DOES MENS REA MATTER?*

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Does mens rea matter to the criminal legal system? Our study addresses this question by performing the first-ever empirical analysis of a culpable mental state's impact on administration of a criminal statute. We focus on the U.S. Supreme Court's 2019 decision in *Rehaif v. United States*, which applied a culpable knowledge requirement to the federal felon-in-possession statute, 18 U.S.C. § 922(g). Prior to *Rehaif*, federal courts viewed § 922(g)'s critical legal status element—whether a firearm or ammunition possessor meets the conditions for one of nine prohibited categories—as being subject to strict liability. After *Rehaif*, the government must now prove that the target of a § 922(g) prosecution was aware of their prohibited legal status to secure a conviction. Our study provides reason to believe that this new mens rea requirement significantly reduced the number of defendants charged with § 922(g) per month, the number of § 922(g) charges filed each month, the number of § 922(g) charges per defendant, and the likelihood that any individual charge of § 922(g) would be adjudicated guilty. We estimate these charging reductions prevented 2,365.32 convictions and eliminated 8,419.06 years of prison sentences for § 922(g) violations during the eight-month period between the issuance of the *Rehaif* opinion and the start of the COVID-19 pandemic, which severely disrupted federal criminal prosecutions. At the same time, we also find that the government's § 922(g) conviction rate—the likelihood that someone charged by federal prosecutors with violating § 922(g) will ultimately be found guilty—did not change after *Rehaif*. All told, our study indicates that mens rea can constrain prosecutorial discretion, lower convictions, and reduce punishment without bringing criminal administration to a halt.

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Introduction 288
I. Mens Rea, The Federal Felon-in-Possession Statute, and *Rehaif v. United States* 294
A. The Federal Felon-in-Possession Statute 294
B. Mens Rea Reform in *Rehaif v. United States* 299
C. Theorizing the Legal Impact of Mens Rea Reform 302
II. Data, Methods, and Results 306
A. Data 307
B. Methods 308
C. Results 311
1. Descriptive Statistics 311
2. Charging 312
3. Disposition 314
4. Punishment 317
5. Robustness Checks 318
6. Assessing *Rehaif*'s Impact 325
III. Discussion 326
A. *Rehaif*, Mens Rea, and Prosecutorial Decision-Making 327
1. Mens Rea and Constraints on Prosecutorial Discretion 327
2. Mens Rea and Criminal Administration 329
B. *Rehaif*, Mens Rea, and Punishment 331
C. Methodological Limitations 333
D. Key Questions: Generalizability, Pathways, and Racial Disparities 337
1. Generalizability 337
2. Pathways 339
3. Racial Disparities 340
Conclusion 342

INTRODUCTION

Mens rea—Latin for guilty mind—is a pillar of U.S. criminal law.[1] Typically, the government cannot secure a criminal conviction absent

1. *See, e.g.*, Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932) ("For hundreds of years the books have repeated with unbroken cadence that *Actus non facit reum nisi mens sit rea.*"); Gideon Yaffe, *The Point of* Mens Rea*: The Case of Willful Ignorance*, 12 CRIM. L. & PHIL. 19, 25 (2018) ("Criminal law exhibits a well-known fixation with the defendant's mind, a fixation that we do not find in other areas of law, including areas in which the mental states of the parties matter to liability."); ELIZABETH PAPP KAMALI, FELONY AND THE GUILTY MIND IN MEDIEVAL ENGLAND 3–4 (2019); Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 815, 850 (1980).

proof that the accused engaged in conduct prohibited by a criminal statute with a culpable mental state—for example, purpose, knowledge, recklessness, or negligence.[2] This limitation on criminal liability is widely considered to be a necessary condition for fair and effective punishment.[3] In a legal system where criminal charges bring with them life-altering consequences, culpable mental state requirements serve as a bulwark against convicting the morally innocent.[4]

For this and many other reasons, the topic of mens rea is also a central preoccupation of those who study criminal law.[5] From legal

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The term mens rea is "chameleon-like" in nature. Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201, 1202 n.4 (2017) [hereinafter, Serota, *Proportional Mens Rea*]; *see, e.g.*, Francis Bowes Sayre, *The Present Signification of* Mens Rea *in the Criminal Law*, *in* HARVARD LEGAL ESSAYS 399, 402 (1934). On the broader (and older) conception, mens rea refers to all mental (or quasi-mental) phenomena that influence the blameworthiness of someone who engages in criminally prohibited conduct. Serota, *Proportional Mens Rea*, *supra*, at 1202 n.4; *see* Michael Serota, *Blaming Minds*, 82 MD. L. REV. (forthcoming 2023) (exploring the contours of psychological blameworthiness under this broader conception of mens rea) (on file with author). On the narrower (and more recent) conception, mens rea is understood to refer to a culpable mental state, *i.e.*, the purpose, knowledge, recklessness, or negligence necessary to prove a given element of a crime. Serota, *Proportional Mens Rea*, *supra*, at 1202 n.4; *see, e.g.*, Douglas Husak, *"Broad" Culpability and the Retributivist Dream*, 9 OHIO STATE J. CRIM. L. 449 (2012) (distinguishing between the broader and narrower conceptions of mens rea). Unless otherwise noted, this Article's use of the term mens rea follows the narrower conception and is intended to be synonymous with culpable mental state.

2. *See, e.g.*, MODEL PENAL CODE § 2.02 (AM. L. INST. 1985); Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

3. *See, e.g.*, *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 489 (E.D.N.Y. 1993); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992); Paul H. Robinson, *Strict Liability's Criminogenic Effect*, 12 CRIM. L. & PHIL. 411 (2018); *but see infra* notes 12–15 and accompanying text discussing the debate over strict liability.

4. *See, e.g.*, *Morissette v. United States*, 342 U.S. 246, 251 (1952). Culpable mental state requirements also play an important role in ensuring proportionate punishment for otherwise blameworthy offenders. *See, e.g.*, Serota, *Proportional Mens Rea*, *supra* note 1, at 1203–05 (discussing the principle of proportional mens rea in U.S. criminal law); *Tison v. Arizona*, 481 U.S. 137, 171 (1987) (asserting that legal recognition of differences between culpable mental states is "essential if we are to retain the relation between criminal liability and moral culpability on which criminal justice depends") (Brennan, J., dissenting).

5. *See, e.g.*, Husak, *supra* note 1, at 449 ("The criminal law is centrally concerned with culpability or mens rea—roughly, the mental (or quasi-mental) components of blame."); Gary V. Dubin, Mens Rea *Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 325 (1966) (observing the "nearly deified legal status" of mens rea); Gideon Yaffe, *Mens Rea by the Numbers*, 12 CRIM. L. & PHIL. 393, 394 (2018).

scholarship[6] to policy reports[7] to the drafting of model criminal codes,[8] culpable mental states receive extensive attention from criminal law experts. Judicial opinions also devote significant time to exploring the intricacies of mens rea,[9] as do substantive criminal law courses at U.S. law schools where the topic is a primary focus.[10] Taken together, it is not a stretch to say that "the criminal law's requirement of mens rea is the central distinguishing characteristic of the institution."[11]

But while mens rea is foundational, it is also controversial.[12] In numerous areas of criminal regulation—from drug crimes to gun crimes to sex crimes—the law holds actors strictly liable for their conduct without regard to whether they knew or even should have known about the wrongfulness of their conduct.[13] Many, including a broad swath of

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6. *See, e.g.*, STEPHEN P. GARVEY, GUILTY ACTS, GUILTY MINDS (2020); GIDEON YAFFE, THE AGE OF CULPABILITY: CHILDREN AND THE NATURE OF CRIMINAL RESPONSIBILITY (2018); DOUGLAS HUSAK, THE PHILOSOPHY OF CRIMINAL LAW (2010); LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW (2009); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (2d ed. 2008); Peter Westen, *An Attitudinal Theory of Excuse*, 25 L. & PHIL. 289 (2006); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (2000); MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (1997).

7. *See, e.g.*, BRIAN W. WALSH FOR THE HERITAGE FOUND. & TIFFANY M. JOSLYN FOR NAT'L ASS'N OF CRIM. DEF. LAWS., WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010); JAMES M. ANDERSON & IVAN WAGGONER FOR RAND CORPORATION, THE CHANGING ROLE OF CRIMINAL LAW IN CONTROLLING CORPORATE CRIMINAL BEHAVIOR (2014).

8. *See generally* MODEL PENAL CODE & COMMENTARIES (AM. LAW INST. 1985); Francis X. Shen, Morris B. Hoffman, Owen D. Jones, Joshua D. Greene & René Marois, *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1315–16 (2011) (observing that the MPC's extensive treatment of mens rea accomplished "what no legal system had ever expressly tried to do: orchestrate the noise of culpability into a reasonably uniform and workable system").

9. *See, e.g.*, *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. Cordoba-Hincapie*, 825 F. Supp. 485 (E.D.N.Y. 1993).

10. *See, e.g.*, JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES AND MATERIALS (8th ed. 2019); SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS (10th ed. 2017); PAUL H. ROBINSON, SHIMA BARADARAN BAUGHMAN & MICHAEL T. CAHILL, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES (5th ed. 2021).

11. Claire Finkelstein, *The Inefficiency of Mens Rea*, 88 CALIF. L. REV. 895, 896 (2000).

12. *See, e.g.*, Michael Serota, *How the Criminal Law Lost Its Mind*, BOS. REV. (Oct. 27, 2020), https://bostonreview.net/law-justice/michael-serota-how-criminal-law-lost-its-mind [hereinafter Serota, *Criminal Law Lost Its Mind*]; Michael Serota, *Strict Liability Abolition*, 97 N.Y.U. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4047185# [hereinafter Serota, *Strict Liability Abolition*].

13. *See, e.g.*, Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1081–82, 1090, 1097 (1997). This Article uses the phrases "strictly liable" and "strict liability" to generically refer to the absence of a culpable mental state requirement as to *a* material element of an offense *or* an element

scholars, judges, and defense attorneys, strongly object to the elimination of culpable mental state requirements in any context involving the potential for criminal sanctions.[14] Others, including a sizeable number of prosecutors and legislators, embrace strict criminal liability as an indispensable policy tool appropriately deployed in particular contexts.[15] Frequently, the participants in this debate talk past one another. However, there is one implicit point of agreement between both sides: mens rea matters.

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that provides the basis for aggravating punishment (*i.e.*, grading factor or sentencing enhancement). This more precise definition extends beyond strict liability *crimes* for which no culpable mental state need be proven as to *any* material element. In the criminal law literature, the latter form of strict liability is typically referred to as "pure," whereas the former is commonly referred to as "impure" or "partial." *Id.* at 1081 ("In 'pure' strict liability, no culpability is required as to any of the material elements of the offense. In 'impure' strict liability, culpability is required as to at least one material element, but it is not required with respect to at least one other element.").

14. *See, e.g.*, Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 268–69 (1987) (highlighting the "injustice of blaming a person despite reasonable mistake," and arguing that strict liability cannot be justified); Serota, *Strict Liability Abolition*, *supra* note 12, at 29–47 (explaining why the public safety rationales offered in support of strict liability lack empirical support); Gideon Yaffe, *A Republican Crime Proposal That Democrats Should Back*, N.Y. TIMES (Feb. 12, 2016), https://www.nytimes.com/2016/02/12/opinion/a-republican-crime-proposal-that-democrats-should-back.html; *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. Cordoba-Hincapie*, 825 F. Supp. 485 (E.D.N.Y. 1993); Press Release, Senator Mike Lee, Senators Hatch, Lee, Cruz, Perdue, and Paul Introduce Bill to Strengthen Criminal Intent Protections (Oct. 2, 2017), https://www.lee.senate.gov/2017/10/senators-hatch-lee-cruz-perdue-and-paul-introduce-bill-to-strength-criminal-intent-protections [https://perma.cc/W2UN-E6KK] (statement of David Patton, Executive Director and Attorney-in-Chief, Federal Defenders of New York, Inc.) ("As Federal Defenders, we are acutely aware of the need for mens rea reform."); Vikrant P. Reddy, *Dear President Trump: Here's How to Get Right on Crime, Part 2*, MARSHALL PROJECT (Jan. 18, 2017, 10:00 PM) (noting that mens rea reform has broad appeal and has "been a priority for prominent progressive voices, such as the National Association of Criminal Defense Lawyers and U.S. Representatives John Conyers and Bobby Scott").

15. *See, e.g.*, Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 403 (1993) ("In particular, prosecutors and legislators welcome the use of strict liability crimes."); *State v. Jordan*, 733 N.E.2d 601, 607 (arguing that strict liability is justified "based primarily on the difficulties inherent in determining a defendant's subjective knowledge"); Brief for the United States, *Rehaif v. United States*, 139 S. Ct. 2191 (2019) (No. 17-9560), 2019 WL 1380194 (same); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 961 (2003) (noting use of deterrence rationales by policymakers in support of strict liability); OFF. OF SEN. ELIZABETH WARREN, RIGGED JUSTICE: HOW WEAK ENFORCEMENT LETS CORPORATE OFFENDERS OFF EASY 4 (2016), https://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf (arguing that strict liability in white collar crime serves important deterrent purposes); Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 829 n.89 (2017) (arguing that doing away with strict liability "could undermine public safety and harm progressive goals").

From the perspective of those who support universal mens rea requirements, strict liability fuels overcriminalization and threatens government overreach. These opponents of strict liability argue that in a world of overzealous prosecution fueled by expansive criminal codes the application of culpable mental state requirements limits the number—or at least the kinds—of cases brought by the government. Conversely, those who support strict liability frequently do so based upon the perceived evidentiary challenges surrounding proof of mens rea and the necessity of easing the prosecution's path to conviction. Requiring the government to establish mens rea for all crimes, these strict liability proponents contend, threatens to bring criminal prosecutions to a halt and therefore make the public less safe.[16]

Both sides in the debate over strict liability thus assume that the decision to apply culpable mental states to criminal statutes has significant consequences—for individual criminal defendants and the criminal legal system as a whole.[17] Surprisingly, this assumption has never been scientifically tested. Although there is a vast philosophical literature on the morality of mens rea and a wide body of legal scholarship addressing the contours of mens rea doctrine, there is a marked lack of quantitative research assessing the measurable effects (if any) of mens rea policy on the criminal legal system. Simply put, do culpable mental state requirements impact charging decisions, criminal convictions, and punishment, and if so, how large is the effect? No empirical study has ever answered this question.[18] This Article seeks to make relevant headway by assessing the legal impact of adding a culpable mental state requirement to an individual criminal statute.

The focus of our study is *Rehaif v. United States*, in which the U.S. Supreme Court added a culpable knowledge requirement to one of the most frequently prosecuted statutes in the federal criminal code: 18 U.S.C. § 922(g).[19] This statute bans individuals with particular legal statuses—including felony convictions, certain misdemeanor convictions, or violations of U.S. immigration law—from possessing guns or

16. *See* Serota, *Strict Liability Abolition*, *supra* note 12, at 25–47 (providing an overview and subsequent deconstruction of public safety-based arguments in support of strict liability).

17. *See supra* notes 3–5, 14–15 and accompanying text.

18. There is surprisingly little empirical work assessing the legal impact of any substantive criminal law reforms. For two notable exceptions, see Lisa A. Callahan, Pamela Clark Robbins, Henry J. Steadman & Joseph P. Morrissey, *The Hidden Effects of Montana's "Abolition" of the Insanity Defense*, 66 PSYCHIATRIC Q. 103 (1995) (assessing the impact of abolishing the insanity defense in Montana); Julia Horney & Cassia Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, 25 L. & SOC'Y REV. 117, 138–39 (1991) (assessing the impact of rape law reforms on rape reporting and case processing across various jurisdictions).

19. 139 S. Ct. 2191 (2019).

ammunition for the remainder of their lives.[20] Prior to *Rehaif*, federal courts treated the legal status element of § 922(g) to be a matter of fact for which a prohibited possessor could be held strictly liable.[21] As a result, for decades federal prosecutors were able to secure convictions without having to prove the accused knew, or even should have known, they satisfied the criteria for any of the nine categories sufficient to trigger § 922(g)'s lifelong ban on guns and ammunition. That all changed in June 2019, however, when the *Rehaif* Court overruled nationwide federal circuit precedent and imposed a culpable knowledge requirement on § 922(g)'s legal status element for all criminal prosecutions.[22]

The *Rehaif* decision affords a unique opportunity to assess the legal impact of a clear change in mens rea policy—from strict liability to culpable knowledge—governing a criminal statute that is responsible for thousands of convictions every year in the federal criminal system. Our study provides reason to believe that this new mens rea requirement significantly reduced the number of defendants charged with § 922(g) per month, the number of § 922(g) charges filed each month, the number of § 922(g) charges per defendant, and the likelihood that any individual charge of § 922(g) would be found guilty. We estimate these charging reductions prevented more than 2,350 convictions and eliminated over 8,400 years of prison sentences for § 922(g) violations during the eight-month period between the issuance of the *Rehaif* opinion and the start of the COVID-19 pandemic. While these results are sizable, however, we also find that the government's § 922(g) conviction rate—the likelihood that someone charged by federal prosecutors with violating § 922(g) will ultimately be adjudicated guilty—did not change after *Rehaif*. All told, our study indicates that mens rea can constrain prosecutorial discretion, lower convictions, and reduce punishment without bringing criminal administration to a halt.

This Article unfolds in three Parts. Part I provides relevant background on the study. It first addresses the historical strict liability interpretation of § 922(g) and then considers the Supreme Court's more recent abrogation of that interpretation. Thereafter, this Part develops a conceptual framework for thinking about the legal impact of mens rea reform—both generally and as specifically applied to the legal status element of the federal felon-in-possession statute.

Part II details a legal impact analysis of the mens rea reform in *Rehaif v. United States*. It describes the study's data and methodology, the robustness checks deployed, and the changes in criminal administration observed in the data after the Supreme Court issued its decision. Thereafter, this Part develops a model for estimating the impact

20. 18 U.S.C. § 922(g) (2018).

21. *Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting).

22. *Id.* at 2200.

of the *Rehaif* decision on charging and punishment as compared to a world in which the Supreme Court had not abolished strict liability as to § 922(g)'s legal status element.

Part III discusses the results of the study as well as the future of empirical mens rea research. This Part first explores what the study's central findings indicate about mens rea's role in prosecutorial decision making and punishment. Thereafter, this Part considers the study's primary challenges and limitations as well as the efforts to counteract them. Finally, Part III concludes with discussion of the most significant questions raised by the paper and the value of answering them in subsequent legal impact studies.

I. MENS REA, THE FEDERAL FELON-IN-POSSESSION STATUTE, AND *REHAIF V. UNITED STATES*

This Part frames our study. Section A provides relevant background on 18 U.S.C. § 922(g)—colloquially referred to here (and elsewhere) as the federal felon-in-possession statute. We describe the statute's legislative origins, legal operation, and historical strict liability interpretation by federal courts. Thereafter, Section B summarizes the Supreme Court's decision in *Rehaif v. United States* to overrule well-established federal precedent and impose a culpable knowledge requirement on § 922(g)'s legal status element. Finally, Section C theorizes the legal impact of mens rea reform on criminal administration both generally and as specifically applied to the court-driven mens rea reform in *Rehaif*.

A. The Federal Felon-in-Possession Statute

Since 1938, the federal criminal code has prohibited people with certain legal statuses from possessing "any firearm or ammunition" that is in or affecting "interstate or foreign commerce."[23] Codified by 18

23. Specifically, the Federal Firearms Act, ch. 850, § 2(f), 52 Stat. 1250, 1251 (1938) (repealed 1968), made it "unlawful for any person who has been convicted of a crime of violence . . . to receive any firearm" transported in interstate commerce. This law was passed in 1938; however, in 1968, Congress prohibited firearm possession by: (1) all felons; (2) individuals dishonorably discharged from the armed forces; (3) individuals adjudged mentally incompetent; (4) individuals who have renounced their citizenship; and (5) aliens unlawfully within the United States. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1202, 82 Stat. 197, 236; Gun Control Act of 1968, Pub. L. No. 90-618, § 301, 82 Stat. 1213, 1236. Then, in 1986, Congress consolidated various firearm provisions of Title 18, and in the process transferred the prohibitions on firearm possession to their current statutory location in 18 U.S.C. § 922(g). *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 102(6), 100 Stat. 452; *see also* Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 149 (1975); *Huddleston v. United States*, 415 U.S.

U.S.C. § 922(g), this prohibition has been subsequently expanded in ensuing decades to apply to nine different groups of people. Specifically, groups currently prohibited from possessing guns and ammunition under § 922(g) are:

(1) anyone convicted of a crime "punishable by imprisonment for a term exceeding one year;"[24]
(2) those in the United States unlawfully;[25]
(3) fugitives from justice;[26]
(4) those who are unlawful users of controlled substances;[27]
(5) those who have been adjudicated "as a mental defective" or "committed to a mental institution;"[28]
(6) those who have been dishonorably discharged from the military;[29]
(7) those who have renounced U.S. citizenship;[30]
(8) those who are subject to a court order related to domestic violence;[31] and
(9) those who have been convicted of a misdemeanor crime of domestic violence.[32]

Much could be said about the legal meaning and practical operation of this statute; for purposes of the present study, three aspects of § 922(g) are most salient. First, it is expansive. To take just one example, the felon-in-possession portion of the offense, 18 U.S.C. § 922(g)(1), prohibits anyone who has ever been convicted of a crime punishable by more than one year of prison time from possessing a firearm or ammunition.[33] This prohibition has no expiration date and applies for the

814, 824 (1974) ("The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'") (quoting S. REP. NO. 90-1097 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2113).

24. 18 U.S.C. § 922(g)(1).
25. § 922(g)(5)(A).
26. § 922(g)(2).
27. § 922(g)(3).
28. § 922(g)(4).
29. § 922(g)(6).
30. § 922(g)(7).
31. § 922(g)(8).
32. § 922(g)(9).
33. For a helpful and more extensive overview of the federal felon-in-possession statute, see Zach Sherwood, Note, *Time to Reload: The Harms of the Federal Felon-in-Possession Ban in A Post-*Heller *World*, 70 DUKE L.J. 1429, 1430 (2021).

duration of one's life.[34] That lifelong ban applies, moreover, without regard to the nature of the underlying felony or its attendant consequences.[35] For example, someone who was decades ago convicted of possessing drugs,[36] participating in a fistfight,[37] or cashing the Social Security checks of a recently-deceased parent[38] would today be barred by § 922(g) from possessing a gun or ammunition. And that is so even if the punishment actually imposed decades ago for any one of these felonies was merely a fine[39] or a brief period of probation.[40] In other words, under § 922(g)(1) the actual sentence a criminal defendant receives for a felony is immaterial; so long as the maximum sentence authorized is more than a year, the federal prohibition on guns and ammunition possession is triggered.

Second, violating this federal prohibition leads to very serious consequences. For example, anyone convicted under 18 U.S.C. § 922(g) is subject to ten years of imprisonment,[41] while the U.S. Sentencing Commission reports that the average sentence for § 922(g) convictions is more than five years.[42] Furthermore, for those who have three previous convictions for a "violent felony or a serious drug offense," the punishment for a § 922(g) violation is significantly aggravated by the Armed Career Criminal Act (ACCA), which provides for a *mandatory*

34. To illustrate, we will focus on the first of the nine categories of the federal felon-in-possession ban; however, most of what we say is similarly applicable to all of the other provisions.

35. Sherwood, *supra* note 33, at 1430 n.5 (noting that "the defendant's conviction of misdemeanor assault and battery did not subject him to any jail time") (citing *Schrader v. Holder*, 704 F.3d 980, 983 (D.C. Cir. 2013).

36. Sherwood, *supra* note 33, at 1430 n.2 (citing *United States v. Rozier*, 598 F.3d 768, 769 (11th Cir. 2010)).

37. Sherwood, *supra* note 33, at 1430 n.3 (citing *Schrader*, 704 F.3d at 982)).

38. Sherwood, *supra* note 33, at 1430 n.4 (citing 42 U.S.C. § 408(a)(4) (2018)).

39. *See* 18 U.S.C. § 3571(a) (2018) ("A defendant [in federal court] who has been found guilty of an offense may be sentenced to pay a fine.").

40. Sherwood, *supra* note 33, at 1430 n.7 (noting that the statute "authoriz[es] a 'sentence[] to a term of probation' for federal infractions, misdemeanors, and certain felonies") (citing 18 U.S.C. § 3561).

41. 18 U.S.C. § 924(a)(2). It is important to note that while the maximum sentence for a standalone violation of § 922(g)(1) is ten years, *id.*, under the Armed Career Criminal Act (ACCA), any defendant convicted under § 922(g)(1) who also has three previous convictions for a "violent felony or a serious drug offense," as defined by the ACCA, is subject to a statutory minimum sentence of fifteen years and a maximum sentence of life imprisonment. *Id.* § 924(e)(1).

42. U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession FY19.pdf [https://perma.cc/Q4ZV-WDJ8] [hereinafter FY 2019 Quick Facts]. The average sentence for defendants convicted under § 922(g)(1) who were also subject to an ACCA enhancement is 188 months, and the average sentence for those who do not face an ACCA enhancement is 58 months. *Id.*

minimum sentence of fifteen years and a maximum sentence of life imprisonment.[43]

Third, the severe consequences threatened by the plain terms of 18 U.S.C. § 922(g) are frequently imposed—and most often against people of color. For example, in Fiscal Year 2019, 76,538 cases were reported to the U.S. Sentencing Commission; among these, 7,647 involved convictions under 18 U.S.C. § 922(g).[44] This means that, as in prior years, 10% of all convictions in the federal criminal system involved 18 U.S.C. § 922(g). This amounts to thousands of § 922(g) convictions imposed annually—and typically against people of color. In a nation where less than 60 percent of the population is non-Hispanic White, people of color comprise nearly three-quarters of those convicted of violating § 922(g). [45]

What explains the volume of convictions? The priority that the Department of Justice (DOJ) places on getting guns off the streets and incapacitating those perceived by law enforcement as "dangerous" provides one explanation.[46] The low proof requirements that have historically governed the federal felon-in-possession statute offers another.[47] For more than half of a century, the federal courts of appeal had interpreted § 922(g) to allow for conviction upon proof of three basic elements:

(1) The defendant knowingly possessed a firearm or ammunition.
(2) The firearm or ammunition traveled in interstate commerce.
(3) The defendant possessed one of the prohibited legal statuses.[48]

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43. § 924(e)(1).

44. FY 2019 Quick Facts, *supra* note 42, at 1.

45. For example, in 2019, 55.4% of those convicted were Black, 24.8% were White, 17.1% were Hispanic, and 2.7% were of "Other races." *Id.*

46. *See* David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011, 1014 (2020) ("Numbers dipped slightly from the Bush Administration to the Obama Administration, but in the last year of the Obama presidency, prosecutions were heading up and were more than 50% higher than in the last year of the Clinton Administration. The Trump Administration has pushed them higher still and is on track to bring the highest number of firearm prosecutions ever, surpassing the previous high-water mark of 2004. The same political dynamics surrounding gun control, and federal gun prosecutions, seem as firmly entrenched as ever.").

47. *See generally* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 836 (2001) ("So broad is the reach of possession offenses, and so easy are they to detect and then to prove, that possession has replaced vagrancy as the sweep offense of choice.").

48. *See, e.g.*, *United States v. Smith*, 940 F.2d 710, 713 (1st Cir. 1991); *United States v. Huet*, 665 F.3d 588, 596 (3d Cir.); *United States v. Langley*, 62 F.3d 602, 604–08 (4th Cir. 1995) (en banc); *United States v. Rose*, 587 F.3d 695, 705–06, 706 n.9 (5th Cir. 2009) (per curiam); *United States v. Olender*, 338 F.3d 629, 637 (6th Cir. 2003); *United States v. Lane*, 267 F.3d 715, 720 (7th Cir. 2001); *United States v.*

Under this expansive reading of 18 U.S.C § 922(g), a criminal violation occurs whenever someone falling into *any* of the nine prohibited categories actually or constructively possesses *any* firearm or piece of ammunition for *any* duration of time for *any* reason.[49] But is this almost entirely conduct-focused reading of the statute accurate? Buried beneath a consistent body of federal appellate case law was a difficult question of statutory interpretation: to which objective elements of an offense does an enumerated culpable mental state apply?[50]

The federal felon-in-possession statute raises this question by way of legislative incorporation. Consider that 18 U.S.C. § 922(g) states only the basic criminal prohibition; a separate provision, 18 U.S.C. § 924(a)(2), provides the penalty for a violation by stating that anyone who "knowingly violates" § 922(g) shall be fined or imprisoned for up to 10 years.[51] What remains to be determined is the relationship between this enumerated knowledge requirement and the three critical facts in question in a § 922(g) prosecution: (1) that the accused possessed a gun or ammunition (possession element); (2) that the gun or ammunition traveled in interstate commerce (jurisdictional element); and (3) that the possession occurred by someone who satisfies the criteria for one or more of the nine relevant categories (legal status element).

Historically, federal courts held that Congress solely intended for § 922(g)'s possession element to be subject to the knowledge requirement proscribed in 18 U.S.C. § 924(a)(2).[52] As a result, federal appellate courts consistently concluded § 922(g)'s jurisdictional and legal status elements were intended by Congress to be treated as mere matters of fact

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Kind, 194 F.3d 900, 907 (8th Cir. 1999); *United States v. Miller*, 105 F.3d 552, 555 (9th Cir.), *abrogated on other grounds by Caron v. United States*, 524 U.S. 308 (1998); *United States v. Games-Perez*, 667 F.3d 1136, 1140–41 (10th Cir. 2012); *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997), *abrogated by United States v. Roosevelt Coats*, 8 F.4th 1228 (11th Cir. 2021); *United States v. Bryant*, 523 F.3d 349, 354 (D.C. Cir. 2008).

49. Sherwood, *supra* note 33, at 1432.

50. Although historically a point of confusion, it is now well-established that a mens rea term can apply to one, none, or multiple of an offense's objective elements. *See generally* Robinson and Grall, *supra* note 2. As a result, when a criminal offense enumerates a culpable mental state at the beginning of a criminal statute, it is left to the courts to figure out how the legislature intended for the term to be distributed.

51. *See* 18 U.S.C. § 924(a)(2) (2019) ("Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.").

52. Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Centuries-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 143, 149–50 (2018).

for which the government need not prove any mental state in order to secure a conviction.[53]

While making federal felon-in-possession prosecutions administratively simple (*i.e.*, given how easy it is to prove knowing possession), this strict liability reading of the statute leaves few safeguards for the morally innocent.[54] For example, a person might reasonably be confused about the disposition of his or her prior criminal case or immigration status because, say, a sentencing judge or immigration attorney misinformed them of some fact that is essential to understanding their legal status. Under such circumstances, there is no reason to expect the individual to know that they meet the conditions for one of the nine groups that comprise § 922(g)'s legal status element. And yet, no matter how reasonable or understandable this individual's ignorance, it would ultimately be irrelevant to their criminal liability under the strict liability reading of § 922(g).

However, the foregoing is not the only possible reading of the statute. An alternative interpretation could apply the knowledge requirement stated in 18 U.S.C. § 924(a)(2) to the possession element *and* the legal status element.[55] Under this reading, the "[g]overnment must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm."[56] This is ultimately the reading the Supreme Court embraced after seven decades of federal appellate precedent to the contrary.[57] The relevant decision, *Rehaif v. United States*, is discussed in the next section.

B. Mens Rea Reform in Rehaif v. United States

The defendant in *Rehaif v. United States* came to the United States on a student visa to study at a Florida university but was later dismissed for academic reasons.[58] After informing Mr. Rehaif of his dismissal, the university's email also stated that Mr. Rehaif's immigration status would be terminated if he did not transfer to another school or leave the United

53. *See supra* note 48 and accompanying text.

54. *See* Shreefter, *supra* note 52, at 151–52, 154–55.

55. For an argument that knowledge as to criminality is required, see *United States v. Wilson*, 159 F.3d 280, 293, 295–96 (7th Cir. 1998) (Posner, J., dissenting).

56. *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019).

57. *See* Evan Lee, *Opinion Analysis: Felons-in-Possession Must Know They Are Felons*, SCOTUSBLOG (June 21, 2019, 7:16 PM), https://www.scotusblog.com/2019/06/opinion-analysis-felons-in-possession-must-know-they-are-felons/ [https://perma.cc/LM72-Z4TJ].

58. *See Rehaif*, 139 S. Ct. at 2194.

States.[59] Mr. Rehaif did neither and instead continued to live in Florida.[60] During that period of time, Mr. Rehaif went to a firing range, purchased ammunition, and fired weapons.[61] Upon learning about his target practice, the government prosecuted Mr. Rehaif for possessing firearms as an "alien" unlawfully in the United States in violation of 18 U.S.C § 922(g) and § 924(a)(2).[62] At the ensuing trial, the federal district court judge instructed the jury that it need not find that Mr. Rehaif knew his lawful immigration status had expired.[63] The jury soon thereafter returned a guilty verdict for Mr. Rehaif, who was sentenced to eighteen months of imprisonment.[64]

Mr. Rehaif appealed his conviction and sentence to the U.S. Court of Appeals for the Eleventh Circuit.[65] Before this intermediate appellate court, Mr. Rehaif argued that the trial court had erred in instructing the jury that § 922(g)'s legal status element was a matter of strict liability when, instead, proof of culpable awareness as to that element must be proven.[66] However, the Eleventh Circuit disagreed, affirming the trial court's decision.[67] Noting substantial agreement among fellow circuits, the Eleventh Circuit affirmed that the term "knowingly" in 18 U.S.C. § 924(a)(2) does not apply to § 922(g)'s legal status element, whether in the context of prosecutions involving those in the U.S. unlawfully, those with prior felony convictions, or those who satisfy the conditions for any of the other groups of individuals the prohibition implicates.[68]

Mr. Rehaif then appealed to the Supreme Court, which was a more receptive audience for his position.[69] In a seven-to-two decision authored by Associate Justice Stephen Breyer, the Court ultimately agreed that the jury instructions in Mr. Rehaif's case were flawed due to the absence of mens rea regarding his immigration status and thereby reversed the conviction. By holding that the term "knowingly" in 18 U.S.C. § 924(a)(2) applies to both the possession element and the status element under 18 U.S.C. § 922(g), the Court not only overruled the Eleventh Circuit but also the seven decades of federal case law governing the issue.[70]

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59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 2195.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 2200 ("[The Court] conclude[s] that in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he

The majority's novel reading of the federal felon-in-possession statute is grounded in the well-established idea that judges should hue toward reading in culpable mental states when presented with legislative silence or ambiguity.[71] Building off this presumption of mens rea, the Court observed that when a criminal statute expressly enumerates a culpable mental state, that term generally should be understood to apply to every material element of the offense.[72] Such interpretation was particularly appropriate for 18 U.S.C. § 922(g), the Court reasoned, because awareness of one's legal status is critical to separating the wholly innocent from criminal conduct[73]—whereas the strict liability reading of this element requires accepting that Congress intended to authorize patent injustices.[74]

The majority gives two examples to illustrate its argument.[75] The first is of a gun possessor unaware that he or she had been brought to the United States unlawfully as a small child.[76] The second is of a gun possessor sentenced only to probation for a prior felony but who did not know their possession of a firearm was "punishable by imprisonment for a term exceeding one year" because the trial judge had told the defendant repeatedly—but incorrectly—that he would "leave this courtroom not convicted of a felony."[77] Under the strict liability interpretation of § 922(g)'s legal status element, both of these individuals could be subject to criminal liability; under the majority's new interpretation, these morally innocent individuals would now be protected by a culpable knowledge requirement.

In imposing this requirement, the majority opinion effectively dismisses concerns that doing away with strict liability risks excessively limiting felon-in-possession prosecutions.[78] In filings before the Court,

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possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.").

71. *Rehaif*, 139 S. Ct. at 2195; *see, e.g.*, *Morissette v. United States*, 342 U.S. 246, 251 (1952) (discussing the presumption of mens rea).

72. *Rehaif*, 139 S. Ct. at 2195 ("[W]hen a statute 'prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense unless a contrary purpose plainly appears.") (quoting AM. L. INST., MODEL PENAL CODE § 2.02(4) (1985)).

73. *Rehaif*, 139 S. Ct. 2198 ("As we have said, we normally presume that Congress did not intend to impose criminal liability on persons who, due to lack of knowledge, did not have a wrongful mental state.").

74. *Id.* at 2195–96.

75. *Id.* at 2197–98.

76. *Id.*

77. *Id.* at 2198 ("[The] defendant [was] held strictly liable regarding his status as a felon even though the trial judge had told him repeatedly—but incorrectly—that he would 'leave this courtroom not convicted of a felony . . . .'") (citing *United States v. Games-Perez*, 667 F.3d 1136, 1138 (10th Cir. 2012)).

78. *Rehaif*, 139 S. Ct. at 2198.

the DOJ asserted that "direct evidence of a defendant's knowledge may be complicated to present at trial" and that "[i]f the government were required to prove a defendant's knowledge of his status as a felon, or as falling within any of the other categories enumerated in Section 922(g), it would fundamentally alter the nature of the trial."[79] The *Rehaif* majority was ultimately unpersuaded, however, "doubt[ing] that the obligation to prove a defendant's knowledge of his status will be as burdensome as the Government suggests."[80]

In contrast, a strong dissent authored by Justice Alito and joined by Justice Thomas was more receptive to the DOJ's concerns.[81] Much of the opinion is devoted to interpretive issues and consideration of precedent, given the "practical unanimity" in readings of the statute by lower and state courts.[82] But there is also an important administrative angle. The dissent argues that the "practical effects" of the shift from strict liability to culpable knowledge as to § 922(g)'s legal status element "will be far reaching and cannot be ignored."[83] This novel mens rea requirement, Justices Alito and Thomas contended, "will make it significantly harder to convict persons falling into some of these categories" in addition to "creat[ing] a mountain of [other administrative] problems."[84]

Publication of the *Rehaif* decision yielded a steady flow of follow-up litigation and commentary, which offers conflicting perspectives on the probable impact of adding a knowledge requirement to 18 U.S.C. § 922(g).[85] Our study seeks to bring a fresh empirical perspective to the conversation around *Rehaif* by analyzing rates in charging, conviction, and sentencing for the federal felon-in-possession statute before and after the Supreme Court's decision was issued. But even more importantly, our study aims to initiate a new and much needed conversation regarding the impact of culpable mental states on criminal administration—both generally and as specifically applied to the mens rea reform in *Rehaif*.

C. Theorizing the Legal Impact of Mens Rea Reform

In the Introduction, we highlighted a shared assumption held by both sides in the debate over strict liability: mens rea is of material

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79. *See* Brief for the United States at 36–37, *Rehaif v. United States*, 139 S. Ct. 2191 (2019) (No. 17-9560), 2019 WL 1380194.

80. *Rehaif*, 139 S. Ct. at 2198.

81. *Id.* at 2201–13 (Alito, J., dissenting).

82. *Id.* (Alito, J., dissenting).

83. *Id.* at 2212–13 (Alito, J., dissenting).

84. *Id.* at 2201 (Alito, J., dissenting).

85. *See, e.g.*, *Greer v. United States*, 141 S. Ct. 2090 (2021); *Mata v. United States*, 969 F.3d 91 (2d Cir. 2020). For a helpful compilation of post-*Rehaif* litigation over 18 U.S.C. § 922(g), see FED. DEFS. N.Y. BLOG, *Archive:* Rehaif (June 14, 2021), https://blog.federaldefendersny.org/category/rehaif/ [https://perma.cc/CW83-8DJ7].

consequence to both individual criminal defendants and the criminal legal system as a whole. To date, this assumption has never been empirically evaluated. Nevertheless, on reflection, there is a cluster of intuitive ideas that supports making it.

One idea is that mens rea constrains the breadth of criminal statutes by limiting the kinds of people (*i.e.*, those lacking particular mental states) who can be convicted for engaging in particular forms of conduct. Another idea is that mens rea imposes particularly challenging evidentiary demands, thereby significantly raising the burden of proof that the government must meet to secure convictions. As a result, adding a culpable mental state requirement to an individual criminal statute should yield fewer situations in which that statute applies and fewer yet where the government is able to generate evidence sufficient to establish the elements of an offense beyond a reasonable doubt.

This commonsense theory of mens rea's legal impact suggests that the Supreme Court's decision to add a culpable knowledge requirement to 18 U.S.C. § 922(g) should constrain prosecutorial discretion, result in less frequent charging, and produce fewer convictions (among other potential consequences). But just how much should one expect prosecutorial discretion to be constrained by the addition of this culpable knowledge requirement? How much less frequent should one expect charging to be? And how many fewer convictions should one expect to result? These are important questions of scale that must be addressed by any mens rea legal impact study—yet there's no pre-existing framework for conceptualizing them.

In setting our study up, we found it helpful to think of mens rea's impact on criminal administration as being mediated by two key variables. One of those variables is *mens rea selection*, understood in terms of the particular culpable mental state requirement lawmakers (and here we use the term broadly to encompass legislators and courts) decide to apply to any given objective element. In practice, lawmakers typically rely upon a well-established four-tier culpable mental state hierarchy in making mens rea policy choices.[86]

At the top of the hierarchy rests the culpable mental state of purpose, which typically entails proof that an actor's conscious object was to engage in wrongdoing[87] (*i.e.*, to cause a harmful result or act under prohibited circumstances).[88] The next highest culpable mental state,

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86. The following summary is a simplified overview of this culpable mental state hierarchy. For more detailed analyses, see, for example, Serota, *supra* note 1; Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992).

87. *See* MODEL PENAL CODE § 2.02(2)(a) (AM. L. INST., Proposed Official Draft 1962).

88. That wrongdoing is one's conscious object is to be distinguished from wrongdoing that is *voluntarily* committed. *See, e.g.*, Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994) (The voluntariness

knowledge, typically entails proof of a high level of awareness of wrongdoing[89] (*i.e.*, that one's conduct would result in harm or occurred under prohibited circumstances).[90] One step below knowledge is recklessness, which typically entails proof of awareness of a substantial risk of wrongdoing.[91] By contrast, the lowest culpable mental state, negligence, is not a subjective mental state but rather the *failure to be aware* of a substantial risk of wrongdoing where a reasonable person would have perceived that risk under similar circumstances.[92]

All else being equal, higher culpable mental states are more demanding, both substantively and evidentiarily speaking, than lower ones. Therefore, as a first general administrative principle, it is sensible to think that: the more culpable the mental state employed in a reform then the greater the resulting restriction to prosecutorial discretion and the larger the reduction in charging and convictions that can be expected to result from that reform.

Just as important to conceptualizing mens rea's legal impact is the *nature of the objective element* to which a culpable mental state is applied. This is the second variable in our model, and it is premised on the idea that the subject of a culpable mental state requirement—that is, the particular kind of conduct, result, or circumstance element being reformed—will significantly influence the evidentiary challenges confronted by the government in meeting its burden of proof.

To illustrate, consider a hypothetical statute that prohibits "purposely causing bodily injury to a human being that is over the age of sixty." Imagine that a legislature is debating whether to apply a recklessness requirement to either: (1) *just* the fact that the victim of a purposeful assault is a "human being" (as opposed to, say, an animal or mannequin), thereby rendering the victim's age a matter of strict liability;

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requirement, which implicates what is sometimes referred to as a "*present* conduct intention," can be "satisfied simply by showing that the actor did in fact intend to perform the bodily movements that he performed"). The mere fact that someone engages in wrongdoing voluntarily is entirely consistent with strict liability. *See, e.g.*, *Buchanan v. United States*, 32 A.3d 990, 1000 (D.C. 2011) (Ruiz, J., concurring) (noting that the "intent to act" interpretation of simple assault, if taken literally, would allow "the prosecution of individuals for criminal assault for actions taken with a complete lack of culpability").

89. *See* MODEL PENAL CODE § 2.02(2)(b) (AM. L. INST., Proposed Official Draft 1962).

90. The reference to "awareness of wrongdoing," both here and throughout this paper, does not implicate awareness that one's conduct might be illegal—although that too would implicate the blameworthiness of a person's state of mind. *See, e.g.,* DOUGLAS HUSAK, IGNORANCE OF LAW: A PHILOSOPHICAL INQUIRY (2016).

91. *See* MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST., Proposed Official Draft 1962).

92. *See id.* § 2.02(2)(d).

or (2) to *both* the fact that the victim is a "human being" and the fact that the victim is "over the age of sixty."

With respect to the first recklessness option, one would not expect that awareness of a substantial risk that the victim of an assault is human would be difficult to prove, let alone actually missing, in many cases. This kind of low-level awareness seems mostly implicit in purposely causing bodily injury, which is already required by the statute. After all, it is unlikely that someone whose conscious objective is inflicting bodily injury will be ignorant as to the victim's status as a human being. And proof that the perpetrator was at least aware of this possibility should be easy for the government to produce.

A materially different analysis applies to the second recklessness option, which involves awareness of a substantial risk that the victim was a human being *over the age of sixty*. It is not difficult to imagine circumstances in which a person purposefully perpetrating an assault—for example, in a late night bar fight—would either be: (1) completely ignorant as to the age of the victim (*e.g.*, because the victim's back is turned) or (2) be reasonably mistaken as to the victim's age (*e.g.*, because the sixty-year-old victim's face looked twenty-years younger). It is also easy to see how in still more cases the government could struggle to produce reliable evidence of this kind of guilty awareness even if the accused actually possessed it. As a result, one could reasonably expect this second application of recklessness to impose far greater constraints on a prosecutor's ability to secure criminal convictions, given the nature of the objective elements implicated by the mens reform.

This suggests a second general administrative principle: (a) the more likely it is for someone to be ignorant or mistaken as to a particular kind of objective element, and (b) the more difficult it is for the government to produce legally admissible, state-of-mind evidence as to that element, then (c) the greater the expected reduction in charging and convictions from applying a culpable mental state requirement to that element.

These two principles frame our expectations about the legal impact of the *Rehaif* decision as follows. On the one hand, the U.S. Supreme Court opted to deploy a hierarchically superior culpable mental state to 18 U.S.C. § 922(g): knowledge. This provides reason to expect a more significant effect from the judicially driven mens rea reform in *Rehaif*.

On the other hand, the objective element to which this new mens rea requirement applies—one's legal status—is not a fact for which one would expect ignorance or mistakes to be common, nor is it a fact for which the government should struggle to generate legally-admissible mental state evidence.[93] Consider, for example, that in recent post-*Rehaif*

93. Sherwood, *supra* note 33, at 1444–45 ("[E]stablishing that a defendant knew he was a felon [should not be] a difficult hurdle to overcome in most cases."). Consistent with this statement, many other legal authorities have observed that the

case law the U.S. Supreme Court explicitly stated what "many courts have recognized and as common sense suggests, individuals who are convicted felons ordinarily know that they are convicted felons."[94] Along similar lines, legal authorities have observed that as an evidentiary matter "a defendant's knowledge of his felon status can often be easily inferred from proof that he has previously spent more than a year in prison or has been convicted of a crime that is unequivocally recognized as a felony offense."[95]

In sum, although knowledge is high on the hierarchy of culpable mental states, the fact that awareness of one's legal status should be common and relatively easy for the government to prove in most § 922(g) prosecutions lead us to predict a meaningful but not overwhelming reduction in charges and convictions under 18 U.S.C. § 922(g). That, as will be discussed in the next Part, is what our study uncovered.

II. DATA, METHODS, AND RESULTS

This Part addresses the data, methods, and results for our study. Section A describes the source of the data and the variables used. Section B details the methods employed, including the analytic plan for the main analyses and the robustness checks. Section C reports the results from the analyses on charging, disposition, and punishment, provides the

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evidentiary hurdles by the *Rehaif* decision should be easy for the government to overcome in felon-in-possession prosecutions. Patton, *supra* note 46, at 1036 ("Although the decision adds to the government's burden and will help some defendants, it is not likely to impact the vast majority of cases in which prosecutors will have a relatively easy time proving a person's knowledge of their own felony conviction.").

94. *Greer v. United States*, 141 S. Ct. 2090, 2095 (2021).

95. Sherwood, *supra* note 33, at 1445; *see, e.g.*, *United States v. Dowthard*, 948 F.3d 814, 818 (7th Cir. 2020) (observing that a lengthy prison sentence for a prior conviction "severely hamper[s] an assertion" by a defendant that he was "ignorant" of his status as someone who had been convicted of a crime punishable by more than a year of imprisonment); *see also United States v. Burghardt*, 939 F.3d 397, 404 (1st Cir. 2019) (inferring that a defendant was well aware of his felon status based on his prior convictions for drug and robbery offenses, which were "punishable by a term of imprisonment well beyond a year").

That proof of knowledge as to a prior felony conviction may be straightforward is ultimately only part of the analysis regarding the nature of the objective element subject to the mens rea reform in *Rehaif*. There are eight additional legal statuses governed by 18 U.S.C. § 922(g), and other such statuses (*e.g.*, immigration status) may be at least marginally more prone to mistakes or ignorance by those who possess guns, or pose at least somewhat greater evidentiary difficulties for federal prosecutors now obligated by *Rehaif* to generate proof of culpable knowledge. Nevertheless, given that § 922(g) deals with a circumstance element (*i.e.*, characteristic) that is personal and biographical to the person charged with a crime, the same basic points regarding ease of proof and infrequency of mistakes and ignorance highlighted above seem at least generally applicable to the other proscribed legal statues.

results from the robustness checks, and then concludes with an estimate of *Rehaif*'s impact on administration of 18 U.S.C. § 922(g).

A. Data

This study uses the Federal Judicial Center's Criminal Integrated Database to evaluate the impact of the *Rehaif* decision on administration of 18 U.S.C. § 922(g). The Federal Judicial Center (FJC) is the research and education agency of the judicial branch of the U.S. government.[96] The FJC, under a working arrangement with the Administrative Office of the U.S. Courts (AOUSC), provides free public access to its Integrated Data Base (IDB) through its website.[97] The IDB contains records on criminal defendant filings (*e.g.*, charges) and terminations in the district courts.[98] The FJC receives regular data updates from the courts and processes the information into the IDB, which is a unified longitudinal database.[99] The revised IDB data include all criminal defendants filed on or after October 1, 1995, and any defendants filed before October 1, 1995, with still pending cases on that date.[100] The database contains individual records for defendants that include both the filing and, if applicable, closing data for each unique defendant.[101] The dataset is organized into fiscal year snapshots that include a single extract record for each unique defendant filed or terminated during that fiscal year or pending at the end of it.[102] As a result, we collapsed the fiscal year snapshots into one dataset, eliminating the earlier year(s) when a single case existed in multiple fiscal years. The last year contained the most complete data, justifying use of it.

We identified individual charges of 18 U.S.C. § 922(g) using the charge filing title variable within the IDB. We aggregated the total number of times the charge was applied and the number of defendants to whom it was applied. Separately, using the termination title variable, we identified cases and defendants that had a disposition for § 922(g). For

96. *See* 28 U.S.C. § 620.

97. Kristin Garri, George Cort & Margaret S. Williams, FED. JUD. CTR., *The Integrated Database: Data Availability in the Federal Courts,* THE 22ND ANNUAL LIMAN CENTER COLLOQUIUM, March 2019, at 151, 151–52, https://www.fjc.gov/sites/default/files/IDB-Research-Guide.pdf [https://perma.cc/KP9Q-LQ8F].

98. *Id.* at 152.

99. *Id.*

100. *Criminal Defendants Filed, Terminated, and Pending from FY 1996 to Present*, FED. JUD. CTR., FJC.GOV, https://www.fjc.gov/research/idb/criminal-defendants-filed-terminated-and-pending-fy-1996-present [https://perma.cc/9Ts9-B7V9]; Garri, Cort & Williams, *supra* note 97, at 152–53.

101. *Id.* at 153.

102. *Integrated Database (IDB)*, FED. JUD. CTR., FJC.GOV, https://www.fjc.gov/research/idb [https://perma.cc/KFS5-AUHW].

the analyses, we aggregated the total number of times the charge had a disposition and the number of defendants who received the disposition. For each charge of § 922(g), we calculated whether it resulted in a conviction, whether it was a conviction via plea or trial, or whether the outcome was not guilty (*i.e.*, dismissed, acquitted, nolle prosequi). Finally, for convictions of § 922(g), we calculated the total amount of prison time assigned to the defendant, the total amount of prison time assigned to § 922(g), the total fine amount assigned to the defendant, and the total amount of probation time given to the defendant.

B. Methods

To evaluate the effect of the *Rehaif* decision, we conducted several analyses. First, for the periods before and after the Supreme Court's ruling on June 21, 2019, we calculated the total number of people charged and with dispositions for 18 U.S.C. § 922(g) as well as the total number of people charged and with dispositions for all other charges. For those same time periods, we calculated the total number of charges and dispositions for § 922(g) and the total number of charges and dispositions for all statutes combined. We also calculated the rate of people charged with § 922(g) relative to all people charged with statutes other than § 922(g) to compare the trends before and after the ruling. We also calculated the rate of § 922(g) charges filed relative to all charges filed for statutes other than § 922(g).

To more formally examine the effect of the ruling, we estimated the following regression model that quantifies the change in the outcome of interest after June 2019 relative to previous periods:

$$y_{ict} = \alpha + \delta June2019_t + \beta_1 circuit_{ic} + \beta_2 month_t + \beta_3 year_t + \epsilon_{ict}$$

y_{ict} is the outcome of interest for individual defendant in circuit c in time period t. This is a dichotomous measure for whether the cases or defendants involved a § 922(g) charge as well as the number of § 922(g) charges that were involved. Separately, the outcome is measured as a conviction and whether a defendant had the outcome of a conviction for § 922(g) as well as the number of convictions for § 922(g). For those convicted of § 922(g), we used as separate outcomes the total prison time assigned to the defendant, prison time for all § 922(g) convictions, the total fine amount assigned to the defendant, and the total probation time assigned to the defendant. The main predictor of interest is the $June2019$ term which is a dichotomous indicator that is equal to one for the period after the *Rehaif* decision. We controlled for time invariant characteristics for each of the circuits ($circuit_{ic}$) and include fixed effects for month

($month_t$) and year ($year_t$).[103] We used ordinary least squares for all regression models with Stata v.17. We used the margins command after each regression to calculate the regression adjusted means from before and after the *Rehaif* decision. We report the means and their 95% confidence intervals (CI).

We limited the study period to the time between June 1, 2017, and February 29, 2020, inclusive. We began on June 1, 2017, as it was the first full month after new Trump Administration Attorney General Jeff Sessions issued a "Department Charging and Sentencing Policy" memorandum.[104] This memorandum established national charging and sentencing policies for federal prosecutors during the Trump Administration.[105] These policies remained in place throughout the duration of the study period, which included two additional Attorneys General (Jeff Sessions and William Pelham Barr) and one acting-attorney general (Matthew Whitaker).[106]

The pre-period of our study covers the time from June 1, 2017, until the U.S. Supreme Court issued the *Rehaif* opinion on June 21, 2019. This includes the five-month window, beginning on January 8, 2019, after the Court granted certiorari but prior to issuance of the opinion. In theory, the decision to grant certiorari in this case might have impacted administration of 18 U.S.C. § 922(g) by signaling to federal prosecutors that a change in law was likely, or at least potentially forthcoming. However, because the outcome in *Rehaif* was unexpected,[107] there is reason to think that prosecutorial administration of the felon-in-possession statute was not significantly impacted during most of this five-month window.[108] Nevertheless, as part of our robustness checks, we

103. A similar estimation strategy has been used to examine the impact of a national policy on healthcare utilization. Christopher M. Whaley, Megan F. Pera, Jonathan Cantor, Jennie Chang, Julia Velasco, Heather K. Hagg, Neeraj Sood & Dena M. Bravata, *Changes in Health Services Use Among Commercially Insured U.S. Populations During the COVID-19 Pandemic*, 11 JAMA OPEN 3 (2020).

104. Memorandum from Jeff Sessions, Att'y Gen., U.S. Dep't of Just. (May 10, 2017), https://www.justice.gov/archives/opa/press-release/file/965896/download [https://perma.cc/57DX-UVBY].

105. *See generally* Alan Vinegrad, *DOJ Charging and Sentencing Policies: From Civiletti to Sessions*, 30 FED. SENT'G REP. 3, 4–5 (2017).

106. *Attorneys General of the United States*, U.S. DEP'T OF JUST., JUST.GOV, https://www.justice.gov/ag/historical-bios [https://perma.cc/6G6E-KT5Z].

107. Jessica Roth, Rehaif v. United States*: Once Again, a Gun Case Makes Surprising Law*, 32 FED. SENT'G REP. 23 (2019) ("A meager three amicus briefs were filed in the case after the Court granted certiorari, lower than the average in the Supreme Court and nowhere near the number filed in a typical landmark case."); *see also State v. Rainoldi*, 268 P.3d 568, 577 n.1 (Or. 2011) ("Every court—state and federal—that has considered the question has held that no such proof is required.").

108. It is possible that prosecutorial administration was influenced by the oral argument held on April 23, 2019, during which time it became clear members of the

performed an event study analysis of charging and disposition in this period, which we describe below.

We concluded our study on February 29, 2020, which was the final month before the national declaration of COVID-19 as a public health emergency. After the start of the pandemic, case processing dramatically changed in the federal criminal system. Access to courts was restricted, and cases were both delayed and handled differently. These changes dramatically reduced the number of prosecutions for 18 U.S.C. § 922(g) (and other federal criminal offenses) for reasons having nothing to do with mens rea considerations, thereby making it impossible to separate the effects of *Rehaif* from those of the pandemic.

To support our main analyses, we performed a series of robustness checks. We used an event study approach to test for pre-*Rehaif* trends. In the event study specification, we estimated the temporal effects of the main Supreme Court ruling variable for all of the months prior to issuance of the *Rehaif* decision within our sample period. We defined the pre-adoption period as ending in June 2019, which is the month in which the *Rehaif* decision was issued. Moreover, we examined post-adoption outcomes where statistically significant estimates would provide additional evidence that the variation was due to the Supreme Court decision. We report the results of the event studies graphically and include 95% confidence intervals for each of the point estimates. We estimate the event study for all outcomes where we find a statistically significant effect for the *Rehaif* decision. As an additional check, we estimate the event study for the number of monthly charges for all offenses other than 18 U.S.C. § 922(g) in the aggregate. This is to determine if charging decisions changed in general for other statutes in the federal system prior to and after the *Rehaif* decision was issued.

We also applied placebo tests for all statistically significant effects in the post-period by estimating the core regression model but hypothetically changing the date that the *Rehaif* decision was issued. We did not expect to find a statistically significant decline in 18 U.S.C. § 922(g) outcomes on these earlier dates. A statistically significant increase would be possible, though, because both charging and conviction increased during the pre-period. For the placebo test, we hypothetically changed the *Rehaif* decision to instead have occurred nine (September 2018), twelve (June 2018), and fifteen (March 2018) months earlier than in June 2019. We excluded data from the post-period (between June 2019 and February 2020) in these tests.

Finally, we performed alternative placebo tests that examined trends in charging for 8 U.S.C. § 1326 (reentry of removed aliens) and 8 U.S.C. § 1324 (bringing in and harboring certain aliens). We chose these two

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Court were leaning toward ruling in favor of Mr. Rehaif. *See infra* Section III.C for further discussion of this issue.

charges because they were frequently used, providing a sufficient sample size, and because they concerned prosecution of individuals in violation of immigration law as with 18 U.S.C. § 922(g). In performing the alternative placebo tests, we quantified changes in the total number of monthly charges and convictions for each of § 1326 and § 1324. For these models, we used the same main regression specification as with § 922(g) with the post-period defined as after the *Rehaif* decision. We expected that there would be no impact on these charges because the *Rehaif* decision did not change the mens rea standards for either § 1326 or § 1324. If a change occurred between the pre- and post-periods for either of these charges, that would have suggested an external factor other than *Rehaif* caused the observed differences.

C. Results

The results of our study are conveyed in six subsections, beginning with descriptive statistics containing background information about the sample.[109] The next three subsections report our findings on charging, disposition, and punishment for 18 U.S.C. § 922(g). The fifth subsection details the results of our robustness checks. The sixth and final subsection estimates how these findings compare to a world in which the U.S. Supreme Court had never issued the *Rehaif* decision.

1. DESCRIPTIVE STATISTICS

Table 1 lists descriptive statistics for the total sample and for the presence of a filing of a charge for 18 U.S.C. § 922(g). In both the pre- and post-periods, the number of charges was greater than the number of defendants for both the total sample and for those charged with § 922(g). This is expected as prosecutors can file more than one charge of any type against a defendant. During the period of study, the U.S. Courts of Appeal for the Fifth and Ninth Circuits were home to the largest number of cases. These circuits contain most of the U.S. border with Mexico and are home to the two states—California and Texas—with the largest estimated populations of undocumented immigrants in the United States.[110] One category of prohibited possessors under § 922(g) are those in the United States unlawfully.[111]

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109. For further information about this study, see our Appendix, https://www.rand.org/content/dam/rand/pubs/external_publications/EP60000/EP68887/RAND_EP68887.pdf [https://perma.cc/57XE-QDHW].

110. *U.S. Unauthorized Immigrant Population Estimates by State, 2016*, PEW RSCH. CTR., https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ [https://perma.cc/Y3UG-38B7].

111. 18 U.S.C. § 922(g).

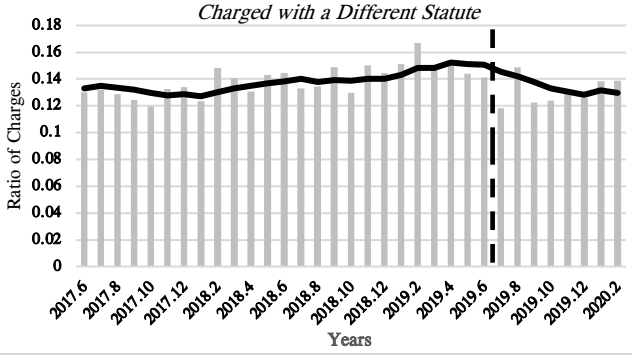
Table 2 contains descriptive statistics for cases with a disposition for any charged offense and specifically for 18 U.S.C. § 922(g).[112] Similar to the charging information in Table 1, more dispositions can be found than defendants overall and for § 922(g) offenses. Again, the largest number of dispositions happened in the Fifth and Ninth Circuits, consistent with the charging.[113]

2. CHARGING

The bar graph in Figure 1 depicts the unadjusted ratio of people charged with 18 U.S.C. § 922(g) to people charged with statutes other than § 922(g) per month. The red line is the 6-month average—for the prior 6 months inclusive—of the number of people charged. In the pre-period, the ratio of people with § 922(g) charges to defendants without § 922(g) charges increased, peaking at 0.167 in February 2019 (16.7 people charged with § 922(g) for every 100 defendants not charged with § 922(g)). The number declined after issuance of the *Rehaif* decision in June 2019 to 0.118 defendants charged with § 922(g) per defendant not charged with § 922(g) in July 2019. At the end of the post-period in February 2020, prosecutors charged 0.139 defendants with § 922(g) per defendant not charged with § 922(g).

Figure 1

Ratio of People Charged with 18 U.S.C. § 922(g) to People Charged with a Different Statute



112. The filing and disposition samples are slightly different in size with more defendants in the initial charge analyses relative to the disposition analyses. This difference is likely due to cases not being completed in the post-period or some filing charges being displaced by more serious dispositions. The dataset only contains the disposition for the five most serious charges.

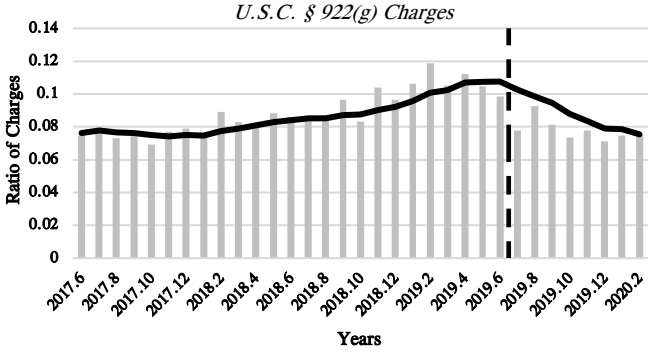
113. The *Rehaif* decision created the possibility that cases that were under appeal could be retried or a new plea bargain could be struck. However, during the post-period, only twenty-two cases reached disposition on appeal, and fifty-three such cases occurred during the pre-period. Each was 0.3% of all cases, so such cases should not have impacted the study results.

Our modeling indicates that prior to the *Rehaif* decision on June 21, 2019, the regression adjusted likelihood of a defendant being charged with 18 U.S.C. § 922(g) relative to all other charges was 12.31% [95% CI: 12.12%–12.51%]. After the ruling, the likelihood declined to 11.36% [95% CI: 10.94%–11.78%]. This decline of 0.95% ($p < 0.01$) was equivalent to a 7.79% decline from the pre- to the post-period. The full regression results can be found in Table 3.

Figure 2 shows the unadjusted ratio of 18 U.S.C. § 922(g) charges to non-§ 922(g) charges in each month of the study period. Note that this analysis is not based on the number of *defendants* but rather the number of *charges* as a defendant could be charged more than once with § 922(g). As with the defendant-level analysis, we find that the ratio of § 922(g) charging to non-§ 922(g) charges increased during the pre-period to reach a peak of 0.119 in February 2019—11.9 charges of § 922(g) for every 100 charges of a statute other than § 922(g). After issuance of the *Rehaif* decision, the number thereafter sharply declines to 0.078 charges of § 922(g) for every non-§ 922(g) charge in July 2019, and at the end of the post-period in February 2020 the ratio equaled 0.075 charges of § 922(g) for every non-§ 922(g) charge.

Figure 2

Number of Charges for 18 U.S.C. § 922(g) per Non-18 U.S.C. § 922(g) Charges



We next examined the number of charges of 18 U.S.C. § 922(g) per felon-in-possession defendant. We find that for § 922(g) defendants the average number of § 922(g) charges declined from 1.25 [95% CI: 1.24–1.26] to 1.02 [95% CI: 1.00–1.04] after *Rehaif* (see Table 3 for the full regression results). This decline of 0.23 ($p < 0.01$) in the number of § 922(g) charges per case was a 19.08% reduction.

We also employed several fixed effect regression models to better quantify the results. The number of people charged with 18 U.S.C. § 922(g) declined from 75.70 [95% CI: 73.18–78.21] per circuit per

month[114] during the pre-period to 63.78 [95% CI: 58.31–69.25] during the post-period. This 16.32% reduction in the number of people per circuit per month charged with § 922(g) was statistically significant ($p < 0.01$). The full results from the regressions can be found in Table 4.

Again, it is also informative to focus on the level of the *individual charge* as opposed to solely on the *defendant* as a person can be charged multiple times with felon-in-possession. The total number of 18 U.S.C. § 922(g) charges per circuit per month declined from 94.42 [95% CI: 91.25–97.60] before *Rehaif* to 63.74 [95% CI: 56.83–70.64] after it (see Table 4 for the full results). This 34.59% drop in the number of § 922(g) charges filed per circuit per month was statistically significant ($p < 0.01$).

3. DISPOSITION

We next examined dispositions for 18 U.S.C. § 922(g). We focus on four key outcomes: (1) conviction (by any method); (2) conviction via plea (either plea of guilty or nolo contendere); (3) conviction by trial (either court or jury); and (4) whether a charge was adjudicated as not guilty (dismissed, acquitted, or nolle prosequi). Given that a person can be charged with more than one count of § 922(g), our analysis focuses on both the defendant and charge level. Overall, the results indicate that a *defendant* charged with § 922(g) was no more likely to be found guilty after the *Rehaif* decision, but that it was less likely for any *individual § 922(g) charge* to result in a guilty disposition. This reflects that an individual defendant could have multiple charges of § 922(g), allowing the likelihood of conviction for a *person* to remain the same while the likelihood for an *individual charge* to decline. The regression results for the defendant- and charge-level disposition outcomes appear in Table 5.

Guilty. The likelihood of a defendant being convicted of 18 U.S.C. § 922(g) did not change after the *Rehaif* decision, holding steady from the pre-period at 72.44% [95% CI: 71.56–73.32%] to 72.72% [95% CI: 70.89–74.55%] in the post-period. The change was not statistically significant. However, the likelihood that an individual charge of § 922(g) would result in conviction declined from 64.73% [95% CI: 63.79-65.66%] in the pre-period to 56.11% [95% CI 54.38–57.85%] in the post-period. This 8.61% decline was statistically significant ($p < 0.01$) and represents a 13.14% decline from baseline. These results are represented in Figure 3.

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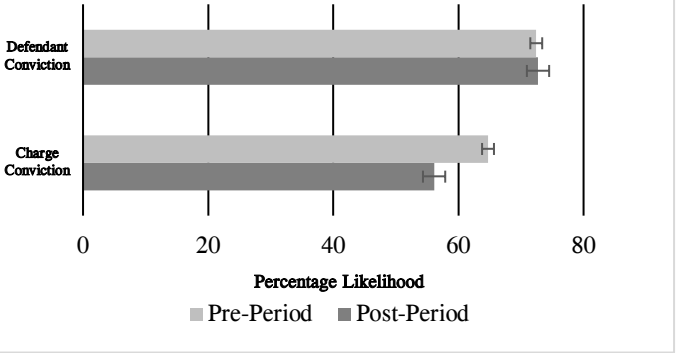
114. We present the results as per circuit per month because this is the unit of analysis for the monthly regression models, which include month, year, and circuit as predictors in the specification. The "per circuit per month" numbers indicate the average circuit for an average month during either the pre- or post-period, depending on which is referenced. This allows comparing the pre- and post-periods to one another as a unit.

Figure 3

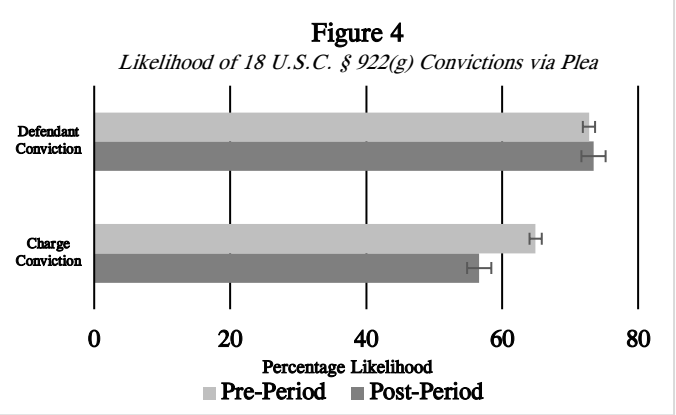
Likelihood of 18 U.S.C. § 922(g) Convictions



Guilty via plea. The likelihood of a defendant being convicted via plea for 18 U.S.C. § 922(g) was not impacted by the *Rehaif* decision, holding constant from 72.77% [95% CI: 71.89–73.64%] in the pre-period to 73.44% [95% CI: 71.62–75.26%] in the post-period. This change was not statistically significant. However, at the individual charge level, the rate of conviction via plea for § 922(g) declined from 64.93% [95% CI: 64.00–65.86%] to 56.63% [95% CI: 54.89–58.17%] between the pre- and post-periods. This 8.30% decline was statistically significant ($p < 0.01$) and amounted to a 12.59% decline from the baseline rate. These results can be seen in Figure 4.

Figure 4

Likelihood of 18 U.S.C. § 922(g) Convictions via Plea



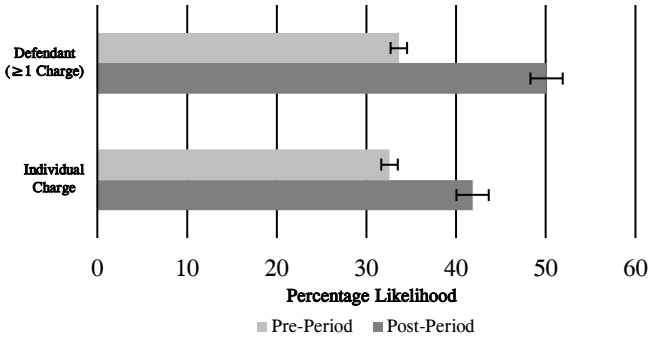
Guilty via trial. The likelihood of a defendant being convicted via trial for 18 U.S.C. § 922(g) also did not significantly change. It was 2.27% [95% CI: 1.98–2.56%] prior to *Rehaif* and 1.93% [95% CI: 1.33–2.52%] afterwards, which was not statistically significant. At the individual charge level, the rate of being found guilty via trial went from 2.33% [95% CI: 1.87–2.40%] to 1.48% [0.10–1.97%]. Here again, the decline was not statistically significant. In conjunction with the decline in guilty pleas, this supports the conclusion that the decline in guilt by

plea and not by trial drove the overall decline in the likelihood of a § 922(g) charge being adjudicated guilty.

Not guilty. The overall likelihood of a *defendant* being found guilty of 18 U.S.C. § 922(g) did not change during the pre- and post- periods. Nevertheless, we found that the likelihood of a defendant being found *not* guilty of one or more § 922(g) charges increased substantially. This result is made possible by the fact that some people were subject to multiple § 922(g) charges. In these multiple charging situations, the likelihood of a person being found not guilty of at least one § 922(g) charge increased from 33.62% [95% CI: 32.68–34.57%] to 50.09% [95% CI: 48.13–52.05%]. Consistent with this finding, the share of individual § 922(g) charges adjudicated not guilty rose from 32.58% [95% CI: 31.66–33.50%] to 41.84% [95% CI: 40.13–43.56%]. This 9.26% increase between the pre- and the post-period was statistically significant ($p < 0.01$) and amounted to a 29.04% increase from the baseline rate. Combined with the results about guilty pleas, this suggests that in the study post-period, defendants were equally likely to plead guilty to a single charge of § 922(g) but less likely to plead guilty to additional charges of it. These results are in Figure 5.

Figure 5

Likelihood of 18 U.S.C. § 922(g) Being Adjudicated Not Guilty



Convictions. Among those charged with 18 U.S.C. § 922(g), the average number of people convicted of the offense per circuit per month was 45.27 [95% CI: 43.69–46.84] during the pre-period and 41.62 [95% CI: 38.20–45.04] during the post-period. This change in the number of people convicted of § 922(g) was not statistically significant. At the level of individual charges, the average number of convictions per circuit per month for § 922(g) was 46.40 [95% CI: 44.78–48.02] before *Rehaif* and 42.72 [95% CI: 39.19–46.24] afterwards. This change was not statistically significant either. The full regression results can be found in Table 6.[115]

115. This does *not* indicate that the frequency of convictions was unimpacted by issuance of the *Rehaif* decision. *See infra* Section II.C.5 for further discussion.

4. PUNISHMENT

The fourth component of our study addresses the impact of *Rehaif* on punishment in the federal criminal system. As expected, we did not find any sentencing changes for 18 U.S.C. § 922(g) between the pre- and post-periods. All regression results for punishment can be found in Table 7.

The likelihood that someone convicted of § 922(g) received a prison sentence did not change after the *Rehaif* decision. Both before and after the ruling, nearly all of the people convicted of § 922(g) received a prison sentence. The average length of time imposed for each § 922(g) charge held steady at 56.95 months [95% CI: 55.88–58.03] in the pre-period and at 56.26 months [95% CI: 53.98–58.55] in the post-period. The change was not statistically significant. Similarly, there was no change in the total prison time for persons convicted of one or more § 922(g) charges across the pre- and post-period. Before *Rehaif*, the average total prison term for all offenses for those convicted of § 922(g) was 75.20 months [95% CI: 66.69–83.72], and afterwards it was estimated at 89.79 months [95% CI: 71.50–108.08]. This difference was not statistically significant.[116]

Cumulatively, before *Rehaif* courts sentenced defendants to 217.52 years in prison per circuit per month [95% CI 208.98–226.06] for 18 U.S.C. § 922(g) convictions, and afterwards they assigned 197.36 years in prison per circuit per month [95% CI: 179.01–215.70]. This decrease was not statistically significant.[117] For those cases in which a § 922(g) conviction was one of the defendant's guilty counts, the overall amount of prison time defendants received during the pre-period was 277.91 years per circuit per month [95% CI: 244.20–311.62], and in the post-period it was 301.90 years per circuit per month [95% CI: 229.48–374.32]. Again, this change was not statistically significant.[118]

The likelihood of a person being placed on probation remained relatively stable at around 0.2% before and after the *Rehaif* decision. The length of time for probation on average did not change in a statistically significant way, either. In the pre-period, the average probation time was 0.23 months [95% CI: 0.11–0.34], and it fell to -0.03 months in the post-period [95% CI: -0.28–0.21].

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116. While on the surface the gap between 75.20 and 89.79 months may appear substantive, the 95% confidence intervals overlapped, meaning that the difference between the two numbers had a greater than 5% likelihood to be the result of chance.

117. Due to the 95% confidence intervals overlapping, the difference between the two numbers had a greater than 5% likelihood to be the result of chance. *See id.*

118. As with the results regarding convictions, even though these analyses indicate no change in the amount of incarceration between the pre- and post-periods, they do not account for the charges and convictions that did not occur due to *Rehaif*. This is discussed further *infra*, Section II.C.5.

Likewise, the average monetary fine in the pre-period was 127.59 dollars with a standard deviation of 2138.93, and in the post-period the mean was 86.58 dollars with a standard deviation of 689.27. Due to the distribution of the monetary fine variable, we calculated the change in the natural log[119] of the total fine variable from before and after the decision. We found that the average fine remained stable from 0.33 [95% CI: 0.30–0.36] to 0.28 [95% CI: 0.21–0.35] log dollars. Thus, we found no difference in the mean monetary fine between the pre- and post-periods.

5. ROBUSTNESS CHECKS

We performed a series of robustness checks for our main analyses. In Figure 6, we report the event study analyses for the charging outcomes that were statistically significant. The vertical dashed line indicates the date of the *Rehaif* decision. For each of the outcomes we do not find any noticeable statistically significant pre-trends five months before the *Rehaif* decision. However, we also note that for each of the outcomes there appears to be an increase in the charging for 18 U.S.C. § 922(g) across the pre-period, but in the time period immediately before issuance of the *Rehaif* decision there is no consistent increase in charging. This is consistent with the increase in § 922(g) charging that occurred across the pre-period, as previously noted.

During several of the months after issuance of the *Rehaif* decision, we found a statistically significant decline in the number of people charged with 18 U.S.C. § 922(g) relative to both (1) all people charged with any criminal offense and (2) the total number of charges per circuit per month. At the same time, we did not find a statistically significant effect on the number of people charged with § 922(g) per circuit per month (Panel B). Thus, while our main findings regarding the number of charges per defendant and the total number of charges per circuit per month appear to hold, the results for the number of defendants per circuit per month are not as well supported. As such, they should be taken with caution and would benefit from a future study with a longer post-period, as suggested below in the limitations section.

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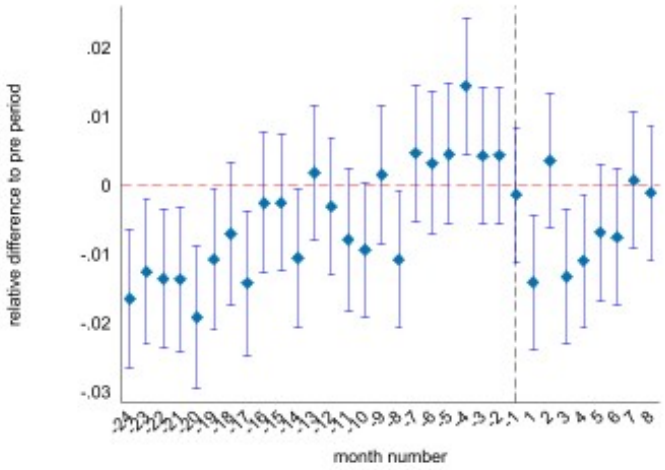
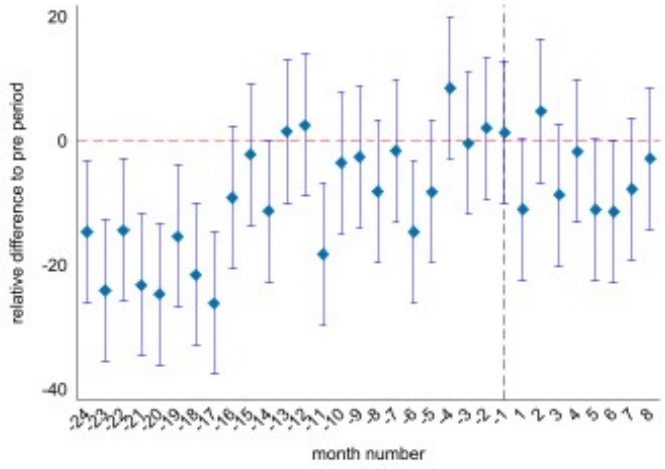
119. We transformed to the natural log because of the non-normal distribution of monetary fines. A small number of people received large fines, creating a right-hand tail.

Figure 6. Event study graphs for charging decisions.

Panel 6A. Likelihood of individual being charged with 18 U.S.C. § 922(g).



Panel 6B. Number of people charged for § 922(g) per circuit per month.



Panel 6C. Number of charges for § 922(g) per circuit per month.

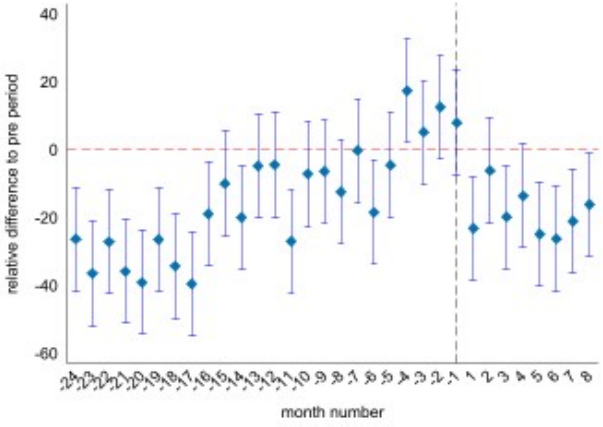
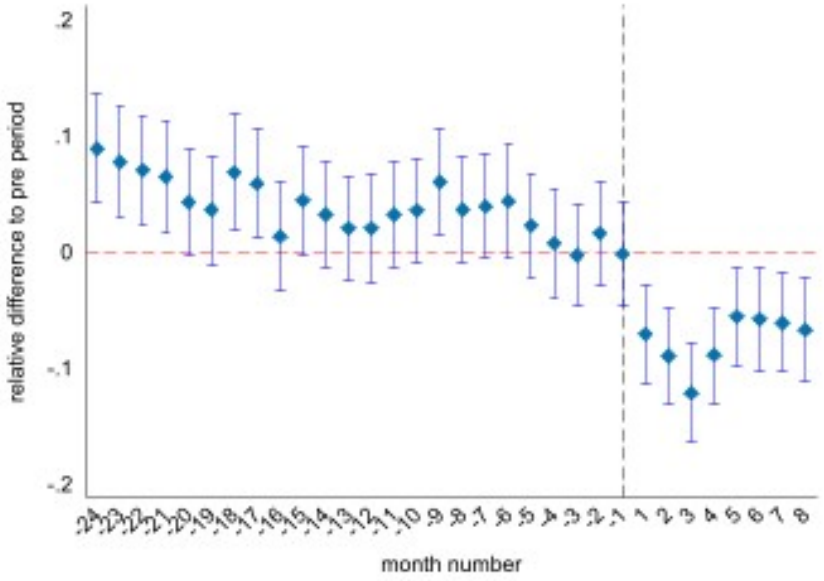


Figure 7 contains the event study analyses for the statistically significant disposition results. In Panel A, we report the likelihood of conviction at the charge level. While there was a decline during the pre-period, in the five months leading up to issuance of the *Rehaif* decision, no discernible pre-trend is present. However, after the decision was issued, we found a sharp and statistically significant decline in the likelihood of conviction at the charge level, and this remained relatively stable during the entire post-period. This is consistent with our main analysis. We found a similar result in Panel B for the likelihood of pleading guilty at the charge level.

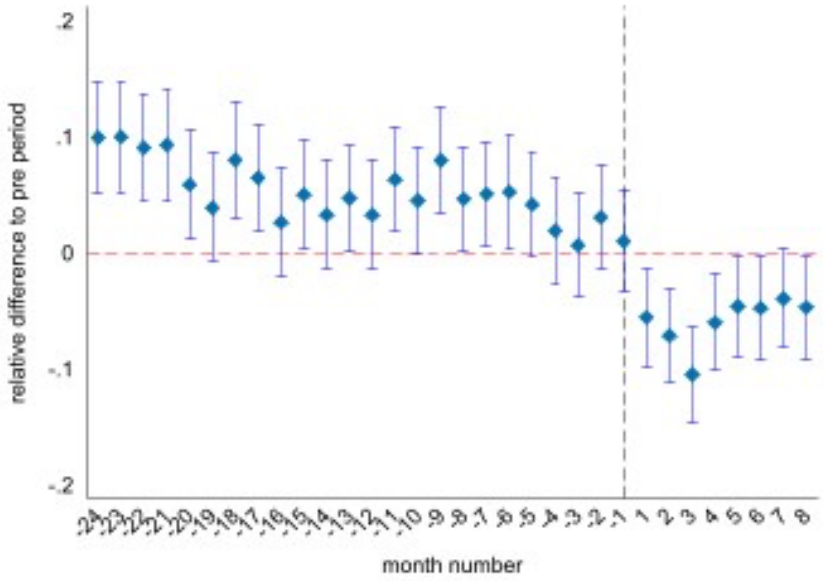
In Panels C and D, respectively, we examine the likelihood of a defendant being found not guilty of one charge and the likelihood of an individual charge being adjudicated as not guilty. For both outcomes, there appears to be a general increase in the likelihood of a not guilty adjudication during parts of the pre-period; however, that increase is not reflected in the five months immediately prior to issuance of the *Rehaif* decision. After the decision, by contrast, a sustained increase appears in the likelihood of a not guilty adjudication, which is consistent with our main analysis.

Figure 7. Event study graphs for disposition outcomes.

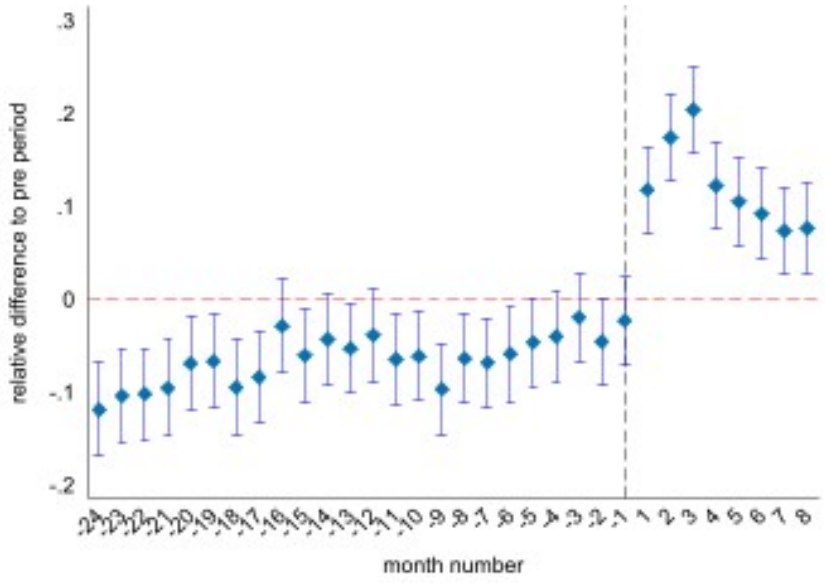
Panel 7A. Conviction at the charge level.



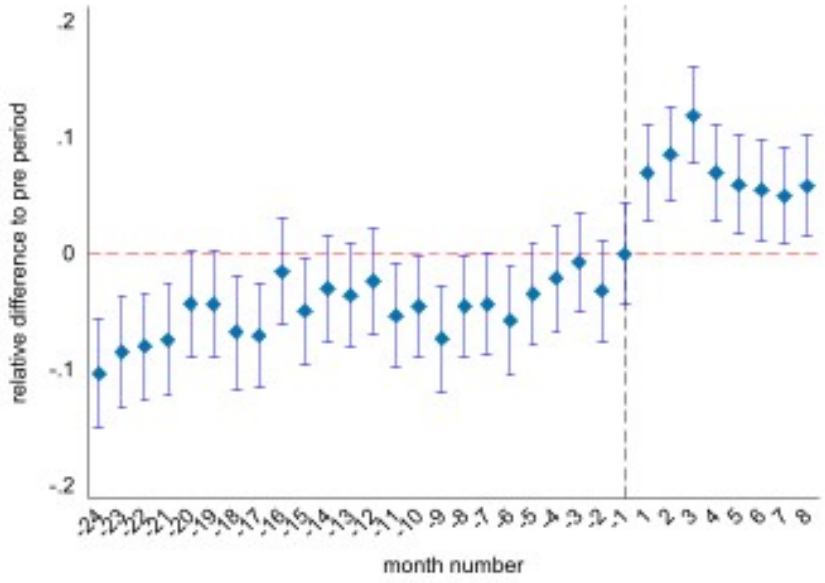
Panel 7B. Pleading guilty at the charge level.



Panel 7C. Not guilty of at least one charge at the defendant level.



Panel 7D. Not guilty at the charge level.

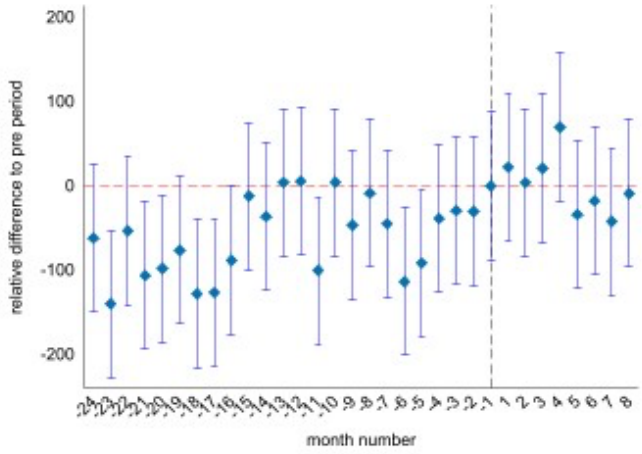


In Figure 8, we report the event studies for monthly charges filed for all offenses besides 18 U.S.C. § 922(g). For both the monthly aggregate defendant- and charge-levels, we did not find any consistent pre-trend prior to the decision. Nor did we find noticeable changes in the

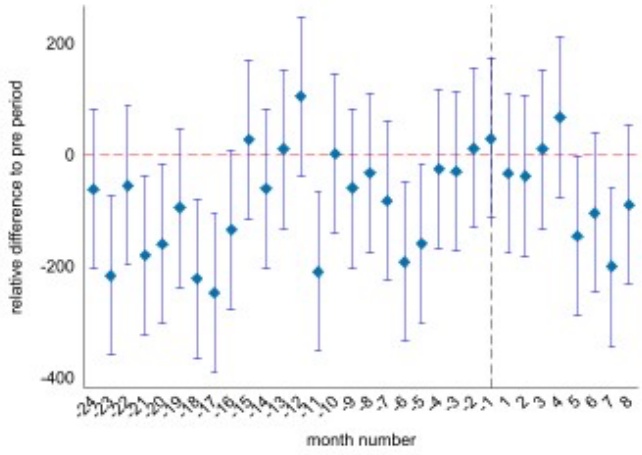
number of defendants or individual charges for the aggregated total of all other statutes aside from § 922(g) during the post-period. The stability of federal criminal practice outside of § 922(g) supports the conclusion that administration of § 922(g) was impacted by the *Rehaif* decision. In sum, the event study analyses provide support for our main analyses, increasing confidence in our results.

Figure 8. Event study graphs for aggregate monthly charging of non-18 U.S.C. § 922(g) offenses.

Panel 8A. Event study at the month level for number of individuals charged with an offense other than 18 U.S.C. § 922(g).



Panel 8B. Event study at the month level for number of charges for an offense other than 18 U.S.C. § 922(g).



Next, we report the results from the placebo tests for which we hypothetically varied the date the *Rehaif* decision was issued. Table 8 contains the placebo tests for the 18 U.S.C. § 922(g) charge filing models. We do not find a statistically significant decline in the number of charges after the placebo dates. This provides greater confidence in attributing the changes between the pre- and post-periods to the actual content of *Rehaif* decision as opposed to the timing of the ruling.

Table 9 contains the placebo tests for the charge-level convictions and pleading guilty outcomes. Consistent with the main regression analyses, we do not find statistically significant effects for the twelve- and fifteen-month placebo tests. This adds greater confidence in the main results. We also found a statistically significant increase in convictions and guilty pleas with the nine-month placebo test; however, an increase does not undermine the main analysis as our concern is with a false positive in our result of a decrease in these measures.

In Table 10, we report the likelihood of being found not guilty under the placebo test at the individual and charge level. The results are similar for both. While we found in our main specification increases in the likelihood of being found not guilty due to *Rehaif*, we did not find a statistically significant change in one of the twelve-month and both fifteen-month placebo tests. The results of these placebo tests give us greater confidence in our findings.

By contrast, in the nine-month placebo tests, we found decreases in the likelihood of being found not guilty in both units of analysis. These changes are contrary to our predicted outcomes and do not confirm our main analyses. These final placebo tests provide some reason for caution in our results concerning not guilty findings at the person and charge level. However, these placebo tests should also be considered in the context of the overall evidence from the main analyses and event study analyses that are consistent with an effect due to *Rehaif*.

Finally, we estimate changes in the number of monthly charges and convictions for 8 U.S.C. § 1326 and § 1324. We find that there are no statistically significant changes in the number of monthly charges or convictions for either offense, which is important because these frequently used charges also address issues of immigration status, like 18 U.S.C. § 922(g). That charging and conviction for these offenses was stable between the pre-and post-periods provides additional evidence that the changes observed for § 922(g) are attributable to the *Rehaif* decision.

In total, most of the results from our placebo tests provide support for the assertion that the results of our main analyses are not a result of *when* the *Rehaif* decision was issued but rather the content of the decision. Together with the event study analyses, the robustness checks support the main analyses with some exceptions indicated, contributing to the conclusion that the administration of 18 U.S.C. § 922(g) changed after the Supreme Court decision.

6. ASSESSING *REHAIF*'S IMPACT

So far, we have considered the effects of the *Rehaif* decision through a straightforward comparison of criminal administration of 18 U.S.C. § 922(g) before and after the opinion was issued. However, this analysis does not adequately account for the people who were not charged in the post-period and, hence, were not in the post-period sample. Incorporating this group of individuals into our analyses is critical for fully capturing the effects of adding a culpable knowledge requirement to the legal status element of § 922(g). To do so, we imagine a world in which the Supreme Court had not abolished strict liability as to this legal status element. We will refer to this as an "alternative non-*Rehaif* world." In this hypothetical world, we stipulate that pre-period behavior in charging, conviction, and punishment continued into the post-period. As such, this is not an exact prediction, but rather a helpful point of comparison for understanding the potential effects of *Rehaif* on criminal administration.

The first key possible effect is on criminal convictions: how many 18 U.S.C. § 922(g) convictions were prevented by the culpable knowledge requirement recognized in *Rehaif*? To develop an estimate, we begin with a statistically significant result from Subsection 2: the total number of § 922(g) charges per circuit per month declined from 94.42 [95% CI: 91.25–97.60] before *Rehaif* to 63.74 [95% CI: 56.83–70.64] after it. We multiply that difference (of 30.68) by the twelve circuits in the United States and the eight months of the post-period to estimate that prosecutors nationwide filed 2,945.28 fewer § 922(g) charges during the eight-month post-period (June 21, 2019, to February 29, 2020).[120] We then add these 2,945.28 charges of § 922(g) to the 8,597 charges of § 922(g) filed in the real world post-period, which equals a total of 11,542.28 charges of § 922(g) in the alternative non-*Rehaif* world.[121] Based on the pre-*Rehaif* conviction rate for an individual charge of 64.73%,[122] we estimate that there would have been 7,471.32 convictions for § 922(g) in the alternative non-*Rehaif* world during the post-period, which is 2,365.32 more convictions than the 5,106 convictions for § 922(g) during the real-world post-period. Thus, we estimate that adding a culpable knowledge requirement to the legal status element of § 922(g) prevented 2,365.32 convictions for § 922(g).

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120. For simplicity of calculations, we round down to eight months as opposed to eight months and ten days. As such, these estimations are conservative in relation to the calendar.

121. We calculate a new number of convictions in the alternative non-*Rehaif* world because the conviction rate changed between the pre- and post-period. This is likely a conservative estimate of the number of people charged as it relies on the real-world post-period charging.

122. This is based on the § 922(g) conviction rate in the alternative non-*Rehaif* world. *See supra* Figure 3.

Punishment is another crucial potential effect of the *Rehaif* decision worth exploring: how many years of incarceration for 18 U.S.C. § 922(g) violations were prevented by adding a culpable knowledge requirement to the statute's legal status element? To make that calculation, we multiply the 2,365.32 fewer convictions just noted by the 56.95-month average length of punishment for § 922(g) convictions. This equals 11,225.41 years.[123] That is not our final estimate, however, because of an important fact: 25% of § 922(g) convictions during the pre-period were accompanied by convictions for other charges (hereinafter, non-solo convictions).[124] These non-solo convictions are relevant to our punishment projection because in the federal system sentences for multiple convictions frequently run concurrently with one another.[125] As a result, *Rehaif* may not have prevented the prison time associated with these non-solo convictions from actually being served, given that the sentence imposed for them may have run concurrently with other sentences. So, to be conservative,[126] we subtract from our punishment projection the years of incarceration associated with this 25% of non-solo convictions. Our best (conservative) estimate, therefore, is that the culpable knowledge requirement recognized in *Rehaif* resulted in 8,419.06 fewer years of prison time for § 922(g) convictions during the eight-month post-period.

III. DISCUSSION

This study is motivated by a basic question: does mens rea matter? Our legal impact analysis of *Rehaif v. United States* provides a novel empirical perspective. The U.S. Supreme Court's decision to abolish strict liability as to the legal status element of 18 U.S.C. § 922(g) appears

123. Because there was no statistically significant difference in prison time for individual § 922(g) convictions, we do not recalculate the prison time for those who were already convicted in the real-world post-period.

124. This includes convictions for other offenses and multiple § 922(g) convictions.

125. 18 U.S.C. § 3584 ("Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively.").

126. This estimate is conservative because federal judges are legally able to (and sometimes do) impose consecutive sentences for both: (1) felon-in-possession and other criminal convictions; and (2) multiple felon-in-possession convictions. *See, e.g.*, *United States v. Ricks*, No. CR 16-11, 2021 WL 1023067, at *1 (E.D. La. Mar. 17, 2021) ("At sentencing, the Court sentenced Defendant to 60 months for the felon in possession of a firearm count and 240 months for the other counts running consecutively."); *Samuels v. United States*, No. 3:16-CV-453-GCM, 2017 WL 4583902, at *6 (W.D.N.C. Oct. 13, 2017) ("Double jeopardy does not prevent the four felon-in-possession sentences from being run consecutively in the instant case because each offense was based on a separate independent incident.").

to have had statistically significant consequences for multiple aspects of criminal administration. This study's findings not only illuminate the effects of adding a knowledge requirement to the federal felon-in-possession statute but also the potential impact of adding culpable mental state requirements to criminal statutes more broadly.

Below, we elaborate on these points. In Sections A and B, we discuss the implications of our study from two different perspectives: (1) prosecutorial decision making and (2) punishment. Thereafter, in Section C we consider some of the study's methodological limitations. Then, in Section D we conclude with discussion of the most significant questions raised by our paper and the value of conducting empirical mens rea research.

A. Rehaif*, Mens Rea, and Prosecutorial Decision-Making*

One way to appreciate the import of this study is by focusing on the relationship between mens rea and prosecutorial decision making. Earlier, we hypothesized that adding a culpable mental state requirement to an individual statute should lead to reduced charging and constrain prosecutorial discretion by narrowing a statute's breadth of coverage and elevating the government's burden of proof in individual cases.[127] As discussed below, our findings support this general hypothesis while revealing the scale of the reductions in charging and conviction that are likely attributable to *Rehaif*. Those reductions, as explored in subsection two, appear to have been significant but not altogether disruptive for federal gun prosecutions. Contrary to the predictions of some, the mens rea reform in *Rehaif* clearly did not bring criminal administration of § 922(g) to a halt.

1. Mens Rea and Constraints on Prosecutorial Discretion

Our findings provide empirical support for the idea that mens rea leads to reduced charging. This is made clearest by our analysis of § 922(g) charging rates before and after the Supreme Court issued the *Rehaif* decision. For example, we found that during the pre-*Rehaif* period of the study when § 922(g)'s legal status element was subject to strict liability, federal prosecutors utilized the statute an average of 94.42 times per circuit per month.[128] In contrast, during the post-*Rehaif* period of study, federal prosecutors charged § 922(g) an average of 63.74 times per circuit per month.[129] This amounts to a 34.59% reduction in overall monthly charging for § 922(g).

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127. *See supra* Section I.C.
128. *See supra* Subsection II.B.6.
129. *Id.*

Just how impactful was this reduction in charges? In Part II, we estimated that the reduction would have amounted to at least 2,945 fewer charges filed during the first eight-months following issuance of *Rehaif*. Assuming the continuity of those reductions, this is equivalent to an annual rate of 4,417 fewer § 922(g) charges in the federal criminal system.[130]

Looking beyond the raw numbers, our study suggests adding a culpable knowledge requirement to 18 U.S.C. § 922(g) constrained prosecutorial discretion by lowering the amount of pressure federal prosecutors could exert against criminal defendants. The extent to which prosecutors use the threat of criminal liability and punishment as leverage during plea negotiations to secure outcomes deemed favorable is well-documented.[131] In the federal system, 90% of all cases are resolved through plea bargaining.[132] Therefore,the leverage provided by § 922(g) is substantial.[133] As previously discussed, a single count of § 922(g) brings with it the possibility of a maximum ten-year sentence, and the average sentence handed down is approximately five years.[134]

The punitiveness of the federal felon-in-possession statute is amplified by the fact that § 922(g) charges are easily stackable.[135] For example, the government can bring a separate charge for every firearm possessed by someone with a prohibited status, and if those weapons were obtained at different times or stored in different locations, then a criminal defendant can be sentenced for each of them.[136] As a result, the

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130. *Id.*

131. *See, e.g.,* Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175, 1235 (2020); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 56–58 (2007); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 520, 528 (2001); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2467, 2470–71 (2004); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 12 (2010); Scott Hechinger, *How Mandatory Minimums Enable Police Misconduct*, N.Y. TIMES (Sept. 25, 2019), https://www.nytimes.com/2019/09/25/opinion/mandatory-minimum-sentencing.html.

132. Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009—Statistical Tables*, BUREAU OF JUSTICE STATISTICS (December 2013), https://bjs.ojp.gov/library/publications/felony-defendants-large-urban-counties-2009-statistical-tables.

133. *See generally* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.

134. *See supra* note 42 and accompanying text.

135. *See, e.g.*, Stuntz, *supra* note 131, at 594 (discussing "the power to stack charges, to charge a large number of overlapping crimes for a single course of conduct").

136. *See, e.g.*, *United States v. Meza*, 701 F.3d 411, 433 (5th Cir. 2012); *United States v. Buchmeier*, 255 F.3d 415, 423 (7th Cir. 2001) ("[G]overnment may charge an individual with multiple violations of [felon-in-possession statute] where it can produce evidence demonstrating that the firearms were stored or acquired separately and at different times or places."); *but cf. United States v. Zareck*, 588 F. App'x 100, 101

government's ability to threaten serious punishment would seem to grow with each charge, thereby increasing an accused's incentive to plead guilty—regardless of whether they were factually guilty.[137]

It is therefore notable that our study not only found statistically significant reductions in the number of people charged with 18 U.S.C. § 922(g) but also the number of § 922(g) charges brought within individual cases. For example, in the pre-*Rehaif* period there were an average of 1.25 § 922(g) charges brought across felon-in-possession prosecutions. In contrast, during the post-*Rehaif* period the average felon-in-possession defendant was subjected to 1.02 charges of § 922(g)—a 19.08% decline.

Viewed collectively, these findings provide reason to believe that adding a culpable knowledge requirement to the federal felon-in-possession statute's legal status meaningfully reduced charging and constrained prosecutorial discretion. For reasons discussed in the next subsection, though, the extent to which the mens rea reform in *Rehaif* impacted prosecutorial administration should not be overstated.

2. MENS REA AND CRIMINAL ADMINISTRATION

Supporters of strict liability frequently base opposition to mens rea reform in the administrative difficulties associated with culpable mental state requirements. The idea is that state-of-mind evidence is so difficult to find or time consuming to produce that adding culpable mental state requirements to a statute risks severely disrupting a prosecutor's ability to secure criminal convictions.[138]

That does not appear to have been true of the culpable knowledge requirement adopted by the *Rehaif* Court. During the post-*Rehaif* period we studied, 18 U.S.C. § 922(g) remained one of the most frequently charged federal statutes, and the charging reductions attributable to *Rehaif* still constituted a small proportion of the overall charges and

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(3d Cir. 2014) ("[A]lthough a defendant may be charged with violations of multiple subsections of 18 U.S.C. § 922(g), it is impermissible to impose separate sentences for each subsection of the statute *based on a single incident of possession*.") (emphasis added).

137. Stuntz, *supra* note 131, at 523 ("By stacking enough charges, prosecutors can jack up the threat value of trial and thereby induce a guilty plea, even if the government's case is weak. Thus, the ability to charge-stack seriously reduces the value of the defendant's right to force the government to prove its case. As with prosecutors' decisions to charge overbroad crimes, charge-stacking tends to transfer adjudication from the courthouse to the district attorney's office."); *see* Rakoff, *supra* note 133.

138. *See, e.g.*, Darryl K. Brown, *Strict Liability in the Shadow of Juries*, 67 SMU L. REV. 525, 535 (2014) ("In decisions on public-welfare or regulatory offenses, courts have long cited 'difficulty of proof of knowledge' as justifying strict liability."); *State v. Jordan*, 89 Ohio St. 3d 488, 494, 733 N.E.2d 601, 607 (arguing that strict liability is justified "based primarily on the difficulties inherent in determining a defendant's subjective knowledge").

individual prosecutions. So, even if the mens rea reform in *Rehaif* made § 922(g) prosecutions more difficult, the government was able to manage this burden—and ultimately secure convictions whether by pleas or at trial—in the vast majority of cases.

Our study therefore lends credence to the *Rehaif* majority's skepticism that "the obligation to prove a defendant's knowledge of his status will be as burdensome as the Government suggests."[139] As previously mentioned in Part I, DOJ argued that it would be exceptionally difficult for prosecutors to generate proof of the culpable knowledge requirement then under consideration by the *Rehaif* Court.[140] The dissent penned by Justices Alito and Thomas is consistent with the government's position, asserting that with this new mens rea requirement prosecutors would find it "significantly harder to convict persons falling into some of [the different status] categories[.]"[141] While it is clear that the *Rehaif* decision increased the evidentiary burden confronted by the government in § 922(g) prosecutions, our study indicates that the concerns expressed by the DOJ and Justices Alito and Thomas were overwrought.

This conclusion finds support in the fact that the likelihood of conviction for defendants charged with 18 U.S.C. § 922(g) did not change in a statistically significant way after *Rehaif*. As previously discussed, the government did charge fewer people with federal felon-in-possession during the post-period relative to the pre-period. However, once federal prosecutors made the initial decision to charge, they were just as likely to convict a defendant of § 922(g) under the culpable knowledge interpretation of the federal felon-in-possession statute as they were under the strict liability interpretation.[142]

This stability in conviction rates indicates that the mens rea reform in *Rehaif* did not bring federal felon-in-possession prosecutions to a halt. At the same time, it also suggests that prosecutorial decision making is sensitive to legal requirements. During informal discussions we had with federal prosecutors, they reported that they do not like to see charges dismissed for lack of legal sufficiency pre-trial or adjudicated not guilty at trial.[143] These informal reports are consistent with the stability of the likelihood of conviction across the pre- and post-periods, from which one might infer that federal prosecutors were carefully recalibrating their

139. *Rehaif v. United States*, 139 S. Ct. 2191, 2198 (2019).

140. *See* Brief for Respondents at 36–37, *Rehaif v. United States*, 139 S. Ct. 2191 (2019) (No. 17-9560).

141. *Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting).

142. *See supra* Section II.C.3.

143. *See generally* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470–77 (2004) (discussing prosecutorial incentives and structural distortions to prosecutorial decision-making).

charging decisions in light of *Rehaif*.[144] After this recalibration, federal prosecutors still maintained an exceptionally high volume of felon-in-possession prosecutions and a correspondingly low volume of "losses" even though a culpable knowledge requirement had been added to the statute.[145]

B. Rehaif*, Mens Rea, and Punishment*

Another way to appreciate the import of our findings is by focusing on the relationship between mens rea and punishment. Culpable mental state requirements have long been viewed as a critical tool for protecting the morally innocent and furthering the ends of justice.[146] However, their practical impact on the primary output of criminal legal systems—punishment, understood in terms of both criminal convictions and sentences—has long been obscured by the absence of any empirical work investigating the matter. Our legal impact study of the *Rehaif* decision offers relevant insight.

Going into the study, we expected that the *Rehaif* decision would not have any impact on the severity of the punishments under 18 U.S.C. § 922(g). Our findings are consistent with that expectation: the average sentence length for a § 922(g) conviction remained unchanged before and after *Rehaif*. Nevertheless, the fact that there were so many fewer convictions for § 922(g) during the post-period supports the conclusion that the mens rea reform in *Rehaif* ultimately prevented a significant amount of punishment from being imposed.[147] Specifically, in Part II we

144. *See, e.g.*, DEP'T OF JUST., *Principles of Federal Prosecution*, JUST. MANUAL § 9-27.300 (Feb. 2018), www.justice.gov/jm/jm-9-27000-principles-federal-prosecution [https://perma.cc/6VXP-XKR7] ("Once the decision to prosecute has been made, the attorney for the government should charge and pursue the most serious, readily provable offenses. By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences.").

145. *See supra* Section II.C.5.

146. *See, e.g.*, H.L.A. HART, PUNISHMENT & RESPONSIBILITY 6–7, 13–17, 20–23 (2d ed. 2008).

147. For prior scholarship on the downstream effects of charging and convictions on punishment, see, for example, M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1320–26, 1342–49 (2014); Eric P. Baumer, *Reassessing and Redirecting Research on Race and Sentencing*, 30 JUST. QUARTERLY 231, 231–38, 240–44, 255–56 (2013); Besiki L. Kutateladze, Nancy R. Andiloro, Brian D. Johnson & Cassia C. Spohn, *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 CRIMINOLOGY 514, 535–40 (2014); Cassia C. Spohn, *Evolution of Sentencing Research*, 14 CRIMINOLOGY & PUB. POL'Y 225, 227–28 (2015); John Wooldredge, James Frank, Natalie Goulette & Lawrence Travis III, *Is the Impact of Cumulative Disadvantage on Sentencing Greater for Black Defendants?*, 14 CRIMINOLOGY & PUB. POL'Y 187, 189–92, 217–18 (2015); Marjorie S. Zatz, *The Changing Forms of Racial/Ethnic Biases in Sentencing*, 24 J. RES. CRIME & DELINQUENCY 69, 83–87 (1987).

estimated that the *Rehaif* decision led to 2,365.32 fewer convictions for § 922(g) from July 2019 to February 2020. Based on that estimate, we calculated that the *Rehaif* decision may have prevented 8,419.06 years of prison time from being imposed for § 922(g) violations in the subsequent eight months alone. Thus, the human impact of mens rea reform in *Rehaif* is potentially substantial.

There are two main reasons for this. First, "[i]mprisonment in its basic structure entails caging or imposed physical constriction, minute control of prisoners' bodies and most intimate experiences, profound depersonalization, and institutional dynamics that tend strongly toward violence."[148] Every year of incarceration prevented by *Rehaif* is thus one year less of these extraordinary forms of suffering imposed upon human beings.[149] Second, the theorized reductions in imprisonment may have broader systemic effects as well.[150] For example, mass incarceration has disrupted families with serious psychological consequences for children who have been separated from their parents.[151] And it has also devastated communities by eroding employment ability, housing opportunity, physical and mental health, and valuable social capital.[152] Under these kinds of conditions, any reductions in imprisonment wrought by the mens

148. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1184 (2015); *see also* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 467 (1997) ("[T]o go to prison in the United States . . . can mean exposure to a debased, mind-numbing environment, including significant possibilities of forcible rape[.]"); *Johnson v. California*, 543 U.S. 499, 515 (2005) ("Prisons are dangerous places[.]").

149. *But see* notes 164–168 and accompanying text (discussing the issue of hydraulic effects).

150. Sonja B. Starr, *On the Role of Cost-Benefit Analysis in Criminal Justice Policy: A Response to the Imprisoner's Dilemma*, 98 IOWA L. REV. BULL. 97, 106 (2013); *see, e.g.*, COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 3–5, 27 (2016); NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 6, 27 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

151. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1284 (2004) ("Separation from imprisoned parents has serious psychological consequences for children, including depression, anxiety, feelings of rejection, shame, anger, and guilt, and problems in school."); *see, e.g.*, DONALD BRAMAN, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA (1st ed. 2004).

152. *See, e.g.*, Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 207 (1998); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 145 (1999); *see also* Adriaan Lanni, *The Future of Community Justice*, 40 HARV. CIV. RTS.- CIV. LIBERTIES L. REV. 359, 389 (2005) ("The severity of the current sentencing regime has devastating effects on high-crime communities, including reduced employment opportunities, financial hardship, disruption suffered by the offender's family and children, and the erosion of social capital and organization resulting from the aggregation of these effects over the community.").

rea reform in *Rehaif* may at least chip away at mass incarceration's heavy social costs.

Years of imprisonment averted is only one way to understand *Rehaif*'s potential penal impact. The number of felony convictions that *Rehaif* may have forestalled in just eight months (2,365.32) is of independent importance. For one thing, felony convictions bring with them substantial social stigma and serious collateral consequences, which include the loss of housing, employment, public assistance, jury service, and constitutional rights (which can include the right to vote).[153] Beyond that, felony convictions can also be used to impeach someone's character in a future trial,[154] delay the defendant's eligibility for parole, and support the application of a recidivist statute for a future offense.[155] Finally, felony convictions drive criminal history scores, which play a central role in determining the severity of a sentence under both state and federal sentencing guidelines.[156] As a result, fewer § 922(g) convictions today may ultimately yield fewer years of incarceration in the future to the extent those convictions would have been used to aggravate someone's sentence at a later date.

Viewing these effects collectively reveals the potentially profound impact that adding culpable mental state requirements to frequently prosecuted criminal statutes can have on the lives of individual defendants, their families, and their communities.[157]

C. Methodological Limitations

Having presented our study's major findings and primary implications, we now turn to discussion of its most important methodological limitations.

One of those limitations is the relatively brief eight-month window during which we were able to assess *Rehaif*'s impact on criminal administration. This limited window is due to the fact that in March 2020—eight months after the *Rehaif* decision was issued—federal courts

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153. *See, e.g.*, *Commonwealth v. Jones*, 382 Mass. 387, 396 (1981); *O'Clair v. United States*, 470 F.2d 1199, 1203 (1st Cir. 1972); *Benton v. Maryland*, 395 U.S. 784, 790–91 n.5 (1969); Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 299–300 n.161 (1965); Note, *Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970).

154. *See Benton*, 395 U.S. at 791.

155. *Ball v. United States*, 470 U.S. 856, 865 (1985).

156. *See, e.g.*, Rhys Hester, Richard S. Frase, Julian V. Roberts & Kelly Lyn Mitchell, *Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences*, 47 CRIME & JUST. 209, 215, 238–39 (2018).

157. Of course, these reductions in convictions and prison time may have also had detrimental public safety effects. For general discussion of those potential effects, and why they may be too uncertain to support strict liability as a matter of criminal policy-making, see Serota, *Strict Liability Abolition*, *supra* note 12.

were completely upended by the COVID-19 pandemic. To deal with the public health risks posed by the pandemic, the Judicial Conference of the United States severely limited access to courts and dramatically altered the administration of cases.[158] Clearly, a longer period of study would have been preferable: a more extensive post-period would facilitate even better measurement of the outcomes, augmenting the analyses. Nevertheless, the eight-month window between issuance of *Rehaif* and the start of the pandemic provided sufficient time and data to conduct a meaningful analysis.

Another methodological limitation is the common challenge of a pre/post design, such as the one employed by our study, which makes it more difficult to draw causal inferences. It is possible that factors unrelated to the *Rehaif* decision impacted the reductions in § 922(g) charging and convictions. However, our study accounted for some of these factors. For example, to adjust for the influence of seasonal effects in prosecutorial administration, we included month and year as covariates in our regression models. In addition, we were also careful to end our study's post-period prior to the Covid-19 shutdown of the federal courts (though it remains theoretically possible that the burgeoning influence of the pandemic impacted criminal administration even earlier).

Another challenge worth noting is the potential impact of possible short-term prosecutorial retooling. In the immediate wake of the mens rea reform in *Rehaif*, federal prosecutors may have pulled back on charging § 922(g) in order to recalibrate their approach. If true, this could have inflated the impact of *Rehaif* on federal prosecutions during the post-period. There is some facially plausible evidence to support this idea. Reconsider Figure 2,[159] which provides a month-by-month analysis of offense-level charging trends. The month following issuance of the *Rehaif* decision (July 2019) reveals a marked drop followed by an uptick the month after that (August 2019). However, the statistical analyses performed for the complete post-period more precisely revealed that the declines were statistically significant and that any single month fluctuation was simply that. The overall charging trends reflected a new, lower baseline, suggesting lasting effects from the addition of the culpable knowledge requirement to § 922(g)'s legal status element.

Less obvious, but just as important, is the possibility that strategic decision-making by prosecutors during the pre-period may have artificially deflated the impact of *Rehaif* on federal prosecutions during

158. JUD. CONF. OF THE U.S., *Court Orders and Updates During COVID-19 Pandemic*, U.S. COURTS (Aug. 25, 2022, 1:30 PM), https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic [https://perma.cc/E4GG-KVB9].

159. An examination of Figure 1 leads to similar conclusions. *See supra* Section II.C.2 fig.1.

the post-period. This possibility is attributable to the fact that federal prosecutors received an important signal of the forthcoming mens rea reform to § 922(g) during the pre-period. That signal was sent in the *Rehaif* oral argument—held on April 23, 2019—when a majority of Justices firmly pushed back against the strict liability interpretation of the federal felon-in-possession statute. As SCOTUSblog reported:

> Justice Neil Gorsuch signaled his adherence to the view he held while on the U.S. Court of Appeals for the 10th Circuit — that the government is required to prove the defendant's knowledge of his culpable status, whether as an unauthorized immigrant or an ex-con. Justice Brett Kavanaugh signaled that he too holds that view. Only Justice Samuel Alito showed clear agreement with the government's position that such status elements should be treated the same as jurisdictional elements, which require no mens rea, or criminal intent.[160]

The charging data from the two months following oral argument—May and June 2019 on Figure 2—reveal reductions that are consistent with the potential influence of *Rehaif* on prosecutorial decision-making prior to issuance of the opinion. If true, this would have effectively drawn some of *Rehaif*'s effects into the pre-period, thereby leading our study to underestimate the overall impact of adding a culpable knowledge requirement to the legal status element of the federal felon-in- possession statute.

Fortunately, the more precise regression models—such as those employed in this study—address these kinds of interpretive challenges. Comparing the data between the entire pre- and post-periods mitigates the influence of short-term fluctuations. The models include time as a covariate to account for possible month-related effects, and those regressions indicate a statistically significant difference in charging after the issuance of *Rehaif*. That said, future work could use alternative identification strategies to verify the strength of our findings, especially if researchers are able to use a longer post-period.

Another methodological limitation for our study is the lack of a suitable comparison group for felon-in-possession prosecutions. Ideally, we would have liked to compare defendant- and charge-level results for 18 U.S.C. § 922(g) to a group of people prosecuted for a similar charge that was not affected by *Rehaif*. However, our conversations with prosecutors did not reveal a frequently used charge that would support

160. Evan Lee, *Argument Analysis: Court Leaning Toward Requiring the Government to Prove That a Felon in Possession Knew He Was a Felon*, SCOTUSBLOG (Apr. 24, 2019, 11:41 AM), https://www.scotusblog.com/2019/04/argument-analysis-court-leaning-toward-requiring-the-government-to-prove-that-a-felon-in-possession-knew-he-was-a-felon/ [https://perma.cc/D3Z5-CJWY].

this kind of statistical analysis. As a result, we instead compared the § 922(g) defendant- and charge-level results to all those in the federal system at the same time. This revealed that during the post-period both defendant- and individual-level § 922(g) charges declined at a greater rate than did charges for all crimes aside from felon-in-possession. This finding supports our conclusions as do the results of an additional check we performed: examining a pair of frequently charged immigration offenses, 8 U.S.C. § 1326 and § 1324. Specifically, we found that charging and conviction rates for these statutes were stable across the pre-and post-periods, which is in stark contrast with the felon-in-possession trends observed in our study.

In closing our discussion of methodological limitations, we think it is important to acknowledge a key assumption behind our analysis of the *Rehaif* decision's decarceral effects. Although we estimated that the mens rea reform in *Rehaif* significantly reduced the number of convictions and years of incarceration attributable to § 922(g), these findings assume that prosecutors have not simply replaced § 922(g) charges with charges for another offense. That assumption may be frustrated, however, by the "hydraulic effects" of prosecutorial discretion.[161]

The theory of hydraulic effects posits that the reduction or elimination of discretion in one area of the criminal legal system will be offset by or resurface through the exercise of discretion in another area. This concern is especially warranted where narrow statutory revisions are made to individual offenses in a broader system that permits wide prosecutorial charging discretion.[162] The federal criminal code is notoriously broad and thus affords prosecutors a broad array of options for generating criminal convictions, most of which go unused.[163] So limiting one option by adding a mens rea requirement to an individual statute may simply have lead prosecutors to rely upon another easier-to-prove statute to achieve the same outcome. Did this dynamic mitigate the

161. *See e.g.*, Terance D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155, 155–56 (1987) (noting that "this 'hydraulic' or 'zero-sum' effect is so firmly entrenched as a criticism of current reform efforts that most researchers begin with the assumption that the displacement of discretion exists"); Lauren O'Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 395–96 (2010) (observing that "scholars agree that attempts to curtail judicial discretion are likely to concomitantly increase prosecutorial discretion" and that "prosecutorial discretion . . . may risk the perpetuation of the types of disparities sentencing reforms were intended to reduce").

162. *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719–21 (2005).

163. *See, e.g.*, Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 646–67, 650, 652, 654–55, 658, 670–71, 673–74 (2006).

decarceral impact of the reductions in charging and conviction for § 922(g) during the post period—and if so, to what extent? Informal discussions with prosecutors provide little reason to think hydraulic effects obviated our findings; however, this is something that future research on the legal impact of the *Rehaif* decision ought to consider.[164]

D. Key Questions: Generalizability, Pathways, and Racial Disparities

Our project raises a number of questions for the future of empirical mens rea research. This Section addresses three of the most important. First, to what extent are the findings of our legal impact analysis of *Rehaif* generalizable to other potential reforms? Second, what are the pathways through which mens rea reform reduces charging and convictions? And third, how are the decarceral benefits of mens rea reform distributed among different communities (and, in particular, communities of color)? These questions are respectively addressed below.

1. GENERALIZABILITY

This project was motivated by our desire to initiate a line of empirical research into mens rea's legal impact. We began by using the opportunity presented by the *Rehaif* decision to ask: how does adding a particular culpable mental state (knowledge) to a particular element (legal status) of a particular statute (18 U.S.C. § 922(g)) impact criminal administration? In conducting this inquiry, our study provides empirical support for a broader idea: that culpable mental state requirements can meaningfully limit charging and convictions for individual statutes without bringing administration of those statutes to a halt.

That is as far as we are comfortable going in terms of generalizing the results of our study because it is very likely that the consequences of mens rea reform—*i.e.*, the scale of reductions in charging and convictions—will depend on the specifics of the reform in question.

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164. A related question is whether and to what extent state prosecutors deploy state law-analogues to 18 U.S.C. § 922(g) to fill in the gap in federal felon-in-possession prosecutions. *See, e.g.*, Shreefter, *supra* note 52, at 154–55 ("All states have their own penal law similar to the federal 'felon in possession' statute."). Prior to *Rehaif*, state felon-in-possession statutes were subject to strict liability. Brief for Everytown for Gun Safety as Amicus Curiae Supporting Respondent at 11, *Rehaif v. United States*, 588 U.S. (2019) (No. 17-9560) ("[S]tate courts have consistently interpreted state prohibited possessor laws to require a mens rea only for the possession element of the crime."). And to date, state courts have declined to incorporate the U.S. Supreme Court's culpable knowledge reading of the status element. *See Campbell v. State*, 161 N.E.3d 371, 379 (Ind. Ct. App. 2020) (declining to apply holding in *Rehaif* to Indiana's strict liability felon-in-possession statute); *State v. Holmes*, 478 P.3d 1256, 1260 (Ariz. Ct. App. 2020) (same in Arizona).

Therefore, we hope that future empirical work will assess the impact of culpable mental state requirements in other contexts to illuminate whether and to what extent different species of mens rea reform yield disparate effects on criminal administration.

The two-factor model of mens rea's legal impact developed in Part I provides one way to think about the challenges of generalizing the results of our study and how future research might provide more insight into the impact of changes to mens rea requirements. That model posits that mens rea's legal impact will be driven in part by the particular culpable mental state at issue—*i.e.*, purpose, knowledge, recklessness, or negligence—given the distinct evidentiary challenges posed by individual culpable mental state requirements.

Drawing on this model, the culpable mental state of knowledge selected by the *Rehaif* Court is evidentiarily demanding: it generally requires proof of full subjective awareness of some fact.[165] Had the Court selected a less demanding culpable mental state—for example, recklessness, which requires partial subjective awareness,[166] or negligence, which does not require any subjective awareness at all[167]—the reductions in charging and convictions could have been less pronounced.[168] But just how much less pronounced would the consequences of adding of one of these unintentional mental state requirements have been—whether in the context of § 922(g) prosecutions or as applied to any other criminal statute? Our study does not comment on the comparative legal impact of different culpable mental states on criminal administration, which is a practically significant issue to be addressed in future research.

Equally significant is the comparative legal impact of the second factor in our model: the *nature of the objective element* to which a culpable mental state requirement applies. For example, whether and to what extent do adding culpable mental state requirements to different objective elements within an individual offense yield distinct consequences? It is possible that had the *Rehaif* Court decided to require proof of knowledge as to 18 U.S.C. § 922(g)'s jurisdictional element instead of the offense's legal status element, this would have led to

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165. *See* Model Penal Code § 2.02(b) (AM. L. INST., Proposed Official Draft 1962) (defining "knowledge").

166. *Id.* at § 2.02(c) (defining "recklessness").

167. *Id.* at § 2.02(d) (defining "negligence").

168. *See supra* text at p. 117 ("As a general administrative principle, one should expect that the higher the culpable mental state added by lawmakers to a criminal statute, the greater the restriction to prosecutorial discretion and concomitant reduction in charging and convictions will be.").

different reductions to § 922(g) charging and conviction rates.[169] But just how significant would those differences be?

Even more fundamentally, one can ask whether and to what extent adding culpable mental state requirements to different objective elements across offenses would yield distinct consequences for prosecution. For example, what if a court or legislature were to add a culpable knowledge requirement to a drug sentencing statute that holds people strictly liable as to the weight or nature of the drugs involved in a sale, or whether the sale occurred near a school zone?[170] It would be both interesting and useful to know how the outcomes stemming from these kinds of mens rea reforms vary from those after the *Rehaif* decision.

Offenses such as gun possession and drug distribution involve strict liability circumstance elements; however, other offenses—such as felony murder—hold people strictly liable for the harmful results caused by their conduct.[171] Are there categorical differences between abolishing strict liability as to result elements as opposed to circumstance elements—or is the legal impact of an individual mens rea reform ultimately just element specific?

Developing a finer sense of these issues would help inform criminal policymaking. Hopefully, future empirical studies assessing the impact of mens rea reform in other contexts will be able to provide it.

2. PATHWAYS

Another important issue raised by our study focuses on the pathways through which mens rea reform impacts prosecutorial administration. As discussed earlier, there is reason to infer that *Rehaif* yielded lower charging and conviction rates by increasing the evidentiary burden imposed on federal prosecutors in felon-in-possession cases. However, there are at least two different explanations of why increasing evidentiary burdens might have yielded fewer prosecutions. One is because the government *was unable to produce* legally sufficient proof of culpable

169. After all, evidence of awareness that a weapon or ammunition in one's possession has traveled in interstate commerce could be substantially more (or less difficult) for the government to generate than proof that the accused "knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif v. United States*, 139 S. Ct. 2191, 2200; *see supra* Section I.C (discussing the impact that the nature of the objective element involved in mens rea reform may have on charging and conviction rates).

170. *See, e.g.*, Wesley M. Oliver, *Limiting Criminal Law's "In for A Penny, in for A Pound" Doctrine*, 103 GEO. L.J. ONLINE 8 (2013) ("If the prosecution is able to demonstrate that the defendant knew he possessed illegal drugs, neither the type nor the quantity of the drugs has to be foreseeable, and the defendant is liable for whatever he happens to possess.").

171. *See* Serota, *Strict Liability Abolition*, *supra* note 12, at 61–71 (collecting examples of strict liability).

knowledge for moral or evidentiary reasons (as further discussed below). Another is because the government *chose not to produce* legally sufficient proof of culpable knowledge for reasons of administrative efficiency (*i.e.*, because the generation of proof would have been too arduous or time-consuming for prosecutors). The reduction in charging and convictions indicated by our study likely reflects a mix of the two. However, it would be helpful to know the distribution between these two pathways since the first (inability to produce evidence) has implications for understanding the just application of the law, whereas the latter (choosing not to produce evidence) is helpful for understanding the priorities and decisions of prosecutors.

Focusing on the first pathway, there is a further distinction to be made between two different explanations for why the government may be unable to produce legally sufficient proof of mens rea in a given case. One is because the person actually lacked the requisite culpable mental state (*i.e.*, the person is factually innocent). Another is that the person, although possessing the requisite culpable mental state, acted under circumstances where state-of-mind evidence is either difficult or impossible for the government to generate. The reduction in charging and convictions wrought by *Rehaif* likely reflects a mix of the two—though our study provides no indication of the number and proportion of actors who fall into each category.

This issue is of particular policy significance. For example, the first category of actors—those for whom state-of-mind evidence *does not exist*—is linked to one of mens rea reform's principal virtues: minimizing false positives, understood in terms of lowering the rate at which morally innocent actors are convicted of crimes.[172] In contrast, the second category of actors—those for whom state-of-mind evidence *cannot be found*—is linked to what some might construe as one of mens rea reform's principal costs: increasing false negatives, understood in terms of raising the rate at which morally blameworthy actors escape criminal liability.[173] So we suspect that policymakers considering the abolition of strict liability would be particularly interested to know the pathways through which culpable mental state requirements lead to reduced charging and convictions. Hopefully future empirical mens rea studies will be able to shed light on this significant issue.

3. RACIAL DISPARITIES

Finally, we close with one issue unaddressed by our study which is of particular moral significance: understanding the relationship between mens rea reform and racial disparities. Currently, the U.S. legal system

172. *See* Serota, *Blaming Minds*, *supra* note 1.

173. *See id.*

is "defined by widespread criminalization, an epidemic of racialized police violence, and an astronomical population of people caged or under state correctional supervision."[174] Of all the individual lives, families, and communities harmed by this system, people of color, especially Black people, have disproportionately borne the costs of mass incarceration. [175] Therefore, it is vital to ask to what extent are the decarceral benefits of adding culpable mental states to criminal statutes, as in *Rehaif* or in any other context, distributed to people of color? This is a critical question to ask, in particular, because those who work on criminal justice reform should prioritize policy changes that meaningfully benefit the communities who have suffered the greatest from mass incarceration.[176]

Despite limitations in the data that prevented us from performing a racial impact analysis of the *Rehaif* decision,[177] it is likely that people of color meaningfully benefited from the addition of a culpable knowledge requirement to the federal felon-in-possession statute. This conclusion is based on the fact that in fiscal year 2019 the U.S. Sentencing Commission reported that 55.4% of those convicted of the federal felon-in-possession statute were Black, 24.8% were White, 17.1% were Hispanic, and 2.7%

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174 Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 521 (2019).

175. *See, e.g.*, Michael Serota, *Improving Criminal Justice Decisions*, 52 ARIZ. ST. L.J. 693, 700–03 (2020) (summarizing research on mass incarceration's racially disparate effects); Roberts, *supra* note 151, at 1272–73 ("The gap between black and white incarceration rates . . . has deepened along with rising inmate numbers. . . . [T]he transformation of prison policy at the turn of the twenty-first century is most accurately characterized as the mass incarceration of African Americans."); Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 DÆDALUS 74, 78 (arguing that incarceration is concentrated in, and targeted against, certain classes, races, and geographic locales, with its primary target being low-income black men in urban settings); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (The New Press, eds., 2010) (arguing that the American criminal legal system is a racial caste system designed to control people of color through policing, prosecution, and incarceration).

176. For a more in-depth discussion of this and other ideas presented in this Section, see generally Serota, *Strict Liability Abolition*, *supra* note 12.

177. We were not able to analyze participant race or other related variables that would have enabled us to perform a racial equity analysis. We explored merging the AOUSC's Integrated Database with the United States Sentencing Commission Database to enrich our analyses using the methods outlined by Maria-Veronica Ciocanel et al. Maria-Veronica Ciocanel, Chad M. Topaz, Rebecca Santorella, Shilad Sen, Christian Michael Smith & Adam Hufstetler, *JUSTFAIR: Judicial System Transparency Through Federal Archive Inferred Records*, 15 PLOS ONE 10, (Oct. 26, 2020) https://doi.org/10.1371/journal.pone.0241381 [https://perma.cc/RQ5E-6GKS]. This technique resulted in matching only about one-third of all possible records. Therefore, we did not engage in this procedure as it was not clear that such a merged dataset would be representative of the full dataset.

were "Other races."[178] Given that approximately three-fourths of § 922(g) prosecutions involve people of color and half were Black people, members of those groups likely constituted a substantial proportion of the pool of individuals who were not charged with or convicted of the federal felon-in-possession statute post-*Rehaif*. However, the criminal legal system often reproduces racial disparities after reforms, so there is no guarantee that people of color, and Black people in particular, were the principal beneficiaries of the *Rehaif* decision.

Hopefully a future empirical study will perform this kind of racial equity analysis. Calculating the number of people of color who were among *Rehaif's* beneficiaries and how that number compared to the number of White people who benefited from it would shed light on the relationship between mens rea reform and racial justice. The more concentrated the decarceral benefits to people of color of adding culpable mental state requirements to statutes, the stronger the case in support of mens rea reform as an important tool in the fight against mass incarceration.[179]

CONCLUSION

Mens rea is a cornerstone of U.S. criminal law and has long been the subject of moral and doctrinal analysis by scholars and jurists. Yet the topic has largely evaded scientific scrutiny. To date, no empirical study has assessed whether and to what extent culpable mental state requirements influence charging decisions, criminal convictions, and punishment. This study made relevant headway by quantitatively analyzing the legal impact of adding mens rea to one of the most frequently charged offenses in the federal criminal code.

Our analysis of the *Rehaif* decision supports the conclusion that the addition of a culpable knowledge requirement to the legal status element of 18 U.S.C. § 922(g) significantly reduced charging and convictions for that statute. Modeling what federal practice would have looked like in the absence of *Rehaif*, we estimated that the mens rea reform in *Rehaif* prevented more than 2,000 felon-in-possession convictions and eliminated more than 8,000 years of prison sentences during the first eight months after the decision was issued. Yet even with these reductions, the felon-in-possession statute remained one of the most frequently charged offenses in the federal criminal code, and prosecutors were just as likely to secure convictions of the people they charged with § 922(g) after the *Rehaif* decision as they were before it. All told, these results indicate that culpable mental state requirements can constrain

178. U.S. SENT'G COMM'N, QUICK FACTS ON FELONS IN POSSESSION OF A FIREARM (2019).

179. *See* Serota, *Strict Liability Abolition*, *supra* note 12, at 7, 48, 69.

prosecutorial discretion, lower convictions, and reduce punishment without bringing criminal administration to a halt. And in so doing our study provides empirical support for what criminal law scholarship and policy debate has long assumed: that mens rea does indeed matter.

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