind is not otherwise relevant."[321] For instance, battery at common law "consisted of 'the unlawful application of force to the person of another,' including an offensive touching."[322] This crime would be considered a general intent crime, because it does not "require any specific intent either to injure or to touch offensively, but rather only a more general intent to commit the unlawful act" of applying force.[323]

Though the examples of larceny and battery might suggest relative clarity, delineation between "specific intent" and "general intent" crimes in fact can be problematic due to inconsistent usage[324] and the inherently imprecise contours of these concepts.[325] For example, a crime might be considered a "general intent" crime because it does not require a specific mental state with respect to some consequence or result beyond the proscribed act (as in the battery example), but this does little to clarify the meaning of the *mens rea* requirement that the crime does have. Though the definition of *general intent* given above distinguishes only between volition and accident, the concept of intentionality has long been "slice[d] . . . more finely than accident versus non-accident."[326]

Exacerbating these definitional and line-drawing problems at common law was the proliferation of different *mens rea* terms that often provided little clarity as to what sort of mental state was actually required. "Terms such as willfully, corruptly, maliciously, feloniously, wrongfully, unlawfully, wantonly, intentionally, purposely, with criminal negligence, and culpably" were all used (among others), sometimes "to describe what was probably the same mental state," sometimes to describe different mental states, and often without "any further definition."[327] The result was "seemingly infinite shades of meaning along [a] continuum upon which" the concepts

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[319] Eric A. Johnson, *Understanding General and Specific Intent: Eight Things I Know for Sure*, 13 OHIO ST. J. CRIM. L. 521, 525, 527 (2016); *see also* United States v. Lamott, 831 F.3d 1153, 1156 (9th Cir. 2016) ("In a crime requiring 'specific intent,' the government must prove that the defendant subjectively intended or desired the proscribed act or result.").

[320] Johnson, *supra* note 319, at 525.

[321] *Lamott*, 831 F.3d at 1156. Defining *general intent* solely in terms of volition is of dubious usefulness, as any crime proscribing an affirmative act requires that the act be voluntary. *See* LAFAVE, *supra* note 5, at § 6.1(c) ("At all events, it is clear that criminal liability requires that the activity in question be voluntary.").

[322] United States v. Delis, 558 F.3d 177, 180 (2d Cir. 2009) (quoting 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 16.2, at 552 (2d. ed. 2003)).

[323] *Id.*

[324] *See* United States v. Bailey, 444 U.S. 394, 403 (1980) ("Sometimes 'general intent' is used in the same way as 'criminal intent' to mean the general notion of mens rea, while 'specific intent' is taken to mean the mental state required for a particular crime. Or, 'general intent' may be used to encompass all forms of the mental state requirement, while 'specific intent' is limited to the one mental state of intent. Another possibility is that 'general intent' will be used to characterize an intent to do something on an undetermined occasion, and 'specific intent' to denote an intent to do that thing at a particular time and place." (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 201–02 (1972))).

[325] See CRS Report R46836, *Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses*, by Michael A. Foster, at 3–5 (2021) (discussing scholarship on specific and general intent and explaining that "Additionally, even classifying a crime as requiring either specific or general intent might not necessarily serve to elucidate the requisite mental state in a meaningful way").

[326] Francis X. Shen & Morris B. Hoffman, et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1310 (2011).

[327] Treiman, *supra* note 194, at 284.

of specific and general intent resided.[328] It was in the context of this "variety, disparity, and confusion of [judicial] definitions of the requisite but elusive mental element"[329] that the drafters of the MPC sought to establish "relatively clear definitions of mental requirements and relatively straightforward rules regarding how to read these requirements into criminal statutes"[330] through what it termed general "culpability" rules.[331]

MPC Approach to Mental States

Many states have, in whole or part, supplanted "confused, vague, and inconsistent" approaches to mental states drawn from the common law with the more systematic approach to state-of-mind requirements found in the MPC's "culpability" provisions.[332] Federal courts also have looked to MPC principles for guidance in interpreting federal law,[333] notwithstanding the fact that federal criminal statutory law (largely codified at Title 18) contains no uniform *mens rea* standards or generally applicable definitions of mental-state terms (as discussed below).[334]

One of the MPC's culpability provisions' core achievements is eliminating the distinction between specific and general intent offenses and "reduc[ing] nearly eighty miscellaneous culpability terms to five carefully defined levels."[335] These levels have become a prevalent, if not the predominant, prism through which courts view state-of-mind distinctions.[336] The five MPC levels of culpability are (1) purpose; (2) knowledge; (3) recklessness; (4) negligence; and (5) strict liability.[337] The MPC also clarifies the relationship between these different culpability levels and the offense elements to which they apply by dividing elements into three categories: (1) conduct; (2) attendant circumstances; and (3) results.[338] The element categories are not defined,

[328] Batey, *supra* note 318, at 341.

[329] Morissette v. United States, 342 U.S. 246, 252 (1952).

[330] Batey, *supra* note 318, at 401; *see also* Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, 579 (1988) (explaining that the MPC drafters "were required to resolve an approach to culpability" and "appeared to recognize that the fundamental need was clarity").

[331] MODEL PENAL CODE § 2.02 (AM. L. INST. 1985).

[332] Treiman, *supra* note 194, at 284–85 (indicating that as of 1981, nearly two-thirds of states had revised their criminal codes based on the MPC, and many revisions included the MPC's section on culpability); *see* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (identifying "thirty-four [state] enactments [that] were influenced in some part by the Model Penal Code").

[333] *E.g.*, United States v. Bailey, 444 U.S. 394, 406 (1980) (looking to "[p]rinciples derived from common law as well as precepts suggested by the" MPC to discern level of culpability); Voisine v. United States, 579 U.S. 686, 691 (2016) (citing MPC definition of "reckless" as "the dominant formulation").

[334] Geraldine Szott Moohr, *Playing with the Rules: An Effort to Strengthen the Mens Rea Standards of Federal Criminal Laws*, 7 J. L. ECON. & POL'Y 685, 692 (2011) ("The United States Code does not define *mens rea* terms or provide interpretive guidelines. Instead, each federal criminal law specifies its own *mens rea* element, making it possible for legislators to select from a wealth of common law terms." (footnotes omitted)).

[335] Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 815 (1980); *see also* United States v. Manganellis, 864 F.2d 528, 538–39 (7th Cir. 1988) ("Significantly, the Model Penal Code has adopted four general levels of culpability, in addition to strict liability, and makes no distinction between specific intent and general intent crimes.").

[336] Robinson, *supra*, note 335, at 816.

[337] MODEL PENAL CODE §§ 2.02(2)(a)–(d), 2.05 (AM. L. INST. 1985); *see also Bailey*, 444 U.S. at 403–04 ("This new approach, exemplified in the American Law Institute's Model Penal Code, is based on two principles. First, the ambiguous and elastic term 'intent' is replaced with a hierarchy of culpable states of mind. The different levels in this hierarchy are commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence.").

[338] *See generally* MODEL PENAL CODE § 2.02 (AM. L. INST. 1985). The MPC defines the term *element of an offense* as such conduct, circumstance, or result of conduct as "is included in the description of the forbidden conduct in the (continued...)

but an example of conduct and circumstance elements might involve a crime of having sexual intercourse with a minor, with intercourse being the conduct element and the age of the victim being the circumstance element.[339] An example of a result element would be engaging in conduct that causes the death of another human being, with death being the proscribed result.[340]

Each culpability level in the MPC is defined in relation to each kind of objective offense element.[341]

The MPC's culpability levels may be viewed in a kind of descending order of intentionality. *Purposely* generally requires an element to be the actor's "conscious object" (e.g., a desire for the result of the act, such as shooting another with a firearm with the purpose to kill the victim); *knowingly* requires the actor's awareness to a practical certainty or of a high probability (regardless of what the actor desires or has as their object) (e.g., knowing that shooting a firearm at the victim will almost certainly kill them, though the shooter does not have a desire one way or the other); *recklessly* requires the actor's awareness of a substantial risk (e.g., awareness that discharging a firearm in the general vicinity of a group of individuals carries a substantial risk of an individual being struck); and *negligence* requires no awareness at all but merely that the actor objectively should have been aware of a substantial risk (e.g., lacking awareness that discharging a firearm in particular circumstances carries a substantial risk that an individual may be struck, though a reasonable actor would have had an awareness of the substantial risk). For a limited category of strict liability offenses, the mental state of the actor is irrelevant.[342] These definitions represent an effort to cut through the confusing morass of *mens rea* terms that had existed up to that point.[343] The categorization of offense elements and the implicit recognition that the requisite *mens rea* might be different and should be analyzed separately with respect to each offense element also reflects a shift from a prior notion that "each offense has one state of mind requirement"—in essence, that criminal offenses may be classified simply as "general intent" or "specific intent" rather than specifying what state of mind is actually required for which parts of the crime.[344]

Federal Approach to Mental States

The *U.S. Code* has no general *mens rea* term definitions or interpretive rules, and dozens of different terms are used throughout the Code.[345] Further, the terms used may be conclusory and give little indication of what mental state is called for—for instance, terms such as *corruptly*,

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definition of the offense," establishes the requisite culpability, negates an excuse, justification, or a statute of limitations defense, or establishes jurisdiction or venue. *Id.* § 1.13(9).

[339] Robinson, *supra* note 272, at 235.

[340] *Id.*

[341] MODEL PENAL CODE § 2.02 (AM. L. INST. 1985); *e.g.*, *id.* § 2.02(2)(a) ("Purposely. A person acts purposely with respect to a material element when (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.") (emphasis added).

[342] MODEL PENAL CODE §§ 2.02; 2.05 (AM. L. INST. 1985).

[343] *See, e.g.*, Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 692–93 (1983) (observing that Section 2.02 "clarifies *mens rea* analysis" by, among other things, "narrow[ing]" the "eighty or so culpability terms" that existed previously).

[344] *Id.* at 688.

[345] Moohr, *supra* note 334, at 692.

maliciously, *unlawfully*, and *feloniously* can all be found in Title 18 alone.[346] As such, understanding what mental state is required for a given federal crime will almost necessarily require reference to judicial opinions construing that particular provision. Even then, "the same terms are defined differently depending on which substantive crime is at issue, which federal circuit one is in, and which judge within a given district is crafting the jury's instructions."[347] Nevertheless, judicial opinions interpreting federal *mens rea* terms "display far fewer mental states than the statutory language" might suggest.[348] Of "paramount importance" in federal criminal law are the concepts of "intention" or, in the language of the MPC, "purpose," "as well as knowledge or awareness."[349] Less common, though still relevant, are concepts embodied at least partially in the MPC's frameworks for recklessness and negligence.[350] Different courts may have different approaches to these concepts and the definitions they entail. This section provides an abridged overview of the meanings of some of the most common *mens rea* standards under federal law, grouped loosely into categories similar to those recognized in the MPC.

Intentionally, Knowingly, and Willfully

The terms *intentionally*, *knowingly*, and *willfully* are among those "used most frequently" in federal criminal statutes, but as with other federal *mens rea* terms, they have "eluded precise definition."[351] It seems that all three terms require at least some degree of conscious, subjective awareness of the element to which the requirement attaches.[352] Beyond this baseline, the

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[346] *See* 1 WORKING PAPERS OF THE NAT'L COMM'N ON REFORM OF FED. CRIM. L., 119 (U.S. Gov't Printing Off. 1970) (citing 18 U.S.C. §§ 201, 549, 1427, & 1506).

[347] James A. Macleod, *Belief States in Criminal Law*, 68 OKLA. L. REV. 497, 511 (2016). Because *mens rea*, as "an ingredient of the crime charged," is "a question of fact which must be submitted to the jury," Morissette v. United States, 342 U.S. 246, 274 (1952), judicial interpretations of statutory *mens rea* requirements typically arise in the context of challenges to the trial court's jury instructions defining the mental-state element that must be proved. *See, e.g.*, Liparota v. United States, 471 U.S. 419, 423 (1985) (involving challenge to jury instructions based on district court's refusal to instruct jury that specific intent was required).

[348] Wehr v. Burroughs Corp., 619 F.2d 276, 280 n.6 (3d Cir. 1980) (quoting WORKING PAPERS OF THE NAT'L COMM'N ON REFORM OF FED. CRIM. L., 119, 120 (U.S. Gov't Printing Off. 1970)).

[349] *See* 1A KEVIN F. O'MALLEY, JAY E. GRENIG, & WILLIAM C. LEE, FEDERAL JURY PRACTICE & INSTRUCTIONS § 17:01 (6th ed. 2006).

[350] MODEL CRIM. JURY INSTRUCTIONS ch. 5 (U.S. Ct. Appeals, 3d Cir. 2023) [hereinafter THIRD CIRCUIT JURY INSTRUCTIONS] (listing "intentionally, knowingly, or willfully" as "the mental states commonly used in federal offenses" and explaining that "recklessly or negligently" are "less commonly" used).

[351] O'MALLEY, GRENIG, & LEE, *supra* note 349, at § 17:01. A fourth term bearing similarity to the other three is *maliciously*, which, in one formulation, denotes intent to do a prohibited act without justification, mitigation, or excuse. *E.g.*, United States v. Kelly, 676 F.3d 912, 918 (9th Cir. 2012); *cf.* United States v. Grady, 746 F.3d 846, 849 (7th Cir. 2014) (approving jury instruction defining *maliciously* as "intentionally or with deliberate disregard of the likelihood that damage or injury would result" but omitting proposed addition of phrase "without just cause or reason"). The concept of "malice" is used to define the requisite mental states for certain federal homicide crimes, which also provide an example of one circumstance where the "mitigation or excuse" component of the above definition is relevant—murder and voluntary manslaughter both require intent to kill or cause serious bodily injury (or at least extreme recklessness as to such result), but voluntary manslaughter bears a mitigating element of "sudden quarrel or heat of passion" that renders it "without malice." United States v. Serawop, 410 F.3d 656, 664 (10th Cir. 2005); *see* United States v. Delaney, 717 F.3d 553, 557 (7th Cir. 2013) ("This is puzzling, because 'malice aforethought' in the statute means intent and so what does it mean to say that a person did something intentionally but without malice?"). Malice can also bear a distinct meaning that incorporates notions of "evil purpose or motive" in at least one statute. *See* United States v. Hassouneh, 199 F.3d 175, 181 (4th Cir. 2000) ("[T]he history surrounding the progression of the Bomb Hoax Act confirms that Congress intended the term 'acts willfully and maliciously' to mean 'acts with an evil purpose or motive.'").

[352] Or at least a high enough degree of risk that the existence of the element is "virtually certain." Shen & Hoffman, *et al.*, *supra*, note 326 at 1312 (describing "most recent major fault line in the law of intentionality" as distinguishing (continued...)

meanings of the terms may vary or overlap considerably depending on the court, statute, and context of their use.[353]

Intentionally and Knowingly. As with other federal *mens rea* terms, the meanings of *intentionally* and *knowingly* can vary widely based on context.[354] The approach[355] largely reflected in the MPC and some federal precedent is to distinguish between *intention* or *purpose* on the one hand as being limited to a conscious object or desire, and *knowledge* on the other hand as capturing a requirement of awareness of a high probability or to a practical certainty.[356] The Supreme Court in *United States v. Bailey* referenced this distinction approvingly and suggested that *intention* or *purpose* "corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent."[357] Some federal courts utilize a definition of *knowing* that approximates the MPC approach, instructing that to act knowingly a defendant must have "realized what he was doing and [be] aware of the nature of his conduct" rather than acting "through ignorance, mistake or accident."[358]

Congress has also signaled an intent to distinguish between the two *mens rea* terms in this way in particular statutes. For instance, prior to 1986, the Computer Fraud and Abuse Act (CFAA) proscribed "knowingly" accessing a computer without authorization or exceeding authorized access in certain circumstances.[359] In its 1986 amendments, however, Congress changed the standard from "knowingly" to "intentionally," and the Senate report emphasized that the change

between "desire-based intent" and "a new category of 'recklessness-plus'" that is "grounded in the degree of risk the actor is consciously undertaking").

[353] *E.g.*, Bryan v. United States, 524 U.S. 184, 191 (1998) ("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." (quoting Spies v. United States, 317 U.S. 492, 497 (1943))).

[354] *See* Foster, *supra* note 325, at 19–22.

[355] O'MALLEY, GRENIG, & LEE, *supra* note 349, at § 17:01 (6th ed. 2006) (quoting WAYNE R. LAFAVE, CRIMINAL LAW § 3.5 (4th ed. 2003)).

[356] *See supra* "MPC Approach to Mental States." Some federal courts may frame knowledge in terms of "belief" rather than awareness, particularly in contexts such as sting operations where a circumstance element at issue may not actually be present. *E.g.*, United States v. Flores, 945 F.3d 687, 712 (2d Cir. 2019) ("'[A]lthough knowledge is' . . . 'belief substantiated by veracity,' 'in the context of a sting operation' 'belief is tantamount to knowledge.'" (quoting United States v. Mektalov, 461 F.3d 309, 316 (2d. Cir. 2006))).

[357] *Bailey*, 444 U.S. at 405; *see also* United States v. Ramamoorthy, 949 F.3d 955, 961 (6th Cir. 2020) ("To commit a general-intent crime, a defendant must only intend to do the act that the law proscribes. To commit a specific-intent crime, a defendant must do more than knowingly act in violation of the law. He must also act with the purpose of violating the law." (internal citations and quotation marks omitted)). One commentator has argued that the Supreme Court's dicta in *Bailey* mistakenly treats the difference between general and specific intent as "reducible to the difference between two mental states." Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 WAKE FOREST L. REV. 769, at 790 n.119 (2012). As described above, at least one conception of the difference between general and specific intent is that it delineates between the *elements* to which a given mental state attaches. *See id.* at 790–91; *supra* "Background on Mental-State Requirements ."

[358] United States v. Salinas, 763 F.3d 869, 880 (7th Cir. 2014). Ordinarily, "the term 'knowingly' merely requires proof of knowledge of the *facts* that constitute the offense" and not knowledge of the law or unlawfulness. *Bryan*, 524 U.S. at 193 (emphasis added). However, construction of particular statutes may lead to a different result based on the analysis described *infra*, "Distribution of Mental State Requirement to Prohibited Conduct and Other Elements." For instance, in *Liparota v. United States*, the Court determined that a statute prohibiting knowing use of food stamps "in any manner not authorized" by statute or regulation required a defendant to know "that his conduct was unauthorized or illegal." 471 U.S. 419, 426, 434 (1985).

[359] *See* United States v. Sablan, 92 F.3d 865, 868 (9th Cir. 1996) (describing legislative history).

was meant to require "more than that one voluntarily engaged in conduct. . . . Such conduct . . . must have been the person's conscious objective."[360]

Willful Blindness

For federal statutes that establish a "knowing" *mens rea* requirement, one issue that can arise concerns a circumstance where a person may not have positive knowledge of the element at issue "only because he consciously avoided it." *United States v. Jewell*, 532 F.2d 697, 702 (9th Cir. 1976). In this situation, every federal circuit has recognized that so-called "willful blindness" or "deliberate ignorance" can equate to knowledge. *See Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011) (mentioning that "the Courts of Appeals . . . all appear to agree" on basic parameters of willful blindness doctrine). Though the precise formulations and requirements vary, courts "appear to agree on two basic requirements: (1) The defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Id.*

Willfully. One of the most commonly used *mens rea* terms in federal criminal law is *willfully*,[361] which may appear as a stand-alone term[362] or in conjunction with *knowingly*.[363] The term also exemplifies, perhaps better than any other, the nonuniformity of mental-state requirements under federal law. As the Supreme Court has recognized, 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."[364] Other courts have referred to the term more colorfully as "notoriously slippery" and a "chameleon word."[365] Thus, formulations abound,[366] but in a common one, "a 'willful' act is one undertaken with a 'bad purpose,'" meaning that to act "willfully" requires "knowledge that [one's] conduct was unlawful."[367] This formulation distinguishes the term *willfully* from a common conception of *knowingly* under federal law, as the latter ordinarily requires only knowledge of the facts that constitute an offense.[368] The typical knowledge-of-unlawfulness formulation of *willfully* does *not*, however, require knowledge of the precise legal provision or prohibition that has been violated.[369] Rather, all that is required is knowledge that conduct is unlawful "in some general sense."[370]

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[360] S. REP. NO. 99-432, at 6 (1986); *see* United States v. Drew, 259 F.R.D. 449, 459 (C.D. Cal. 2009) (quoting report language in interpreting CFAA). The notion of intent as conscious object or purpose can also be significant for other kinds of crimes like homicide, which is federally proscribed in jurisdictionally limited circumstances, and treason. *See Bailey*, 444 U.S. at 405.

[361] O'MALLEY, GRENIG, & LEE, *supra* note 349, at § 17:01.

[362] *E.g.*, 18 U.S.C. § 924(a)(1)(D) (establishing criminal penalties for those who "willfully" violate certain firearm-related requirements).

[363] *E.g.*, *id.* § 1501 (prohibiting "knowingly and willfully" obstructing a federal process server, among other things).

[364] Bryan v. United States, 524 U.S. 184, 191 (1998) (quoting Spies v. United States, 317 U.S. 492, 497 (1943)).

[365] United States v. Starnes, 583 F.3d 196, 210 (3d Cir. 2009) (quoting United States v. Ladish Malting Co., 135 F.3d 484, 487–88 (7th Cir. 1998)).

[366] Foster, *supra* note 325, at 22–23.

[367] *Bryan*, 524 U.S. at 191.

[368] Dixon v. United States, 548 U.S. 1, 5 (2006). As noted above, construction of particular statutes may result in a definition of *knowingly* that *does* include knowledge of unlawfulness to some degree, which may be thought of as more akin to the typical formulation of a willfulness requirement. *See supra* note 358.

[369] *See Bryan*, 524 U.S. at 195–96 (rejecting argument that willfulness requirement in firearm-related statute necessitates knowledge of the law, as "knowledge that the conduct is unlawful is all that is required"); Screws v. United States, 325 U.S. 91, 103, 106 (1945) (Reading willfulness requirement in 18 U.S.C. § 242 as calling for "specific intent to deprive a person of a federal right made definite by decision or other rule of law" but indicating that defendant does not need to be "thinking in constitutional terms").

[370] *Starnes*, 583 F.3d at 210; *see also* United States v. Kosinski, 976 F.3d 135, 154 (2d Cir. 2020) ("As a general matter, (continued...)

Recklessly and Negligently

The *mens rea* concepts of *recklessness* and *negligence* are much less central in federal criminal law than are concepts of intention or knowledge,[371] but some federal criminal provisions do utilize them.[372] In general, *recklessness* and *negligence* are distinct from other *mens rea* standards in that they focus on *risk*.[373] Nonetheless, *recklessness* shares with higher forms of *mens rea* a requirement of subjective awareness, while *negligence* is often understood to establish an objective standard that arguably takes it out of the realm of a true "mental-state" requirement altogether.[374]

Recklessly. According to the Supreme Court, the "dominant formulation" of a *mens rea* requirement of *recklessness* is that one "consciously disregard[s] a substantial risk" of harm.[375] This formulation is drawn from the MPC, which defines *recklessness* as conscious disregard of "a substantial and unjustifiable risk" that an element exists or will result from one's conduct.[376] It appears that federal courts largely use this definition, or one that is substantially similar, in construing federal statutes that contain the terms *reckless* or *reckless disregard*.[377] As the definition suggests, criminal recklessness under federal law generally requires subjective awareness of a risk and deliberate disregard of it, that is, "the intentional taking of a risk that might result in harm,"[378] though there may be some variation among courts and across statutes as

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'a person who acts willfully need not be aware of the specific law that his conduct may be violating. Rather, knowledge that the conduct is unlawful is all that is required.'" (quoting United States v. Henry, 888 F.3d 589, 599 (2d. Cir. 2018))); United States v. Hernandez, 859 F.3d 817, 822 (9th Cir. 2017) ("In this case, the government was required to show that [the defendant] knew his transportation of firearms . . . was somehow unlawful, even if he did not know of the specific legal duty, or the particular law, that made it unlawful.").

[371] *See* O'MALLEY, GRENIG, & LEE, *supra* note 349, at § 17:01 (stating that concepts of *recklessness* and *negligence* "have little relevance in federal criminal law"); THIRD CIRCUIT JURY INSTRUCTIONS, *supra* note 350, ch. 5 ("'Recklessly' is not frequently used to define the state of mind requirement in federal criminal statutes.").

[372] *E.g.*, 18 U.S.C. § 1591(a) (prohibiting, among other things, knowingly recruiting a person "in reckless disregard of the fact" that force or other proscribed means will be used to cause the person to engage in a commercial sex act); *id.* § 755 (establishing criminal penalties for one who "negligently suffers [a federal prisoner] to escape," among other things).

[373] *See, e.g.*, MODEL PENAL CODE §§ 2.02(2)(c)-(d) (AM. L. INST. 1985).

[374] *See* Godwin v. United States, 441 F. Supp. 3d 1243, 1257 n.9 (M.D. Ala. 2020) ("The basic distinction between recklessness and negligence is that '[a]n actor is criminally negligent when he should have been aware of the risk but was not, while recklessness requires that the defendant actually be aware of the risk but disregard it.'" (quoting MODEL PENAL CODE §§ 2.02(2)(d) (AM. L. INST. 1985)); *see also* LAFAVE, *supra* note 5, at § 5.1; *see Negligence*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining *criminal negligence* as, among other things, an "objectively assessed mental state of an actor who should know" that there is a certain degree of risk in a prohibited action). However, criminal negligence is not common in the context of federal criminal law. *See* O'MALLEY, GRENIG, & LEE, *supra* note 349, at § 17:01 (6th ed. 2006) (indicating that concepts of *recklessness*, *negligence*, and *strict liability* have "little relevance in federal criminal law"); Elonis v. United States, 575 U.S. 723, 738 (2015) ("[W]e have long been reluctant to infer that a negligence standard was intended in criminal statutes." (quoting Rogers v. United States, 422 U.S. 35, 47 (1975) (Marshall, J., concurring))); *but see, e.g.*, 33 U.S.C. § 1319(c) (establishing criminal penalties for negligent violations of certain pollutant discharge limitations, among other things).

[375] Voisine v. United States, 579 U.S. 686, 691 (2016) (quoting MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985)).

[376] MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985).

[377] *E.g.*, Farmer v. Brennan, 511 U.S. 825, 836–37 (1994); United States v. Fagatele, 944 F.3d 1230, 1239 (10th Cir. 2019); United States v. Rodriguez, 880 F.3d 1151, 1159–61 (9th Cir. 2018); Anderson v. Kingsley, 877 F.3d 539, 543–45 (4th Cir. 2017); United States v. Mottweiler, 82 F.3d 769, 771 (7th Cir. 1996); Macleod, *supra*, footnote 347, at 513 n.54 (2016) ("[T]he MPC recklessness 'formulation is substantially the same as the formulations of recklessness in federal and state criminal codes and judicial decisions.'" (quoting LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 35 (2009))).

[378] *Anderson*, 877 F.3d at 545; *see Farmer*, 511 U.S. at 836–37 ("The criminal law . . . generally permits a finding of (continued...)

to whether awareness of facts and circumstances *giving rise* to a risk is sufficient to establish recklessness in the absence of awareness of the risk itself.[379] *Recklessness* thus differs from a *mens rea* standard of *knowledge* primarily in regard to the degree of *certainty* of a circumstance or outcome of which a defendant is aware—in the MPC formulation that is sometimes used by federal courts, *knowledge* connotes awareness of a high probability or to a practical certainty; *recklessness*, by contrast, focuses on awareness of some lesser degree of risk.[380] In practice, the distinctions between *recklessness*, *knowledge*, and other *mens rea* terms may be blurry.[381]

Negligently. *Negligence* is a familiar concept in tort law.[382] It can also have criminal applications, although *negligence* as a federal *mens rea* standard is less prevalent than other terms discussed in this report.[383] At the most basic level, *negligence* embodies (1) conduct that is "judged by an objective (reasonable man) standard," and (2) some "degree of risk which the defendant's conduct must create."[384] One conception of *negligence* in the criminal context, reflected in the MPC, is that the defendant "should be aware" of a risk that the statutory element at issue exists or will result from his conduct.[385] According to this view, the "basic distinction" between *recklessness* and *negligence* is that a defendant "is criminally negligent when he should have been aware of the risk but was not, while recklessness requires that the defendant actually be aware of the risk but disregard it."[386] Whether a defendant "should have been aware" is, in turn, judged by the objective standard of a reasonable person.[387] The MPC approach to *negligence* also emphasizes that the risk must be "substantial and unjustifiable"—that is, the risk must be "of such a nature and degree" that failure to perceive it "involves a gross deviation from the standard of care that a

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recklessness only when a person disregards a risk of harm of which he is aware."). The MPC further defines a *substantial and unjustifiable risk* as a risk "of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985). Some federal courts may include this further definition in jury instructions as well, recognizing that although recklessness requires *subjective* awareness, "the nature of the risk is measured by an *objective* standard." *Rodriguez*, 880 F.3d at 1161 (emphasis added); *but cf.* THIRD CIRCUIT JURY INSTRUCTIONS, *supra* note 350, ch. 5 (indicating that although "the Third Circuit does not seem to have included this further definition in its few cases discussing recklessly, the trial court could include it in an instruction on recklessly if it thinks a further explanation is necessary").

[379] *Compare Rodriguez*, 880 F.3d at 1160 (making clear that for purposes of statutory prohibition on transporting an illegal alien for financial gain, defendant must not merely be aware of facts "from which the inference of the risk at issue could be drawn" but must "*also draw the inference*"), *with* United States v. Kendrick, 682 F.3d 974, 984 (11th Cir. 2012) (stating that *reckless disregard* term in separate subsection of same statute "means to be aware of, but consciously and carelessly ignore, facts and circumstances clearly indicating that" element exists); *see also* United States v. Carson, 870 F.3d 584, 603 (7th Cir. 2017) (recognizing that "[o]ther courts to have considered the question have concluded that the phrase 'reckless disregard' in [a] statute [proscribing sex-trafficking activities] requires only an awareness of facts and circumstances that give rise to a risk of a . . . violation, not an awareness of the risk itself").

[380] *See supra* notes 355-356; United States v. Carr, 303 F.3d 539, 547 (4th Cir. 2002) ("From the definitions we see that 'knowing' and 'reckless' states of mind both require a subjective awareness of risk on the part of the actor. The difference lies in the degree of the risk that the actor is aware of.").

[381] *See generally* Foster, *supra* note 325, at 18–28.

[382] *See* LAFAVE, *supra* note 5, at § 5.4(a) (indicating that negligence "will usually do for tort liability").

[383] *See supra* note 350 and accompanying text; William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049, 1072 (1992) (referencing "near complete absence of negligence" in Title 18 of *U.S. Code*).

[384] *See* LAFAVE, *supra* note 5, at § 5.4(a).

[385] United States v. Zats, 298 F.3d 182, 189 (3d Cir. 2002) (quoting MODEL PENAL CODE § 2.02(2)(d) (1985)).

[386] Godwin v. United States, 441 F. Supp. 3d 1243, 1257 n.9 (M.D. Ala. 2020) (quoting People v. Hall, 999 P.2d 207, 219–20 (Col. 2000)).

[387] *See* LAFAVE, *supra* note 5, at § 5.4(a)(2) ("All that negligence requires is that [a person] ought to have been aware of [the risk] (i.e., that a reasonable man would have been aware of it).").

reasonable person would observe in the actor's situation."[388] These elaborations may be said to embody a heightened standard of "gross" or "criminal" negligence, as distinguished from the ordinary negligence typically sufficient for civil liability that, in one representative formulation, requires only "doing something which a reasonably prudent person would not do, or . . . failing to do something which a reasonably prudent person would do."[389]

Some have suggested that an "ordinary" negligence standard is inappropriate for imposition of criminal liability, arguing that criminalizing mere failure to exercise ordinary care has "limited deterrent value" and is "fundamentally unfair."[390] Nevertheless, "the notion that criminal liability might extend in special circumstances to simple negligence . . . is a surprisingly long-standing feature of federal statute, with a similarly long history of favorable treatment by the Supreme Court."[391] As such, to the limited extent negligence is employed in federal law as a *mens rea* standard for criminal prohibitions, it may be interpreted as requiring only ordinary negligence in the absence of an indication of legislative intent to impose a higher standard.[392] However, there is no uniform conception of negligence in federal criminal law. As with the other *mens rea* standards discussed in this report, formulations may vary by court or statute[393] and may overlap with conceptions of more culpable mental states like recklessness. For instance, 18 U.S.C. § 1112 defines *involuntary manslaughter* as "the unlawful killing of a human being without malice . . . in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death."[394] Several courts have interpreted the statute as imposing a *mens rea* requirement of *gross negligence* but have defined that requirement in at least partially subjective terms.[395]

[388] MODEL PENAL CODE § 2.02(2)(d) (AM. L. INST. 1985).

[389] United States v. Pruett, 681 F.3d 232, 241 (5th Cir. 2012). The MPC and *Pruett* formulations of *ordinary* and so-called *gross negligence* are far from the only ones—as one commentator has observed, "[t]raditional criminal law doctrine . . . does not employ or emphasize any single conception of negligence" but rather "contains a variety of doctrines that could be broadly classified as involving negligence[.]" Kenneth W. Simons, *Dimensions of Negligence in Criminal and Tort Law*, 3 THEORETICAL INQUIRIES L. 283, 288 n.7 (2002).

[390] Brigid Harrington, note, *A Proposed Narrowing of the Clean Water Act's Criminal Negligence Provisions: It's Only Human?*, 32 B.C. ENV'T AFFS. L. REV. 643, 657 (2005); *see* Leslie Yalof Garfield, *A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature*, 65 TENN. L. REV. 875, 910–11 (1998) (identifying a "prevailing view that punishing ordinary negligent behavior generally should be avoided" as unjust and ineffective). Sometimes the argument takes on a constitutional dimension. *But see* United States v. Hanousek, 176 F.3d 1116, 1122 (9th Cir. 1999) (rejecting argument that ordinary negligence standard in Clean Water Act violates due process).

[391] Brook B. Andrews, *Mens Rea in the CWA: Simple Negligence Criminal Liability Under the Clean Water Act*, 28 S.C. LAW. 20, 23 (2016).

[392] *See Pruett*, 681 F.3d at 243 (agreeing with Ninth and Tenth Circuits that ordinary negligence is sufficient for misdemeanor Clean Water Act provision); United States v. Alvarez, 809 F. App'x 562, 567–68 (11th Cir. 2020) (per curiam) (recognizing that plain language of Seaman's Manslaughter Statute "criminalizes simple negligence").

[393] *E.g.*, 42 U.S.C. § 7413(c)(4) (applying to one who "negligently places another person in imminent danger of death or serious bodily injury").

[394] 18 U.S.C. § 1112(a). Involuntary manslaughter may also occur through "the commission of an unlawful act not amounting to a felony" or in the commission "in an unlawful manner" of a lawful act which might produce death. *Id.* The offense is limited to conduct occurring within the SMTJ. *Id.* § 1112(b).

[395] *See* United States v. Bolman, 956 F.3d 583, 586 (8th Cir. 2020) (defining *gross negligence* for purposes of involuntary manslaughter as "wanton or reckless disregard for human life" with knowledge that the defendant's "conduct was a threat to the lives of others or having knowledge of such circumstances as could reasonably have enabled him to foresee the peril to which his act might subject others" (citing United States v. Opsta, 659 F.2d 848, 849 (8th Cir. 1981))); United States v. Pineda-Doval, 614 F.3d 1019, 1038–39 (9th Cir. 2010) (similar).

Other Mens Rea Standards

As described previously, because the *U.S. Code* does not generally employ the standardized culpability rules and definitions found in the MPC, federal *mens rea* requirements are largely statute-specific.[396] Congress has also, at times, used state-of-mind language in particular statutes that either does not clearly signal which level of culpability is intended or that appears to establish a state-of-mind requirement that does not fit neatly into one of the categories described above, leaving courts to attempt to interpret the language in a way that comports with congressional intent. As a result, specific federal crimes, as defined or as interpreted by the federal courts, may bear mental-state requirements that appear to blend aspects of more than one standard.[397] For instance, several federal statutes prohibit conduct engaged in with either intent or knowledge, or with "reason to believe," "reasonable cause to believe," or "reason to know" of some attendant circumstance or result.[398] Court decisions have displayed a degree of confusion as to where this language falls on the continuum between actual knowledge and an objective, "reasonable person" standard closer to negligence.[399]

Mental States, Motives, and the Reasons for Which a Defendant Acts

Some federal criminal statutes require proof that a defendant acted for a particular reason. For example, a federal hate crime statute, 18 U.S.C. § 249(a)(1), requires that a defendant willfully caused bodily injury to a victim (or attempted to do so through the use of a dangerous weapon) because of the "actual or perceived race, color, religion, or national origin" of any person. Similarly, 18 U.S.C. § 245(b)(2) applies only if the defendant injured, intimidated, or interfered with a victim (by actual, attempted, or threatened force) because of the victim's race, color, religion, or national origin and because the victim was participating in an enumerated protected right. Such requirements are sometimes described as capturing a defendant's motive. *See, e.g.,* United States v. Doggart, No. 1:15-CR-39-CLC, 2016 WL 6537675, at *1 (E.D. Tenn. Nov. 3, 2016) (determining that the use of "because of" in 18 U.S.C. § 247 "requires a showing of but-for causation as to [d]efendant's motivation").

By one definition, *motive* refers to something such as a "willful desire" that "leads one to act." *Motive*, BLACK'S LAW DICTIONARY (11th ed. 2019). *Motive* is often recognized to be analytically distinct from *mens rea*. United States v. Safehouse, 985 F.3d 225, 238 (3d Cir. 2021) ("[M]otive is distinct from mens rea. A defendant can be guilty even if he has the best of motives."). Nevertheless, the relationship between motives, mental states, and concepts such as "specific intent" can be murky. *See, e.g.*, United States v. Ali, 870 F. Supp. 2d 10, 20 (D.D.C. 2012) ("Court decisions, treatises, and law reviews are rife with debates about the relationship between specific intent and motive, and the relevance (if any) of the latter in a criminal case."); *accord* LAFAVE, *supra* note 5, at § 5.3(a).

Regardless of theoretical construction, the hate crime statutes referenced above illustrate that Congress has sometimes required proof in criminal provisions not only of a particular mental state, but also of a particular reason underlying a defendant's actions. Such requirements may serve a number of purposes. As discussed above, in the hate crime context the requirement of proving a defendant's reasons for acting may provide a jurisdictional basis for the legislation. More broadly, limiting a statute to defendants who act for a particular reason may help to

[396] *See supra* notes 345–347 and accompanying text.

[397] *E.g.*, 49 U.S.C. § 5124(b) (defining *knowingly* for purposes of criminal violations of restrictions on transportation of hazardous material as "actual knowledge of the facts giving rise to the violation" *or* that "a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge").

[398] *See* 18 U.S.C. § 794(a) (proscribing delivery of defense information to foreign government or actor "with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation"); *id.* § 1521 (proscribing filing false lien against federal officer or employee "knowing or having reason to know" of falsity); 21 U.S.C. § 841(c)(2) (proscribing possession or distribution of listed chemicals "knowing, or having reasonable cause to believe," they will be used to manufacture controlled substance).

[399] *See* United States v. Williamson, 746 F.3d 987, 994 (10th Cir. 2014); United States v. Munguia, 704 F.3d 596, 603 (9th Cir. 2012) (quoting United States v. Johal, 428 F.3d 823, 828 (9th Cir. 2005)); United States v. Galvan, 407 F.3d 954, 957 (8th Cir. 2005) (concluding that jury instruction treating "reasonable cause to believe" as akin to actual knowledge would incorrectly render the phrase redundant); United States v. Mallory, 343 F. Supp. 3d 570, 576 (E.D. Va. 2018).

narrow its applicability to the category of individuals Congress believes are worthy of criminal punishment (for instance, ensuring that hate crime statutes apply only to those who did act with a particular biased motivation).

Another area where the concept of motive may be relevant, depending on one's definition, is as a component of certain defenses to criminal liability. *See, e.g.*, Rosemond v. United States, 572 U.S. 65, 89 (2014) (Alito, J., concurring in part and dissenting in part) ("Unsurprisingly, our cases have recognized that a lawful motive (such as necessity, duress, or self-defense) is consistent with the *mens rea* necessary to satisfy a requirement of intent.").

Omitting a Mental State Requirement

Because the language of a statute is the starting point in statutory construction,[400] a federal criminal statute containing a *mens rea* term such as *knowingly* clearly indicates that Congress meant to require some culpable mental state.[401] When Congress omits an express *mens rea* requirement from the statutory text, however, the question arises as to whether that omission was intentional—in other words, whether Congress intended to dispense with any mental-state requirement and make the offense one of strict liability.[402] In a series of cases, the Supreme Court has recognized, at least with respect to federal offenses based on traditional common-law crimes, a "presumption in favor of scienter,"[403] meaning the Court will ordinarily presume a "degree of knowledge sufficient to 'mak[e] a person legally responsible for the consequences of his or her act or omission.'"[404] Put differently, the Court has held that ordinarily "some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime,"[405] and mere omission of a *mens rea* term will not be considered a sufficient indication of such intent.[406]

Assuming the presumption of *mens rea* applies, and thus that a mental-state requirement should be read into a statute that does not explicitly contain one, the question becomes what *kind* of mental state is required. In this respect, the Supreme Court has held that "[t]he presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"[407] Typically, the standard of knowledge is sufficient to meet this requirement.[408] For instance, in *Staples v. United States*, the

[400] Staples v. United States, 511 U.S. 600, 605 (1994).

[401] *See* United States v. Figueroa, 165 F.3d 111, 114 (2d Cir. 1998) ("By using the word 'knowingly,' Congress chose to include some knowledge requirement for a conviction under [the statute].").

[402] *Strict-liability crime* is defined as one "for which the action alone is enough to warrant a conviction, with no need to prove a mental state; specif., a crime that does not require a *mens rea* element, such as traffic offenses and illegal sales of intoxicating liquor." *Crime*, BLACK'S LAW DICTIONARY (12th ed. 2024). Strict liability may apply to only one or some of the elements of an offense. *E.g.*, *Staples*, 511 U.S. at 609 (addressing statute imposing strict liability as to unregistered nature of firearm but requiring knowledge of features of firearm making it subject to regulation).

[403] Rehaif v. United States, 588 U.S. 225, 229 (2019).

[404] *Id.* (*Scienter*, BLACK'S LAW DICTIONARY (10th ed. 2014).).

[405] *Staples*, 511 U.S. at 606.

[406] Morissette v. United States, 342 U.S. 246, 263 (1952).

[407] Carter v. United States, 530 U.S. 255, 269 (2000) (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994)). As explained in more detail *infra*, this formulation also speaks to the question of *which elements* of a statutory offense bear a *mens rea* requirement.

[408] *See Carter*, 530 U.S. at 268–69 (concluding that presumption in favor of scienter required proof "of *general intent*—that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime," but caveating that "some situations may call for implying a specific intent requirement into statutory text"); John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1109 (1999) ("[W]hen Congress has omitted all culpability language, . . . [t]he Court apparently has adopted the 'knowledge' standard as the default[.]"); *but cf.* Counterman v. Colorado, 600 U.S. 66, 69 (2023) ("The question presented is (continued...)

Court held that a statute making it unlawful to receive or possess certain kinds of unregistered firearms[409] required knowledge of the features of the firearm that brought it within the scope of the statute.[410] In reaching its conclusion, the Court observed that omitting a requirement that a "defendant know the facts that make his conduct illegal" would "impose criminal sanctions on a class of persons whose mental state . . . makes their actions entirely innocent."[411]

The Court also has recognized a class of "'public welfare' or 'regulatory' offenses" to which the presumption will not apply (i.e., offenses where statutory silence is treated as imposing "a form of strict criminal liability" by "not requir[ing] the defendant to know the facts that make his conduct illegal.")[412] Typically, "such offenses involve statutes that regulate potentially harmful or injurious items" or activities, which put individuals on notice of the likelihood of regulation, [413] and impose relatively small penalties.[414]

Several factors may be relevant to a court's determination of whether a particular criminal statute imposes strict liability, including the nature of the statute and the particular activity or item regulated, the purpose of the criminal prohibition (i.e., punishment of wrongdoing versus protection of the public), the degree to which a defendant will be in a position to ascertain the relevant facts, and the severity of the penalties.[415] Strictly speaking, however, even so-called "strict liability" public welfare offenses are not viewed as *completely* dispensing with any state-of-mind requirement—rather, they require "only so much knowledge as is necessary to provide defendants with reasonable notification that their actions are subject to strict regulation."[416] Put differently, public welfare offenses "require at least that the defendant know that he is dealing with some dangerous or deleterious substance" but not necessarily "the facts that make his conduct fit the definition of the offense."[417]

The absence of a *mens rea* requirement in a criminal statute may present constitutional difficulties in particular contexts. For instance, the omission of a *mens rea* requirement may raise particular First Amendment concerns in contexts involving speech[418] or Due Process issues under the Fifth

whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements. We hold that it does, but that a mental state of recklessness is sufficient.").

[409] 26 U.S.C. § 5861(d).

[410] 511 U.S. 600, 619 (1994).

[411] *Id.* at 605, 614–15.

[412] *Id.* at 606–07.

[413] *Id.* at 607.

[414] Morissette v. United States, 342 U.S. 246, 254, 256 (1952) (recognizing criminal regulatory offenses "which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare" and noting that "penalties [for such offenses] commonly are relatively small, and conviction does no grave damage to an offender's reputation"). One of the earliest examples of the Supreme Court's recognition of a public welfare offense lacking a mens rea requirement is *United States v. Balint*, in which the Court addressed a statute prohibiting the sale of certain narcotics without a tax form issued by the federal government. 258 U.S. 250, 251 (1922). In *Balint*, the Court concluded that the government was not required to prove that they knew the drugs they sold — derivatives of opium and coca leaves—were covered by the statute, and recognized a class of "regulatory measures" lacking a scienter requirement where the emphasis was "upon achievement of some social betterment rather than . . . punishment." *Id.* at 251, 252–54.

[415] *See, e.g.*, *Staples*, 511 U.S. at 607; *Morissette*, 342 U.S. at 255–56; United States v. Dotterweich, 320 U.S. 277, 280–82 (1943); *Balint*, 258 U.S. at 254.

[416] United States v. Figueroa, 165 F.3d 111, 116 (2d Cir. 1998) (Sotomayor, J.).

[417] *Staples*, 511 U.S. at 607 n.3.

[418] *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (interpreting a statute criminalizing distribution of sexually explicit visual depictions of minors (18 U.S.C. § 2252(a)) as requiring a defendant to have knowledge of the minority of those involved, in part based on First Amendment concerns).

Amendment in statutes imposing severe penalties.[419] Nevertheless, although the Supreme Court has struck down one strict-liability city ordinance on due-process grounds in a fairly unique circumstance involving "wholly passive" conduct with no notice or opportunity to comply,[420] it has at other times appeared to affirm the constitutionality of strict-liability crimes more generally.[421] Further, at least one federal appellate court has rejected the proposition that strict-liability felonies are *per se* unconstitutional.[422] As such, the precise constitutional limits of strict-liability public welfare offenses are unclear.[423]

Distribution of Mental State Requirement to Prohibited Conduct and Other Elements

Assuming either that Congress has provided a *mens rea* requirement in a federal criminal statute, or that a court concludes a statute silent on the issue carries one, the question may arise as to which elements of the crime must meet that requirement. One innovation of the Model Penal Code was its recognition that the mental state for a particular crime should be analyzed on an element-by-element basis.[424] This approach is also generally employed under federal law.[425] In some statutes, Congress may have provided relatively clear instruction as to what *mens rea* term must be established for distinct components of the crime at issue—for example, 18 U.S.C. § 1591 makes it a crime to "knowingly" recruit a person "knowing" or "in reckless disregard of the fact" that force or other proscribed means will be used to cause the person to engage in a commercial sex act, or that the person is under the age of 18 and will be caused to engage in a commercial sex act.[426] It is often the case, however, that Congress will provide penalties for a "willful" or "knowing" violation of a statute that contains multiple elements, for instance, or will omit a textual mental-state requirement for a crime that is presumed to have at least one as described

[419] United States v. Enochs, 857 F.2d 491, 494 n.2 (8th Cir. 1988); *see also* United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985) (indicating that *mens rea* may only constitutionally be eliminated "where (1) the penalty is relatively small, and (2) where conviction does not gravely besmirch," and concluding that felony provision of Migratory Bird Treaty Act "d[id] not meet these criteria"); *cf.* United States v. DeCoster, 828 F.3d 626, 633 (8th Cir. 2016) ("The elimination of a *mens rea* requirement does not violate the Due Process Clause for a public welfare offense where the penalty is 'relatively small,' the conviction does not gravely damage the defendant's reputation, and congressional intent supports the imposition of the penalty.").

[420] Lambert v. California, 355 U.S. 225, 228–29 (1957). For further discussion of *Lambert*, see *supra* "Status Offenses."

[421] *See Balint*, 258 U.S. at 252 ("It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making it so, is an absence of due process of law. But that objection is considered and overruled . . . ."); United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978) (stating that "strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements"). The Court has also acknowledged the muted impact of *Lambert*, stating that its "application has been limited" and signaling some agreement with the proposition that it stands "as 'an isolated deviation from the strong current of precedents[.]'" Texaco, Inc. v. Short, 454 U.S. 516, 537 n.33 (1982) (quoting Lambert v. California, 355 U.S. 255 (1957))).

[422] United States v. Engler, 806 F.2d 425, 433 (3d Cir. 1986) (stating that bright-line rule regarding felonies "ignore[s] a formidable line of cases imposing strict liability in felony cases without proof of scienter"); *see also* United States v. Stepanets, 989 F.3d 88, 98 (1st Cir. 2021) ("[Precedent] refutes the notion that due process requires there to be a *mens rea* element in an offense as a categorical matter.").

[423] *Engler*, 806 F.2d at 433 ("The Supreme Court has indicated that the due process clause may set some limits on the imposition of strict criminal liability, but it has not set forth definite guidelines as to what those limits might be.").

[424] *See supra* "MPC Approach to Mental States."

[425] *See, e.g.*, Rehaif v. United States, 588 U.S. 225, 228 (2019) (assessing which elements of statutory crime require knowledge).

[426] 18 U.S.C. § 1591(a). The statute also limits the "reckless disregard" standard for certain conduct and provides an exception to the requirement of knowledge or reckless disregard of age where "the defendant had a reasonable opportunity to observe the person" recruited. *Id.* §§ 1591(a), (c).

above.[427] In this circumstance, courts are left to glean congressional intent as to which elements must meet the *mens rea* term that either is specified or presumed.

As with the question of whether a statute has a *mens rea* requirement at all, federal courts have applied certain presumptions and general principles that guide them in determining which elements of a crime must meet a mental-state requirement. First, the Supreme Court has made clear that the presumption in favor of scienter applies to "each of the statutory elements that criminalize otherwise innocent conduct."[428] Put another way: "Absent clear congressional intent to the contrary, statutes defining federal crimes are . . . normally read to contain a mens rea requirement that attaches to enough elements of the crime that together would be sufficient to constitute an act in violation of the law."[429] For instance, in *United States v. Bruguier*, a federal appellate court concluded that a federal statute proscribing "knowingly" engaging in a sexual act with another person "if that other person is . . . incapable of appraising the nature of the conduct" or physically incapable of expressing lack of consent[430] required both knowingly engaging in the sexual act *and* knowledge that the other person could not appraise the nature of the conduct or express lack of consent.[431] In reaching this conclusion, the court noted that knowingly engaging in a sexual act with another person "is not inherently criminal under federal law, barring some other attendant circumstance."[432] By contrast, in *United States v. Feola*, the Supreme Court determined that a statute criminalizing assault on a federal officer "while engaged in or on account of the performance" of official duties[433] did not require the assailant to be aware that the victim was a federal officer, emphasizing that a perpetrator "knows from the very outset that his planned course of conduct is wrongful" and thus the "situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected."[434]

The distributive approach emphasizing a distinction between elements that make conduct criminal (as in *Bruguier*, where incapacity and knowledge thereof made conduct criminal that otherwise was not inherently so) and elements that "merely aggravate[] conduct that already is criminal" (as in *Feola*, where the element at issue merely defined a subset of assaults as federally punishable) has been subject to criticism for its lack of clarity.[435] Recent Supreme Court cases have at times appeared to skirt the lack of clarity and move toward a rule more akin to the MPC approach—in essence, that, absent an indication of congressional intent to the contrary, a mental-state requirement applies to each material element of the offense.[436] In *Flores-Figueroa v. United States*, the Court addressed a provision imposing a mandatory two-year prison term on certain persons who "knowingly transfer[], possess[], or use[], without lawful authority, a means of identification of another person."[437] In a largely textual analysis, the Court concluded that the statute required proof that the defendant knew that the "means of identification" belonged to

[427] *E.g.*, *Rehaif*, 588 U.S. at 230 (referring to circumstance where *mens rea* term "introduces a long statutory phrase, such that questions may reasonably arise about how far into the statute the modifier extends"); *see supra* notes 402–406 and accompanying text (discussing judicial development of presumption in favor of scienter).

[428] United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994).

[429] United States v. Figueroa, 165 F.3d 111, 116 (2d Cir. 1998) (Sotomayor, J.).

[430] 18 U.S.C. § 2242. The statute is jurisdictionally limited to the SMTJ and certain federal facilities. *Id.*

[431] 735 F.3d 754, 763 (8th Cir. 2013).

[432] *Id.* at 761.

[433] 420 U.S. 671, 673 n.1 (1975) (quoting 18 U.S.C. § 111).

[434] *Id.* at 685.

[435] *See* Johnson, *supra* note 357, at 780 ("The academic commentary has been broadly critical of this limitation on the *mens rea* presumption.").

[436] *See* MODEL PENAL CODE §§ 2.02(4) (AM. L. INST. 1985).

[437] 556 U.S. 646, 647 (2009) (quoting 18 U.S.C. § 1028A(a)(1)).

another person, based in part on the recognition that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element."[438] Some observers subsequently recognized that this language could be viewed as "parallel[ing] the distributive default of the Model Penal Code,"[439] though several Justices wrote separately in the case to make clear that they did not necessarily agree with the language as a "normative description of what courts *should* ordinarily do when interpreting such statutes."[440] The federal courts of appeals have largely recognized that *Flores-Figueroa*'s language does not "establish a bright-line rule that a specified mens rea always applies to every element of the offense."[441] In contrast, in *Torres v. Lynch*, the Court explained that "[i]n general, courts interpret criminal statutes to require that a defendant possess a *mens rea*, or guilty mind, as to every element of an offense."[442] Moreover, in *Rehaif v. United States*, the Court indicated that the presumption of scienter as to an element "applies with equal or greater force when Congress includes a general scienter provision in the statute itself," citing the MPC provision that establishes a default distributive rule applying to all material elements.[443] The Court in *Rehaif* also gestured to the "innocent conduct" analysis, however, in concluding that the statute at issue—which penalized "knowing[]" violations of a provision proscribing firearm possession by aliens unlawfully in the United States—required application of the knowledge standard to both the defendant's conduct and immigration status, specifying that "the possession of a gun can be entirely innocent" and thus applying *mens rea* to immigration status helped "separate wrongful from innocent acts."[444]

Regardless of whether or when a presumption of scienter attaches to other elements of a criminal offense, what is clear is that no presumption applies with respect to *jurisdictional* elements—that is, elements that "simply ensure that the Federal Government has the constitutional authority to regulate the defendant's conduct" by, for instance, limiting an offense to conduct "in or affecting

[438] *Id.* at 652.

[439] Leonid Traps, *"Knowingly" Ignorant: Mens Rea Distribution in Federal Criminal Law After Flores-Figueroa*, 112 COLUM. L. REV. 628, 629 (2012); *see also* Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, 75 L. & CONTEMP. PROBS. 109, 121 (2012) ("If [the Court's] claim is taken as a canon of construction, it should work much like the MPC's provision that dictates a culpability term should apply to all material elements.").

[440] *Flores-Figueroa*, 556 U.S. at 658 (Scalia, J., concurring); *see also id.* at 660 (Alito, J., concurring) (viewing as "fair" a "general presumption" that a specified *mens rea* applies "to all the elements of an offense" but collecting contextual instances where that presumption is rebutted).

[441] United States v. Washington, 743 F.3d 938, 942 (4th Cir. 2014); *see also* United States v. Price, 980 F.3d 1211, 1220 (9th Cir. 2019) ("We have explicitly rejected the notion that the Court's reading of 'knowingly' in *Flores-Figueroa* compels the same reading in every criminal statute that uses the word 'knowingly.'"); United States v. Cox, 577 F.3d 833, 838 (7th Cir. 2009) (indicating that *Flores-Figueroa* "did not establish a rule for all circumstances"); United States v. Daniels, 653 F.3d 399, 410 (6th Cir. 2011) ("*Flores-Figueroa* does not compel a particular interpretation . . . . Rather, the resolution of this issue depends on the relative weight given to text and context."). Some courts have expressly treated *Flores-Figueroa* as recognizing a presumption that a stated *mens rea* term, or at least a "knowingly" term at the beginning of a sequence of statutory elements, applies to every subsequent element, which can be rebutted "where the 'context' or 'background circumstances' of a statute lead to a different reading." United States v. Bruguier, 735 F.3d 754, 761 (8th Cir. 2013) (*Flores-Figueroa*, 556 U.S. at 652); United States v. Daniels, 685 F.3d 1237, 1248–49 (11th Cir. 2012) ("Although there is a general presumption that a knowing *mens rea* applies to every element in a statute, cases concerned with the protection of minors are within a special context, where that presumption is rebutted.").

[442] 578 U.S. 452, 467 (2016).

[443] 588 U.S. 225, 229 (2019) (citing MODEL PENAL CODE § 2.02(4) (AM. L. INST. 1985)).

[444] *Id.* at 232.

commerce."[445] As the Court in *Rehaif* stated: "Because jurisdictional elements normally have nothing to do with the wrongfulness of the defendant's conduct, such elements are not subject to the presumption in favor of scienter."[446]

Punishment

It has been observed that "conduct cannot be called 'criminal' unless a punishment is prescribed therefor."[447] Congress has considerable leeway to determine the appropriate penalties for a given crime[448]—subject to Eighth Amendment limitations.[449] As one federal court has explained, "[w]hen Congress has identified a societal problem and articulated a rational response, courts must 'step softly and cede a wide berth' to the legislature's 'authority to match the type of punishment with the type of crime.'"[450] Common types of criminal punishment include imprisonment, fines, criminal asset forfeiture, and restitution.[451] This section briefly discusses each of these consequences, although federal statutes can, and often do, authorize multiple types of punishment for the same offense.[452]

[445] *Id.* at 230 (noting that "jurisdictional elements do not describe the 'evil Congress seeks to prevent'" (quoting *Torres*, 578 U.S. at 467)).

[446] *Id.* Additionally, relying on the notion that only the *mens rea* necessary to separate wrongful from otherwise innocent conduct is required, courts have found no need to read a *mens rea* requirement into provisions that merely enhance the sentence for conduct that is already criminally proscribed. *E.g.*, Dean v. United States, 556 U.S. 568, 575–76 (2009) (observing that "it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts" and concluding no *mens rea* applied to a "sentencing enhancement . . . account[ing] for the risk of harm resulting from the manner in which the crime is carried out"); United States v. McDuffy, 890 F.3d 796, 801 (9th Cir. 2018) ("Thus, the presumption in favor of scienter is lessened, if not altogether absent, when considering sentencing enhancement provisions."). Questions may arise as to when a provision in a statute constitutes an element of the offense versus an enhancement provision. *Cf.* United States v. Burwell, 690 F.3d 500, 505, 508 (D.C. Cir. 2012) (calling "misguided" the suggestion "that the label 'element of the offense,' as opposed to 'sentencing factor,' is determinative of the *mens rea* requirement" and emphasizing that "certain offense elements do not require proof of an additional *mens rea*, so long as the offense as a whole carries a scienter requirement that separates innocent from criminal conduct").

[447] LAFAVE, *supra* note 5, at § 1.2; *see also Criminal Law*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining *criminal law* as "[t]he body of law defining offenses against the community at large, regulating how suspects are investigated, charged, and tried, and *establishing punishments for convicted offenders*." (emphasis added)).

[448] *See, e.g.*, United States v. Blodgett, 872 F.3d 66, 72 (1st Cir. 2017) (quoting United States v. Polk, 546 F.3d 74, 76 (1st Cir. 2008)).

[449] The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. For an overview of Eighth Amendment jurisprudence see generally Cong. Rsch. Serv., *Amdt8.1 Overview of Eighth Amendment, Cruel and Unusual Punishment*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt8-1/ALDE_00000258/ (last visited Sept. 9, 2024) through Cong. Rsch. Serv., *Amdt8.4.9.10 Execution Methods*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt8-4-9-10/ALDE_00000975/ (last visited Sept. 9, 2024).

[450] *Blodgett*, 872 F.3d at 72 (quoting *Polk*, 546 F.3d at 76.).

[451] Other consequences may be possible depending on the circumstances. *See, e.g.*, 18 U.S.C. § 2381 (criminalizing treason and specifying that violators "shall be incapable of holding any office under the United States.").

[452] *See, e.g.*, 18 U.S.C. § 1030 (criminalizing various forms of unauthorized computer access and authorizing imprisonment, fines, forfeiture, and a private civil right of action).

Imprisonment

Imprisonment is perhaps the consequence most associated with criminal statutes.[453] Prison terms authorized in federal criminal law vary widely from statute to statute[454] and sometimes within a single statute, depending on the gravity of the offense.[455]

Often federal criminal statutes set a maximum prison term for a violation.[456] For example, 18 U.S.C. § 471—a federal counterfeiting statute—specifies that violators "shall be fined under this title or imprisoned *not more than* 20 years, or both."[457] Similarly, 18 U.S.C. § 41—a statute restricting hunting, fishing, or trapping in national wildlife refuges—states that violators "shall be fined under this title or imprisoned *not more than* six months, or both."[458] In such statutes, the authorized penalty is functionally a ceiling for punishment.

Other federal statutes impose mandatory minimum sentences.[459] These statutes essentially create a floor for punishment whereby offenders must be imprisoned for at least the amount of time specified[460] (assuming another statutory mechanism does not provide relief[461]). As one illustration, 18 U.S.C. § 2332g criminalizes (among other things) possession or use of an antiaircraft missile and specifies that violators "shall be fined not more than $2,000,000 and shall

[453] *See* LAFAVE, *supra* note 5, at § 1.3(a) ("Yet, even aside from differences in moral condemnation, it would seem that criminal punishment, with emphasis on imprisonment, is on the whole more drastic than the sanctions, with emphasis upon paying money, imposed by the civil law, even though in a particular case it may be that the civil sanction imposed is harder on the defendant than the counterpart criminal punishment would be."); *but see* 18 U.S.C. § 489 (prohibiting certain reproductions of coins and authorizing only fines as punishment).

The majority of individuals sentenced for federal criminal violations will also be subjected to a term of supervised release with various conditions—a topic discussed in other CRS products. *See generally* CRS Report RL31653, *Supervised Release (Parole): An Overview of Federal Law*, by Charles Doyle (2021). "Supervised release is the successor to parole in the federal criminal justice system . . . . In its place, Congress instituted a system that includes supervised release, which applies to all federal crimes committed after November 1, 1987." *Id.* at 1. For a discussion of home and community confinement, *see* CRS Report R46297, *Federal Prisoners and COVID-19: Background and Authorities to Grant Release*, by Nathan James and Michael A. Foster, at 12 (2020).

[454] *Compare*, *e.g.*, 18 U.S.C. § 41 (authorizing fines and up to six months of imprisonment for, among other things, unauthorized hunting in certain wildlife refuges) *with e.g.*, *id.* § 1111(b) (authorizing up to life imprisonment (or the death penalty) for first degree murder committed in the SMTJ).

[455] *See*, *e.g.*, Berris, *supra* note 186, at 26–28 (providing tabular summary of the various penalties authorized by the Computer Fraud and Abuse Act).

[456] *See*, *e.g.*, 18 U.S.C. § 752(a) (specifying fines or imprisonment for "not more than one year, or both" for, among other things, aids and assists an escape from federal custody); *id.* § 1082 (proscribing certain activities related to gambling ships and authorizing fines, imprisonment for "not more than two years, or both"); *id.* § 2316 ("Whoever transports in interstate or foreign commerce any livestock, knowing the same to have been stolen, shall be fined under this title or imprisoned *not more than* five years, or both." (emphasis added)).

[457] 18 U.S.C. § 471 (emphasis added).

[458] *Id.* § 41 (emphasis added).

[459] More information may be found in CRS Report RL32040, *Federal Mandatory Minimum Sentencing Statutes*, by Charles Doyle (2023), from which this subsection draws heavily. For a discussion of mandatory minimum sentences and the First Step Act, see generally CRS Legal Sidebar LSB10910, *When Is a Mandatory Minimum Sentence Not Mandatory Under the First Step Act?*, by Dave S. Sidhu (2023).

[460] Some federal statutes effectively set a mandatory minimum penalty by reference to underlying statutes. *See* Doyle, *supra* note 459, at 3 (discussing "piggyback" statutes). For example, 18 U.S.C. § 1114 prohibits the unlawful killing of certain federal employees and sets the penalty for murder by reference to 18 U.S.C. § 1111, which in turn mandates life imprisonment for violations in the first degree. *Id.*

[461] For example, under the First Step Act, some federal drug offenders may be sentenced beneath the otherwise applicable mandatory minimums. *See generally* CRS In Focus IF12651, *Drug Offense Sentencing Relief Under the First Step Act and the U.S. Sentencing Guidelines*, by Dave S. Sidhu (2024); CRS Legal Sidebar LSB11145, *Supreme Court Clarifies Scope of Drug Offense Sentencing Relief Under the First Step Act*, by Dave S. Sidhu (2024).

be sentenced to a term of imprisonment *not less than 25 years or to imprisonment for life*."[462] Similarly, a federal statute criminalizing causing damage to certain types of vehicles carrying "high-level radioactive waste" specifies that those convicted of violations "shall be fined under this title and imprisoned for any term of years *not less than 30, or for life*."[463] Other mandatory minimum statutes take a somewhat different approach; rather than setting a minimum prison term for violations and authorizing sentences at or above that length, they instead set a flat prison term for all violations (often life imprisonment).[464] For example, several federal statutes prohibiting piracy mandate that those convicted "shall be imprisoned for life."[465] Mandatory life sentences may raise unique Eighth Amendment considerations, as in the context of juveniles.[466]

Some federal statutes require that offenders be sentenced to a specific range by specifying both a mandatory minimum and a statutory maximum.[467] For instance, a federal statute prohibiting bribing meat inspectors specifies that offenders "shall be punished . . . by imprisonment not less than one year nor more than three years."[468]

The U.S. Sentencing Guidelines

As indicated, federal criminal statutes often set a maximum or minimum prison sentence, or both. To determine the particular sentence a defendant should receive within statutory limits, federal judges look to the U.S. Sentencing Guidelines (Guidelines). In general, "[s]entencing for all serious federal noncapital crimes begins" with the Guidelines. CRS Report R41696, *How the Federal Sentencing Guidelines Work: An Overview*, by Charles Doyle (2015). The U.S. Sentencing Commission (USSC)—an independent judicial branch agency—promulgates the Guidelines. *Id.* The Guidelines include 43 different offense levels that correspond to a suggested sentencing range, which may be increased or decreased based on other sentencing factors. *Id.*; *see also* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing table (U.S. SENTENCING COMM'N 2018). In determining the applicable range under the Guidelines, sentencing courts look to the base offense level, the defendant's criminal history, and circumstance-dependent sentencing adjustments. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1, Application Instructions (U.S. SENTENCING COMM'N 2018); U.S. SENTENCING GUIDELINES MANUAL § 1B1.2 (U.S. SENTENCING COMM'N 2018). The sentencing court must also consider the statutory factors listed in 18 U.S.C. § 3553(a), which include considerations such as "the nature and circumstances of the offense and the history and characteristics of the defendant" and the need for the sentence "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a).

In general, the Guidelines are considered advisory and not binding on federal courts due to *Apprendi v. New Jersey* and its progeny. 530 U.S. 466, 490 (2000); *see also United States v. Booker*, 543 U.S. 220, 226 (2005); *c.f.* CRS Report R47060, *Overview of Federal Hate Crime Laws*, by Peter G. Berris, at 45 (2022) (collecting authorities about whether the hate crime enhancement remains mandatory since it generally requires that the jury determine

[462] 18 U.S.C. § 2332g(c)(1) (emphasis added); *see also id.* § 2261 ("Whoever commits the crime of stalking in violation of a temporary or permanent civil or criminal injunction, restraining order, no-contact order, or other order described in section 2266 of title 18, United States Code, shall be punished by imprisonment *for not less than* 1 year." (emphasis added)).

[463] *Id.* § 33 (emphasis added).

[464] *E.g.*, *id.* § 175c(c)(3) (mandating life imprisonment if death results from violation of provision criminalizing, among other things, unlawful production, acquisition, or possession of the variola virus).

[465] *Id.* §§ 1651, 1652, 1653.

[466] *See generally* CRS Report R47158, *Juvenile Life Without Parole: In Brief*, by Emily J. Hanson and Joanna R. Lampe (2022).

[467] *See*, *e.g.*, 18 U.S.C. § 1865(d) ("An individual who trespasses in a national military park to hunt or shoot, or hunts game of any kind in a national military park with a gun or dog, or sets a trap or net or other device in a national military park to hunt or catch game of any kind, *shall be imprisoned not less than 5 nor more than 30 days*, fined under this title, or both." (emphasis added)).

[468] 21 U.S.C. § 622.

beyond a reasonable doubt that the defendant acted because of certain biases). In *Apprendi*, the Supreme Court held that the Sixth Amendment right to a jury trial requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 5 30 U.S. at 490. Subsequently, in *United States v. Booker*, the Court applied *Apprendi* to the Guidelines and invalidated a statute that made application of the guidelines mandatory. 543 U.S. 220, 245, (2005). Federal courts must at least consult the guidelines as the starting point of their sentencing determinations. United States v. Booker, 543 U.S. 220, 264 (2005). The Guidelines are also instructive on whether a defendant must serve some or all of their sentence in prison, or whether alternatives such as probation may be available as well. For more information on the Guidelines and related topics, see generally the following CRS products:

- CRS Report R41696, *How the Federal Sentencing Guidelines Work: An Overview*, by Charles Doyle (2015)
- CRS Legal Sidebar LSB10890, *Back in Action, the U.S. Sentencing Commission to Resolve Circuit Splits on Controlled Substances and Sentencing Reductions*, by Dave S. Sidhu (2022)
- CRS Legal Sidebar LSB10910, *When Is a Mandatory Minimum Sentence Not Mandatory Under the First Step Act?*, by Dave S. Sidhu (2023)
- CRS Report WPD00049, *An Overview of the U.S. Sentencing Commission*, by David Gunter and Dave S. Sidhu (2023)
- CRS Video WVB00582, *The Insider Threat: Federal Cybercrime Law & Sentencing*, by Peter G. Berris, Michael A. Foster, and Dave S. Sidhu (2023)
- CRS In Focus IF12422, *Congressional Review of Proposed Amendments to the U.S. Sentencing Guidelines*, by Dave S. Sidhu (2023)
- CRS Legal Sidebar LSB11037, *The U.S. Sentencing Commission Seeks to Limit the Use of Acquitted Conduct in Federal Sentencing*, by Dave S. Sidhu (2023)
- CRS Legal Sidebar LSB11041, *Does Losing a Motion to Suppress Bar a Sentencing Reduction for Admitting Guilt? Federal Courts Are Split*, by Dave S. Sidhu and Rosemary W. Gardey (2023)
- CRS Video WVB00627, *The U.S. Sentencing Guidelines: Overview and Selected Issues*, by Peter G. Berris, Rosemary W. Gardey, and Dave S. Sidhu (2023)

Capital Punishment

Some federal statutes authorize capital punishment—also known as the death penalty—in addition to fines or imprisonment.[469] For example, 18 U.S.C. § 1201—the federal kidnapping statute—states that violations "shall be punished by death or life imprisonment" if "the death of any person results."[470] The Eighth Amendment poses a significant limitation on capital punishment. The Supreme Court's Eighth Amendment precedent on cruel and unusual punishment has limited the class of offenders who are eligible for the death penalty to those "who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[471] In the context of crimes against individuals, the death penalty may not be imposed in "instances where the victim's life was not taken."[472] As a result, although some statutes contain language authorizing the death penalty for offenses that involve actual or attempted kidnapping or aggravated sexual abuse, or an attempt to kill, such as 18 U.S.C. §§ 241, 242, 245, 247, Supreme Court precedent would seemingly foreclose application of

[469] For an overview, see generally CRS Report R42095, *Federal Capital Offenses: An Overview of Substantive and Procedural Law*, by Charles Doyle (2023).

[470] 18 U.S.C § 1201. For more information on federal kidnapping law, see Berris, Foster, and Gaffney, *supra* note 72 24–26.

[471] Kennedy v. Louisiana, 554 U.S. 407, 420, *modified on denial of reh'g*, 554 U.S. 945 (2008) (quoting Roper v. Simmons, 543 U.S. 551, 568 (2005)).

[472] *Id.* at 437; *see also id*. at 438 (stating that nonhomicide crimes, including child rape, "may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' they cannot be compared to murder in their severity and irrevocability" (quoting Coker v. Georgia, 433 U.S. 584 (1977))).

the death penalty to nonfatal or nonhomicide violations of such laws.[473] In addition, the Supreme Court has ruled that the Eighth Amendment forecloses capital punishment for juveniles,[474] the intellectually disabled,[475] or a prisoner with a "concept of reality . . . 'so impair[ed]' that he cannot grasp the execution's 'meaning and purpose' or the 'link between [his] crime and its punishment.'"[476]

Financial Consequences

Beyond imprisonment, federal criminal statutes typically authorize financial punishment.[477] Common examples include fines, criminal asset forfeiture, and restitution. At the margins, the Eighth Amendment's prohibition on excessive fines[478] limits the magnitude of the financial consequences Congress may authorize for a violation of a criminal law.[479] The Supreme Court has said that the "touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[480] More information about the Eighth Amendment and excessive fines may be found in other CRS products.[481]

Fines

Many federal criminal statutes, particularly those contained in Title 18, authorize fines by stating that violators "[s]hall be fined under this title"[482] or "fine[d] in accordance with this title."[483] Such phrases trigger 18 U.S.C. § 3571, a default statute that sets the maximum authorized fines based on the classification of the underlying offense, which itself depends on the maximum authorized prison term.[484] For example, for offenses punishable by a maximum of one year of imprisonment (Class A Misdemeanors), the maximum authorized fine for individuals is generally $100,000.[485] For offenses that are felonies (punishable by more than one year of imprisonment), the maximum

[473] For a discussion of the Eighth Amendment and capital punishment, see, e.g., CRS Legal Sidebar LSB10357, *Federal Capital Punishment: Recent Developments*, by Michael A. Foster (2020).

[474] Roper v. Simmons, 543 U.S. 551, 575 (2005).

[475] Atkins v. Virginia, 536 U.S. 304, 321 (2002); *see generally* Cong. Rsch. Serv., *Amdt8.4.9.7 Cognitively Disabled and Death Penalty*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt8-4-9-7/ALDE_00000972/ (last visited Sept. 9, 2024).

[476] Madison v. Alabama, 586 U.S. 265, 269 (2019) (quoting Panetti v. Quarterman, 551 U.S. 930 (2007)); *see also* 18 U.S.C.§ 3596(b)-(c) ("A sentence of death shall not be carried out upon a woman while she is pregnant . . . [or] upon a person who is mentally retarded . . . [or] upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person.").

[477] *See*, *e.g.*, 18 U.S.C. § 1030 (authorizing fines and asset forfeiture).

[478] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[479] *See* United States v. Bajakajian, 524 U.S. 321, 328 (1998) ("The Excessive Fines Clause thus 'limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" (quoting Austin v. United States, 509 U.S. 602, 609–610 (1993))).

[480] *Id.* at 334.

[481] *See generally* CRS Legal Sidebar LSB10196, *Are Excessive Fines Fundamentally Unfair?*, by Charles Doyle (2019); Cong. Rsch. Serv., *Amdt8.3 Excessive Fines*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt8-3/ALDE_00000962/ (last visited Sept. 9, 2024).

[482] *E.g.*, 18 U.S.C. § 288.

[483] *E.g.*, *id.* § 1468.

[484] *Id.* §§ 3559, 3571.

[485] *Id.* §§ 3559(a)(6), 3571(b)(5).

authorized fine for individuals is generally $250,000.[486] If, however, the defendant derives "pecuniary gain from the offense" or the "offense results in pecuniary loss to a person other than the defendant," the defendant may instead be fined "twice the gross gain or twice the gross loss" if that amount is greater than the standard fine under the statute.[487] A table summarizing the default fines authorized for each offense classification is provided in **Table 1**.

Not all federal criminal statutes authorize fines and set the particular amount by reference to § 3571. For example, 18 U.S.C. § 175c—criminalizing production, possession, or use of the variola virus, among other things—specifies that violations are subject to a fine of up to $2,000,000.[488] Other statutes refer to § 3571 to set fine amounts in general but authorize specific maximum fines for certain types of violations. The federal wire fraud statute, for instance, generally defers to § 3571 except in the case of fraud occurring during certain emergencies or affecting a financial institution, in which case the maximum fine is $1,000,000.[489]

Table 1. Default Federal Criminal Fines

Maximum authorized fines and sentencing classification based on underlying authorized prison term

Prison term authorized by underlying statute	Corresponding sentencing classification	Corresponding maximum fine for individuals if not otherwise specified[a]	Corresponding maximum fine for organizations if not otherwise specified[a]
"Five days or less, or if no imprisonment is authorized"	Infraction	$5,000[b]	$10,000[b]
"Thirty days or less but more than five days"	Class C misdemeanor	$5,000; or $250,000 if offense results in death[b]	$10,000; or $500,000 if offense results in death[b]
"Six months or less but more than thirty days"	Class B misdemeanor	$5,000; or $250,000 if offense results in death[b]	$10,000; or $500,000 if offense results in death[b]
"One year or less but more than six months"	Class A misdemeanor	$100,000; or $250,000 if offense results in death[b]	$200,000; or $500,000 if offense results in death[b]
"Less than five years but more than one year"	Class E felony	$250,000[b]	$500,000[b]
"Less than ten years but five or more years"	Class D felony	$250,000[b]	$500,000[b]
"Less than twenty-five years but ten or more years"	Class C felony	$250,000[b]	$500,000[b]
"Twenty-five years or more"	Class B felony	$250,000[b]	$500,000[b]
"Life imprisonment, or if the maximum penalty is death"	Class A felony	$250,000[b]	$500,000[b]

Source: 18 U.S.C. §§ 3559; 3571.

[486] *Id.* §§ 3559(a)(1)-(5), 3571(b)(3).

[487] *Id.* § 3571(d).

[488] *Id.* § 175c.

[489] *Id.* § 1343.

a. If the underlying statute specifies a greater fine than that specified in 18 U.S.C. § 3571, then the maximum is the amount authorized by the underlying statute. 18 U.S.C. § 3571(b)(1). If, however, "a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under [§ 3571]," then the higher fine under § 3571 is the maximum unless the other law "by specific reference, exempts the offense from the applicability of the fine otherwise applicable under [§ 3571]." *Id.* § 3571(e).

b. If "any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant," then the maximum fine level is the greater of the amount specified or twice the gain or loss associated with the offense. 18 U.S.C. § 3571(d).

Criminal Asset Forfeiture

Like fines, criminal asset forfeiture is another potential consequence of conviction of a federal criminal offense.[490] Criminal asset forfeiture is a statutorily created regime through which the federal government may confiscate tangible and intangible property connected with certain federal crimes.[491] Depending on the particular offense, property subject to criminal forfeiture may include, among other things, that "involved in [the] offense," "constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of [the] violation," or "traceable to the gross proceeds obtained, directly or indirectly, as a result of such violation."[492] Congress has authorized criminal asset forfeiture for numerous federal offenses, either directly in the statute creating the underlying offense[493] or by reference in general statutes governing forfeiture.[494] A detailed examination of criminal asset forfeiture, along with the related concept of civil asset forfeiture, may be found in CRS Report 97-139, *Crime and Forfeiture*, by Charles Doyle (2023).

Restitution

Another financial penalty that may be authorized by statute is restitution—compensation "paid by a criminal to a victim" for the victim's actual losses.[495] Restitution is "not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation."[496] Congress has authorized restitution for numerous federal offenses, either directly in the statute creating the underlying offense,[497] by reference in general statutes governing restitution,[498] or in other situations.[499] Depending on the underlying offense and applicable statutes, restitution may be

[490] *Id.* § 982.

[491] *Id.*

[492] *Id.*

[493] *See, e.g.*, *id.* § 1030(i)(1) ("The court, in imposing sentence on any person convicted of a violation of this section, or convicted of conspiracy to violate this section, shall order, in addition to any other sentence imposed and irrespective of any provision of State law, that such person forfeit to the United States . . . such person's interest in any personal property that was used or intended to be used to commit or to facilitate the commission of such violation; and . . . any property, real or personal, constituting or derived from, any proceeds that such person obtained, directly or indirectly, as a result of such violation.").

[494] *E.g.*, *id.* § 982.

[495] United States v. Ataya, 884 F.3d 318, 324 n.4 (6th Cir. 2018) (*quoting Restitution*, BLACK'S LAW DICTIONARY (10th ed. 2014)); United States v. DiLeo, 58 F. Supp. 3d 239, 248 n.5 (E.D.N.Y. 2014) (similar).

[496] *Ataya*, 884 F.3d at 324 n.4 (*quoting Restitution*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

[497] *E.g.*, 18 U.S.C.§ 43(c).

[498] *E.g.*, *id.* §§ 3663, 3663A.

[499] *See* CRS Report RL34138, *Restitution in Federal Criminal Cases*, by Charles Doyle at 11 (2019) (explaining that a "court may order restitution following conviction pursuant to a plea bargain or as a condition of either probation or supervised release" (footnotes omitted)).

discretionary or mandatory.[500] More information on federal restitution law may be found in CRS Report RL34138, *Restitution in Federal Criminal Cases*, by Charles Doyle (2019).

Penalties for Specific Harms or Circumstances

Not all violations of a given statute are necessarily equal. Some may result in greater or different harm than others. Relatedly, violations could be by a first-time or repeat offender. Congress can, and often does, authorize different penalties for different harms or circumstances. For example, 18 U.S.C. § 249(a)(1)—criminalizing willfully causing bodily injury to another because of certain protected characteristics of any person—generally authorizes up to 10 years of imprisonment for violations. However, the statute authorizes up to life imprisonment if the violation involves actual or attempted kidnapping or aggravated sexual abuse, or an attempt to kill, or if the violation results in death. Another illustration may be found in 18 U.S.C. § 1030. Among other things, the statute criminalizes knowing transmission of a code or command and intentional damage to a computer in certain situations (§ 1030(a)(5)(A)). First-time violations of that provision are ordinarily punishable by up to one year of imprisonment. However, the statute authorizes up to 10 years of imprisonment if there are certain harms such as physical injury to any person or a threat to public health or safety. The statute authorizes up to 20 years of imprisonment for knowingly or recklessly causing serious bodily injury or attempting to do so, or for subsequent violations of the statute. If the defendant knowingly or recklessly causes death, or attempts to do so, the maximum authorized prison term is life. The Armed Career Criminal Act embodies a different approach Congress has taken to authorize additional penalties in particular circumstances. That law focuses on recidivism and imposes a mandatory minimum sentence for those convicted of unlawful possession of a firearm when they have previously been convicted three or more times for violent felonies or serious drug offenses. 18 U.S.C. § 924(e). More information about the penalties in each of these statutes may be found in CRS Report R47557, *Cybercrime and the Law: Primer on the Computer Fraud and Abuse Act and Related Statutes*, by Peter G. Berris (2023); CRS Legal Sidebar LSB11077, *Armed Career Criminal Act (ACCA): When Does a Prior Drug Offense Qualify?*, by Charles Doyle (2023); CRS Report R47060, *Overview of Federal Hate Crime Laws*, by Peter G. Berris (2022). The U.S. Sentencing Guidelines, discussed above, also factor a number of mitigating and aggravating circumstances into the formulas for courts to consider when calculating a sentence.

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[500] *Compare* 18 U.S.C. § 3663(a) ("The court, when sentencing a defendant convicted of an offense under this title . . . *may* order . . . that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate" (emphasis added)) *with id.* § 3663A(a) ("Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court *shall* order . . . that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate." (emphasis added)).

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