REINING IN OVERCRIMINALIZATION: ASSESSING THE PROBLEM, PROPOSING SOLUTIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

SEPTEMBER 28, 2010

Serial No. 111–151

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE
58–476 PDF WASHINGTON : 2010

For sale by the Superintendent of Documents, U.S. Government Printing Office
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SEPTEMBER 28, 2010

REINING IN OVERCRIMINALIZATION: ASSESSING THE PROBLEM, PROPOSING SOLUTIONS

TUESDAY, SEPTEMBER 28, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 3:03 p.m., in room 2141, Rayburn House Office Building, Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Conyers, Gohmert, and Poe.

Staff Present: (Majority) Bobby Vassar, Subcommittee Chief Counsel; Ron LeGrand, Counsel; Veronica Eligan, Professional Staff Member; and (Minority) Caroline Lynch, Counsel.

Mr. SCOTT. The Subcommittee will now come to order.

I am pleased to welcome you today to today's hearing before the Subcommittee on Crime, Terrorism, and Homeland Security. Today's topic is Reining in Overcriminalization: Assessing the Problem, Proposing Solutions.

Last year, on July 22, the Subcommittee conducted a hearing titled Over-Criminalization of Conduct/Over-Federalization of Criminal Law. That hearing occurred as a result of a series of conversations that Ranking Member Gohmert and I had with former Attorney General Ed Meese and a coalition of organizations, including the Washington Legal Foundation, the National Association of Criminal Defense Lawyers, the Heritage Foundation, the ACLU, the American Bar Association, the Federalist Society, and others. They came to Congress to seek a hearing to discuss the practice and process of enacting Federal criminal law; and they came out of concern for what they, and many others, viewed as an astounding rate of growth of the Federal criminal code.

Testimony from last year's hearing served as a disturbing illustration of the harm that can and does result from the enactment of poorly conceived legislation. A year later, they still question the wisdom of continuing the expansion of the criminal code without first taking time to consider and review the process by which Federal crime legislation is enacted.

But more than the rate of the Federal criminal code's growth, these concerned citizens and groups remain alarmed about the deterioration that has occurred in the standards of what constitutes a criminal offense. There is great concern about the overreach and perceived lack of specificity in criminal law standards, i.e. the

vagueness and the disappearance of the common law requirement of mens rea, or guilty mind.

Today's hearing is supported by a similarly broad group of organizations, and we will continue our examination of the issue with a discussion of a draft of their own legislative proposal and review of the findings of a joint study by the National Association of Criminal Defense Lawyers and the Heritage Foundation entitled "Without Intent, How Congress Is Eroding the Criminal Intent Requirement in Federal Law."

The legislative proposal is notable not only for its content but also for the fact that such seemingly odd political bedfellows can come together on this common ground issue. The Without Intent report is a remarkable nonpartisan study that raises important questions about the proper role of the Federal criminal code and also documents problems that I cited at last year's hearing: vagueness in criminal law standards and the disturbing disappearance of the common law requirement of mens rea.

As all of you by now are familiar with my position on crime policy generally, I have been in office for 30 years, and I have learned that when it comes to crime policy you generally have a choice. You can prosecute and incarcerate people for so-called crimes, or you can utilize available civil remedies to handle minor infractions. You can do the things that research and evidence have proven will reduce crime and enact legislation that provides clear and fair notice of what constitutes criminal acts, or we can play politics as usual with the emotionally charged sound bites and slogans that sound good but prove not to be sound policy.

These kinds of things include mandatory minimum sentencing; three strikes and you're out; and after that didn't work, two strikes and you're out; life without parole; abolish parole; or if it rhymes it's even better, if you do the adult crime, you do the adult time. None of those have been shown to reduce the crime rate; and, in fact, the adult crime and time slogan, all of the studies have shown that if you codify that sound bite you will actually increase the crime rate.

We can see the impact of the unfair and vague legislation at the hands of overzealous prosecutors when we look at the prison population. We now have on a daily basis over 2.3 million people locked up in our Nation's prisons, a 500 percent increase over the last 30 years. The Pew Foundation has estimated that any incarceration rate over 500 per hundred thousand is actually counterproductive. This massive increase in the number of Americans incarcerated has very little documented positive effect on public safety, while it contributes significantly to family disruption and other problems in many American communities. In fact, we incarcerate now at such a high rate that it is actually contributing to crime.

We must continue to work on legislation to bring some common sense to enacting Federal criminal law in sentencing. We must put an end to the notion that we need to prosecute every individual for every perceived offense and incarcerate every defendant for the longest possible time. We now lock up not 500 per hundred thousand but over 700 per hundred thousand in the United States, seven times the world average. And now, as we'll hear today, we

continue to lock up people for offenses that should not even require incarceration.

So the problem has been identified, the challenge is clear, and our purpose today is to hear from experts, practitioners, and those who have been personally impacted by vague and unfair laws about what Congress can do to enact criminal legislation that is fair, provides notice, and is truly necessary. Congress already knows how to play politics, but we need do things that will actually reduce crime in a fair way.

It is now my pleasure to recognize the esteemed Ranking Member of the Subcommittee, my colleague from Texas's First Congressional District, the Honorable Louie Gohmert, Ranking Member of the Subcommittee.

Mr. GOHMERT. Thank you, Chairman Scott. Thank you for calling this hearing today. This obviously is the second hearing we have had in the Subcommittee on overcriminalization, and that is a topic of particular importance to me.

I also want to welcome the witnesses here today and thank you for your tireless work and dedication to this issue. Organizations including the Heritage Foundation, the National Association of Criminal Defense Lawyers, the ACLU, Cato Institute, American Bar Association and others have joined together to address overcriminalization and overfederalization.

Now, Chairman Scott and I have differing views on the approach to true crimes. In Texas, when you had judges like Judge Ted Poe and Louie Gohmert on the district bench and we were locking up increasing numbers of people for violent crime, we saw our crime rate go down all through that period. So I know in some places maybe it's just you got the right law enforcement. I'm not sure. But I know we incarcerated in higher numbers those that were committing violent crimes, and the crime rates did go down.

But what we're talking about in this hearing today are things that should not be offenses, things that shouldn't carry criminal sentences as a result of an activity, particularly when there is no mens rea, there is no intent—and from something as minor as failing to stick a sticker on a package with an airplane and a line through it when you have already checked the box that indicates by ground only.

But our witnesses have spent so much time studying this issue and preparing recommendations to Congress; and I hope my colleague, Chairman Scott, and I and others on this Subcommittee will be able to get our colleagues to move forward with many of the proposals that you have made for us.

I would also like to take a moment to welcome two of our witnesses here today, Bobby Unser and Abbie Schoenwetter, who have experienced firsthand the consequences of overcriminalization. Mr. Unser was convicted of operating a motorized vehicle inside a national wilderness area after becoming disoriented during a blizzard that nearly cost him his life. Mr. Schoenwetter was just recently released from over 8 years in prison for purchasing lobster tails not in violation of U.S. regulations but in violation of Honduran regulations, a charge even the Honduran Government disputed.

The evolution of the Internet and 24-hour news cycles has in some respects blurred the lines between State and Federal law.

American communities may suffer an increase in gang activity, car theft, or sexual assault and call upon their representatives in Washington to respond, though these are normally local crimes. Unfortunately, many in Congress are eager to respond to the urgings of their constituents, often without due regard for the proper elements of a criminal statute or other existing Federal and State laws. The result is a labyrinth of Federal criminal laws scattered throughout many of the 50 titles of the U.S. Code, and much of this occurs despite the fact that the Federal Government lacks a general police power.

To be sure, there are areas of legitimate jurisdiction within which Congress can and should prohibit criminal conduct. Congress has authority to regulate crime in the special maritime and territorial jurisdiction, crime occurring on Federal lands, and crime within interstate or foreign commerce. Today, there are an estimated 4,500 or so Federal crimes on the books and still many more regulations and rules that, if not abided by, result in criminal penalties, including incarceration. However, many of these laws impose criminal penalties, often felony penalties, for violations of Federal regulations.

As a former prosecutor and judge, I support the common law tenet that ignorance of the law is not a defense, and this tenet rings true for crimes which are categorized as malum in se, are they just wrong of their own. We expect members of civilized society to know it is wrong to commit murder or burglary or engage in an act of terrorism, regardless of what the law says, but today Americans must contend with literally thousands of obscure and cumbersome Federal regulations. And, as our witnesses today can attest, a simple misreading of a regulation or ignorance of a regulation can land a person in prison.

Our witnesses today will note that a great number of these regulations lack an important element, criminal intent. But an even more fundamental issue is raised by such regulations, and that is whether the prohibited conduct is even criminal in the first place. Should the importation of certain goods such as lobsters or orchids in violation of Federal or even U.S. regulation be met with criminal sanctions or should it instead be met with civil penalties? Should only habitual violations be criminalized or only such violations that result in personal or property damage? And perhaps most important, shouldn't most, if not all, Federal crimes include at least some form of intent to do wrong? Once these important policy considerations are answered, then we can turn to properly constructing the elements of criminality.

The growth in criminal regulations has produced a side effect, so to speak, that is equally disconcerting, an increasing number of Federal agencies empowered to investigate these so-called criminal activities. We are all used to hearing about the investigations by the FBI, DEA, or Customs agents. But what about investigations by the National Marine Fisheries Service within the National Oceanic and Atmospheric Administration or an EPA SWAT team that runs someone off the road, throws them to the ground because he failed to put a sticker on a package?

This agency of the National Marine Fisheries Service is the agency that uncovered the Honduran regulations that Mr. Schoenwetter

is alleged to have violated. I say "alleged", even though he has done time in prison. That still is an issue.

People also may be surprised to learn that the Food and Drug Administration has an Office of Criminal Investigations or that Medicare fraud is hunted down by agents within the Health and Human Services Office of Inspector General.

I mean no disrespect to the men and women of these offices. I only cite them as a means to highlight my concern and why I appreciate Chairman Bobby Scott calling this hearing, that concern being that along with broad, sweeping criminal regulations comes a host of investigative agencies eager to enforce them and we've seen over and over overly eager at times to enforce them.

There's a well-known saying that a prosecutor would rather let 100 criminals go free than to send one innocent person to jail, but I am concerned that criminal regulations and poorly drafted laws may be responsible for sending more than just one innocent person to prison.

I do look forward to hearing from our witnesses and appreciate your helping us bring attention to this issue so that we can convince people on both sides of the aisle. Because people on both sides of the aisle are responsible. Trying to show America that we know how to fix these things, we will slap a prison sentence on it when it's not fixing it, it's in fact creating even more issues of faith in our Federal Government. We need to get back to those issues that are within the constitutional mandate for Congress to take care of, not allow regulators to pass regulations that become criminal laws to get people put in jail.

I look forward to hearing your testimony and yield back my time. Thank you.

Mr. SCOTT. Thank you.

We have been joined by the distinguished Chairman of the full Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Scott, and the two judges that are here with us, former prosecutors, also. I am delighted to be with you. I think this is an important hearing, and I am glad that you have enough witnesses to help us prove the point. Seven, that's a pretty good number to start us off.

My emphasis on this subject is more directed to the way that we are using the drug war to incarcerate people in the United States. We have now over 2 million people imprisoned, which makes us the number one incarcerator of its people in the world. Sixty-eight percent of the people arrested are tested positive for drugs. So what we need are drug courts that provide diversion and treatment rather than mandatory sentences, which this Committee has worked on for so many years.

My concern is that there may be a tendency of my beloved Administration to propose to spend even more money on law enforcement than on treating the drug problem as a crisis. So it's in that sense that I hope some of these seven witnesses will enlarge upon this point that I make in my opening statement, and I will put the rest of my statement in the record.

Thank you very much.

[The prepared statement of Mr. Conyers follows:]

Statement of the Honorable John Conyers, Jr.
for the Hearing on

Reining in Overcriminalization: Assessing the Problems, Proposing Solutions

Before the Subcommittee on Crime, Terrorism, and Homeland Security

Tuesday, September 28, 2010, at 3:00 p.m.
2141 Rayburn House Office Building

The U.S. Constitution requires our Nation's justice system to treat every individual fairly and with due process.

When good people find themselves confronted with accusations of violating laws that are vague and that lack adequate *mens rea,* however, fundamental Constitutional principles of fairness and due process are undermined.

It places all of us at risk of being arrested, prosecuted, and incarcerated for questionable reasons.

The purpose of today's hearing is to continue the discussion that Bobby Scott, as Chairman of the Crime Subcommittee, and Judge Louie Gohmert, as the Ranking Member, have had over the past year with a number of groups to develop a bi-partisan plan to address this problem.

For example, this Subcommittee in July of last year held hearings on the over-criminalization of conduct, and the over-federalization of criminal law. At that time we received testimony documenting the rapid growth of actions penalized under the Federal Criminal Code.

We learned, for example, that there are approximately 4,450 federal crimes codified in the U.S. Code, and that there are an estimated 300,000 federal regulations which impose criminal penalties.

I should note that these regulations were promulgated without benefit of any consideration by this committee, or any other Congressional committee.

When crimes are defined by regulation, we also run the risk of Americans encountering unpleasant surprises in the form of being confronted with accusations that we violated criminal laws of which we not only have no knowledge, but have no reasonable way to know about.

I commend the Heritage Foundation, the National Association of Criminal Defense Attorneys, the American Civil Liberties Union, the American Bar Association, and others for their steadfast efforts to call attention to the issue and to help develop solutions.

As part of this discussion today, there are three points we should consider.

First, the current federal criminal justice system too often prosecutes "crimes" and imposes sentences that are not based on sound principles of justice.

Many of the 4,450 criminal offenses in the Federal Criminal Code are poorly defined, and lack the common law requirement of mens rea, or "guilty mind," that has long served an important role in protecting those who did not intend to commit wrongful or criminal acts.

This same shortcoming applies to many of the 300,000 federal regulations that impose criminal penalties.

Second, when we, as legislators, draft laws that lack specificity, we are in effect setting traps for the uninformed, the unaware, and the naive.

As a result, we run the risk of unjustly punishing actions as crimes when they are no more than truly honest, innocent mistakes.

In addition, the effect of these laws is to place increasing power in the hands of investigators and prosecutors to investigate, prosecute, and convict honest citizens who had no idea they were committing a crime.

And finally, Congress should endeavor, before enacting a new federal criminal statute, to make certain that there is – in fact – a valid purpose and genuine need for it.

To that end, we should verify whether a new **federal** law is necessary, or whether it would simply duplicate criminal prohibitions that are already being effectively enforced at the State level.

A fundamental question that we should ask ourselves is whether it makes more sense to simply provide more resources to the States so that they can do a better job of enforcement.

I thank today's witnesses, and the organizations that have participated in this effort to improve the process of drafting meaningful criminal legislation.

I look forward to hearing your recommendations, and I am confident that this hearing will serve to further our important efforts to rein in over-criminalization.

Mr. SCOTT. Thank you, Mr. Chairman.

I understand that Judge Poe has a statement.

Mr. POE. Thank you, Mr. Chairman. Thank you for holding this hearing and Judge Gohmert for putting this hearing together again today.

I welcome all the witnesses. Good to see Jim Lavine here today, a long-time practicing lawyer, excellent lawyer in Texas. Twenty-two years on the criminal bench in Texas.

You know, in Texas almost everything's a crime, and almost all of them are felonies. Years ago, we operated under the penal code of 1925, which really hammered folks. You know, you leave your wire cutters in your saddle bags and you are off to the penitentiary. A marijuana cigarette could get you life in the penitentiary of the State of Texas. And numerous crimes like that. And, finally, the State got together and decided some things ought to be felonies, some ought to be misdemeanors, and some shouldn't be crimes at all.

I say that to say that we are in the Federal system now, where the general jurisdiction and philosophy for criminal conduct was to be done in State courts. The States were to decide how they wanted to punish folks, either making something a crime or not, and the Federal Government was to take other roles.

We've come a long way since the piracy laws and the kidnapping laws and the bank robbery laws, and now we have 4,450 Federal crimes, and, once again, we are in the situation where everything's a Federal crime. And I think that it's time that we deal with this and make some realistic decisions and also prioritize what the role of the Federal Government is in labeling things a crime and even reconsider this whole concept of the sentencing guidelines, which tend to be I think arbitrary in many cases. So we need to make the decisions what should be Federal crimes, what should be handled by local and State authorities, and even reduce or change to some type of civil sanctions. I agree with my friend Judge Gohmert on those issues.

We have many compelling cases before us. I just want to mention one Federal case that happened recently that is worthy of mention.

In Iowa, there was a kosher slaughterhouse operated by Sholom Rubashkin, and he was sentenced to 27 years in the Federal penitentiary for some financial crimes. He was investigated for immigration violations, charged with 9,311 charges. Over 9,250 of those charges were dismissed, and he still went to the penitentiary for 27 years because he violated that law, that sacred law that's the Packers and Stockyard Act for not paying cattle suppliers within 24 hours of delivery of the cattle—dastardly deed—and got him 27 summers in the Federal penitentiary. He was prosecuted even though all cattle suppliers were paid in full, and the latest was just paid 11 days late. But that was a felony, and it is a felony still. He is the only person I know of prosecuted under this act that was passed in 1921.

So this is an example of I think really an abusive law. Probably our slaughterhouse operators, if there are any left in the country, don't even know this law exists, but they better pay those bills on time.

I'm not going to get into all the complexities of his case, but his sentence was considered excessive by a lot of people. I am one of them. And it was even 2 years longer than the prosecutors asked for. So the Federal judge really was upset about not paying those bills on time. And his account—no, I am not justifying any of the conduct, but financial crimes don't seem to be related to the situation which he was originally charged for, which was immigration allegations. So he is at 51 years of age, and he is doing, in essence,

a life prison sentence in the Federal penitentiary. We probably need that space for somebody that's just really an outlaw.

But, once again, example after example of Federal cases, Federal prosecution where maybe the system needs to look again at these 4,500 crimes under the Federal system and then make sure that when we have somebody that needs to go to the penitentiary they go to the penitentiary. I do believe it does deter criminal conduct, especially violent conduct. But we need the space for these folks, as opposed to the folks that don't pay their slaughterhouse bills on time.

With that, I yield back. Thank you, Mr. Chairman.

Mr. SCOTT. Thank you.

We have several distinguished witnesses today to help us consider the issues.

The first witness is Jim Lavine, president of the National Association of Criminal Defense Lawyers, based in Washington, D.C. He is a former prosecutor in both Texas and Illinois. He is the recipient of the prestigious award from the NACDL given annually to criminal dense lawyers who personally and professionally exemplify the goals and values of the association and the legal profession.

Our second witness is Bobby Unser, a retired race car driver. But he is here not to talk about his racing exploits. In 1996, as we've heard, he and a friend were snowmobiling along the Colorado-New Mexico border, trapped in a blizzard. They dug for shelter and abandoned their snowmobiles, while suffering frostbite, dehydration, and exhaustion. After their rescue, the Forest Service rangers returned days later to recover the vehicles, and he was find $75 for snowmobiling in a wilderness area. He refused to sign; and, following a 2-day bench trial, he was convicted of a one-count misdemeanor.

Our next witness, Abner Schoenwetter, is another victim of overcriminalization. In November, 2000, a Federal jury found him, a hard-working seafood dealer with no prior criminal history, and his codefendants, guilty of multiple violations of the Lacey Act, all premised on violations of a disputed Honduran law regarding importation of fish or wildlife. Interestingly, the Honduran Embassy filed an amicus brief stating that the law was null and void. He served 7 years in prison for shipping lobsters that were under regulation size and transported in plastic bags instead of cardboard boxes. He will be under supervised release for the next 3 years.

During my opening statement at last year's hearing on this issue, I referenced this case; and, at the time, he and his codefendants were still incarcerated. And I said Congress must understand that we are making law-abiding Americans vulnerable of losing their freedom, their livelihood, their lives when we enact laws that are vague and fail to clearly communicate the illegality and criminality of proscribed acts. He is here with us today and will tell us about his experiences.

After he testifies, Brian Walsh is a senior legal research fellow at the Heritage Foundation's Center for Legal and Judicial Studies. He directs Heritage's projects on countering the abuse of criminal law and criminal process. Prior to joining the Heritage Foundation,

he was with the litigation team at Kirkland & Ellis and a law clerk to Judge Bowman of the U.S. Court of Appeals for the 8th Circuit.

Our next witness would be Stephen Smith, professor of law at Notre Dame School of Law. Prior to teaching, he served with the Supreme Court and Appellate Practice Group of Sidley & Austin in Washington, D.C. He also served as an associate majority counsel to a 1996 House of Representatives select committee investigating U.S. involvement in Iranian arms transfers to Bosnia.

The witness after that will be Professor Ellen Podgor, who is the LeRoy Highbaugh Senior Research Chair and professor of law at Stetson University. A former deputy prosecutor and criminal defense attorney, she teaches in areas of white-collar crime, criminal law, and international criminal law. She presently serves on the board of directors of the International Society for Reform of Criminal Law.

Our next witness is Andrew Weissmann, who is co-chair of the white-collar defense and investigations practice at Jenner & Block in New York City. He joined the firm after serving as the director of the Enron Task Force, where he oversaw the prosecution of more than 30 individuals in connection with that company's collapse.

Now, all of the witnesses' written statements will be entered into the record in their entirety. I would ask each witness to summarize his or her testimony in 5 minutes or less. And to help stay with the time, there is a timing device in front of you which will start green, will turn to yellow when there is 1 minute left, and red when the 5 minutes have expired.

Mr. Lavine.

TESTIMONY OF JIM E. LAVINE, PRESIDENT, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WASHINGTON, DC

Mr. LAVINE. Chairman Scott, Ranking Member Gohmert, Committee Members, my name is Jim Lavine, and I am the president of the National Association of Criminal Defense Lawyers. I am also a practicing criminal defense attorney in Houston, Texas, and I was formerly a prosecutor, having the privilege of practicing before Judge Poe during the time in his prior life when he was a judge in Houston. I appreciate the opportunity to testify today on behalf of NACDL and all of my colleagues in the criminal defense community.

No one, including the government, can state how many criminal offenses exist in the Federal code or in the Federal regulations. It is impossible for practitioners who specialize in this area to know all of the conduct that is criminalized. How then is the citizen to protect against unjust prosecution and punishment for making honest mistakes or engaging in conduct they had no reason to know was illegal?

Duplicative statutes, federalization of conduct traditionally belonging to the States, criminalization of regular business activity or social conduct and interactions, this is overcriminalization. When any of these elements is combined with poor legislative drafting, inadequate mens rea requirements, or unfettered prosecutorial discretion, the result is inevitably the victimization of more law-abiding citizens.

While I am here today to speak about overcriminalization, Representative Conyers, NACDL would welcome the opportunity to return at another time and discuss the issue of problem-solving courts; and we have published in our report and discussed the issue in drug courts and diversion in particular, in answer to your earlier question in your opening remarks.

On July 22, in 2009, this Subcommittee came together under the bipartisan leadership of Representatives Bobby Scott and Louie Gohmert to learn about our Nation's addiction to overcriminalizing conduct and over-Federalizing crime. Supported by a broad coalition of organizations ranging from the right to the left, last summer's hearing received attention from national media and ignited the overcriminalization reform movement. NACDL and the Heritage Foundation dedicated themselves to analyzing the legislative process for enacting criminal laws and produced a groundbreaking nonpartisan joint report entitled "Without Intent, How Congress Is Eroding the Criminal Intent Requirement in Federal Law." So basic is this issue that the Nation's practicing criminal defense bar has collaborated with a conservative think tank to produce the Without Intent report.

Just 1 month after its release, over 300 articles from news organizations spread coast to coast were written about the report. The press had taken notice of this unlikely coalition, the American people's growing concern over the current overexpansiveness of Federal criminal laws and the broad bipartisan support for reform.

The interest extends beyond the press. NACDL has received requests for copies of the report from members of every branch of government.

But another side of this problem has received even more attention by Members of this Chamber and the national media alike, the personal side, or as we refer to it, the face of overcriminalization. Presenting the face of overcriminalization is critical to raising public awareness of this problem. For this reason, I will spend the remainder of my testimony doing just that.

During last summer's hearing, Members of this Subcommittee heard the heart-wrenching tales of two victims of overcriminalization, Krister Evertson and George Norris. From this testimony we learned how an unwarranted prosecution can destroy the lives of productive, law-abiding citizens and community members.

Sadly, their stories are not unique. Consider the case of Georgia Thompson, which is described in more detail in my written testimony. Georgia was charged and convicted of violating 18 USC 1346, commonly known as the honest services fraud statute, for conscientiously doing her job and doing it well. Upon hearing oral argument, the Seventh Circuit panel of judges found this prosecution so ill-conceived that it immediately reversed her conviction and ordered her released without delay.

The honest services statute did receive a measure of comeuppance in the Supreme Court this past term but not before its carnage was visited upon untold numbers of victims of overcriminalization. You may ask yourself, how could this happen? An innocent, hardworking civil servant ends up spending 4 months in prison just for doing her job.

Georgia Thompson is the face of overcriminalization. Her story is evidence of the harm caused when Congress fails to draft statutes clearly and with adequate mens rea protection, when prosecutors stretch already broad statutes to reach everyday conduct never intended to be criminalized, and when judges inconsistently apply rules of interpretation.

The honest services fraud statute responsible for victimizing countless law-abiding individuals is the poster child for this problem. The failure of Congress to define criminal conduct in a clear and specific manner allows, and quite possibly encourages, prosecutors to charge all sorts of innocent conduct, from errors in judgment to behavior that is the slightest bit unsavory. Rather than enact a specific, precise criminal statute, Congress instead relies on prosecutorial discretion to shape the contours of criminal offenses. The story of Georgia Thompson as well as Krister Evertson and George Norris demonstrate that such reliance is misplaced.

Today you will hear from two more victims, Abner Schoenwetter and Bobby Unser. Abner spent nearly 6 years in prison for shipping lobster tails in plastic bags rather than cardboard boxes, in violation of a Honduran law that was deemed null and void by the Honduran Government. Bobby Unser got lost in a blizzard while snowmobiling and spent almost 2 days trekking through snow in search of aid. After this near-death experience, Bobby was prosecuted for unknowingly entering protected land with his snowmobile. The fact that he got lost in a blizzard was no defense in the eyes of the government.

The cost of overcriminalization does not stop with the personal freedom of its direct victims. In my over 25 years as a criminal defense attorney, I have seen families shattered, careers ruined, businesses fail, thousands of innocent workers become unemployed, and entire communities devastated, all done at the taxpayers' expense. This dangerous trend needs to end.

The Without Intent report offers five basic good government reforms that, if implemented, will potentially stop haphazard Federal criminalization. The remainder of the panel will discuss these reforms further, but it is important to note that they have received broad support from a coalition of organizations ranging from the right to the left. This is not an ideological or political issue but rather a serious and fundamental aspect of good governance. Indeed, all political parties share a responsibility to ensure that criminal laws are properly circumscribed.

The problems of overcriminalization are very real, deal with very real people in the very real world of courtrooms across this country. NACDL is confident that today's hearing will heighten awareness of overcriminalization and inspire future action. We welcome this hearing and urge the Subcommittee to support rules and legislation embodying these reforms.

Thank you.

[The prepared statement of Mr. Lavine follows:]

PREPARED STATEMENT OF JIM E. LAVINE

Written Statement of
Jim E. Lavine, President
National Association of Criminal Defense Lawyers

Before the
House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

Re: "Reining in Overcriminalization: Assessing the Problems and Proposing Solutions"

September 28, 2010

My name is Jim E. Lavine, and I am the President of the National Association of Criminal Defense Lawyers (NACDL), an organization of over 10,000 members. NACDL is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. I am also a practicing criminal defense attorney in Houston, Texas, with extensive trial and appellate level experience in federal and state courts. I specialize in criminal law, primarily white collar crime, and now spend approximately ninety-percent of my time on federal cases. Before moving to private practice, I was a prosecutor for over eleven years. I appreciate the opportunity to testify on behalf of NACDL today.

There are over 4,450 federal crimes scattered throughout the 50 titles of the United States Code. In addition, it is estimated that there are at least 10,000, and quite possibly as many as 300,000, federal regulations that can be enforced criminally. The truth is no one, including the government, has been able to provide an accurate count of how many criminal offenses exist in our federal code. This is not simply statistical curiosity, but a matter with serious consequences.

The hallmarks of enforcing this monstrous criminal code include a backlogged judiciary, overflowing prisons, and the incarceration of innocent individuals who plead guilty not because they actually are, but because exercising their constitutional right to a trial is all too risky. This enforcement scheme is inefficient, ineffective and, of course, at tremendous taxpayer expense. The cost of incarcerating one of every one hundred adults in America is always troubling, but particularly so during a time of economic instability and ever-increasing federal debt.

On July 22, 2009, this subcommittee came together, under the bipartisan leadership of Representatives Bobby Scott (D-VA) and Louie Gohmert (R-TX), to learn about our nation's addiction to overcriminalizing conduct and overfederalizing crime.[1] An esteemed panel of experts explained that this trend takes many forms, but most frequently occurs through: (i) enacting criminal statutes absent meaningful *mens rea* requirements; (ii) imposing vicarious liability for the acts of others with insufficient evidence of personal awareness or neglect; (iii) expanding criminal law into economic activity and areas of the law traditionally reserved for regulatory and civil enforcement agencies; (iv) creating mandatory minimum sentences that fail to reflect actual culpability; (v) federalizing crimes traditionally reserved for state jurisdiction; and (vi) adopting duplicative and overlapping statutes. The harm caused by this dangerous trend is frequently amplified by the executive and judicial branches, but it is born in the legislative process.

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[1] *Overcriminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009), *available at* http://judiciary.house.gov/hearings/hear_090722_2.html [hereinafter *House Hearing*].

Supported by a broad coalition of organizations—ranging from the right to the left—last summer's hearing received attention from national media and ignited the overcriminalization reform movement. Two coalition organizations, NACDL and the Heritage Foundation, dedicated themselves to analyzing the legislative process for enacting criminal laws in order to provide Congress, and the public, with concrete evidence of the problem. This analytic study formed the basis of a groundbreaking, non-partisan, joint report entitled: *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*. At the official release event, held on May 5, 2010, on Capitol Hill, Chairman Scott heralded the report as a "road map" for reform and Ranking Member Gohmert lamented the victimization of citizens by criminal laws lacking adequate intent requirements.

The *Without Intent* report methodologically dissects the legislative process for enacting criminal laws, sets forth troublingly findings, and offers a blueprint for reform. The report demonstrates just how far federal criminal lawmaking has drifted from its doctrinal anchor in fair notice and due process; that is, individuals should not be subjected to criminal prosecution and conviction unless they intentionally engage in inherently wrongful conduct or conduct that they know to be unlawful. The report supports the expert testimony from the first hearing and evidences the conclusion that the legislative process itself is flawed and disjointed. Finally, it proposes commonsense, workable solutions to a problem that transcends political affiliation or ideology.[2]

And it was that message that echoed throughout the tremendous media coverage that followed the report's release. Just one month after its release, over 300 articles, from news organizations spread coast to coast, were written about the report.[3] The press has taken notice of this unlikely coalition between the left and the right, and the broad bipartisan support for

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[2] The *Without Intent* report recommends that Congress pursue the following five reforms: (1) Enact default rules of interpretation to ensure that *mens rea* requirements are adequate to protect against unjust conviction; (2) Codify the common-law rule of lenity, which grants defendants the benefit of doubt when Congress fails to legislate clearly; (3) Require Judiciary Committee oversight of every bill that includes criminal offenses or penalties; (4) Provide detailed written justification for and analysis of all new federal criminalization; and (5) Draft every federal criminal offense with clarity and precision. Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (The Heritage Foundation and National Association of Criminal Defense Lawyers) (2010) *available at* www.nacdl.org/withoutintent.

[3] *See, e.g.*, *The Congressional Assault On Criminal Justice*, THE BULLETIN, May 7, 2010; Editorial, *Ignorance of the law. Congress going down a dangerous path*, LAW VEGAS REVIEW-JOURNAL, May 6, 2010; *Guilty, or not, Bipartisan group tackles the overcriminalization of the legal process*, Fredericksburg.com, May 10, 2010; Mark Sherman, *Report: Congress makes too many vague laws*, ASSOCIATED PRESS, May 4, 2010 (reprinted in The Seattle Times, the Cleveland Plain Dealer, the Boston Globe, and many others).

overcriminalization reform.[4] The interest in this report and the attention paid to this problem extends beyond the press. NACDL has received requests for copies of the report from members of every branch of government.

The report focuses primarily on the non-personal aspects of this problem, such as the legislative process, empirical data, and fundamental legal concepts. But another side of this problem has received even more attention by members of this chamber and national media alike—the personal side, the human side, or as we refer to it, the face of overcriminalization.

Presenting the face of overcriminalization is critical to raising public awareness of the dangerous trend of overcriminalization. For this reason, I will spend the remainder of my testimony doing just that. During last summer's hearing, members of this subcommittee heard the heart-wrenching tales of two victims of overcriminalization—Krister Evertson and George Norris. Today we are joined by two more victims, Abner Schoenwetter and Bobby Unser. Over my career as a prosecutor and defense attorney, I have seen the faces of similar victims and represented individuals that have suffered tremendous, unjustified loss as a result of overcriminalization and the harm it perpetrates on our criminal justice system.

First, let us take a few moments to reflect on the stories of the overcriminalization victims from the the first hearing. From Krister Evertson and Kathy Norris, testifying on behalf of her husband George Norris, we learned how an unwarranted prosecution can destroy the lives of productive, law-abiding citizens and community members.

Krister Evertson never had so much as a parking ticket prior to his arrest on May 27, 2004.[5] An Eagle Scout, National Honor Society member, science whiz, clean energy inventor, and small business entrepreneur, Krister is now a felon. The nightmare that took two years of his freedom and hundreds of thousands of dollars in invention materials began when he made a simple error: he failed to put a "ground" sticker on a package that he shipped. Despite his clear intention to ship by ground—as evidenced by his selection of "ground" on the shipment form and payment for "ground" shipping—the government prosecuted him for this error anyways.

When the jury acquitted Krister, the government turned around and charged him again, this time for his alleged abandonment of toxic materials. Krister had securely and safely stored his valuable research materials in stainless steel drums, at a storage facility, while he fought for

[4] Adam Liptak, *Right and Left Join Forces on Criminal Justice*, N.Y. TIMES, Nov. 23, 2009, at A1.

[5] The facts of Krister Evertson's story are taken from multiple sources. *See, e.g.*, ONE NATION UNDER ARREST (Paul Rosenzweig & Brian W. Walsh eds., 2010); *House Hearing* (written statement of Krister Evertson, July 22, 2009, *available at* http://judiciary.house.gov/hearings/pdf/Evertson090722.pdf); Quin Hillyer, *Examiner Special Report: How one good man's intentions took him from a fuel cell to a jail cell*, THE WASHINGTON EXAMINER, Jan. 22, 2009.

his freedom in trial over the missing shipping sticker. He ultimately spent two years in a federal prison for that mistake.

The subcommittee also heard from George Norris, a father, grandfather, and elderly retiree who turned his orchid hobby into a part-time business running the greenhouse behind his home.[6] He had never had a run-in with the law before that fateful day in October 2003 when three pickup trucks pulled up outside his home. Federal agents, clad in protective Kevlar and bearing guns, stormed the house. For hours the agents refused to tell George what he had done wrong and, instead, ordered him to remain seated in his kitchen, under supervision, while they ransacked his home and seized his belongings.

For months after the raid, George remained unaware as to its cause. He was eventually indicted in Miami for orchid smuggling. His crime, at its core, was a paperwork violation: he had the wrong documents for some of the plants he had imported. The plants themselves were legal to import and he likely could have obtained the right documents with a bit more time and effort. Although he made a simple mistake, one made regularly by dealers in imported plants, he had certainly complied with the spirit of the law.

The court denied George's request to transfer the case to his home state of Texas. Mounting a defense became very expensive very quickly. Unable to defend himself, George reluctantly gave up the fight, pled guilty to inflated charges, and was sentenced to 17 months in federal prison.

George, in his late sixties at the time, was also diabetic, with cardiac complications, and suffered from arthritis, glaucoma, and Parkinson's disease. While incarcerated, his health declined substantially and he now faces the additional issues of depression, paranoia, and sleep complications. During her testimony at the last hearing, George's wife Kathy described the impact this experience has had on their family. George became detached and was no longer interested in the things he had held so dear—his children, grandchildren, the outdoors, and gardening. Afraid to even leave his home, George is now a broken man.

Krister, George, Kathy, and their families are the face of overcriminalization. Sadly, their stories are not unique, for there are so many other victims. Consider the case of Georgia

[6] The facts of George Norris' story are taken from multiple sources. *See, e.g.*, ONE NATION UNDER ARREST (Paul Rosenzweig & Brian W. Walsh eds., 2010); Andrew Grossman, *The Unlikely Orchid Smuggler: A Case Study in Overcriminalization*, HERITAGE FOUND. L. MEMO. No. 44, July 27, 2009; *House Hearing* (written statement of Kathy Norris, July 22, 2009, *available at* http://judiciary.house.gov/hearings/pdf/Norris090722.pdf).

Thompson, a Wisconsin civil servant convicted of federal corruption charges in 2006.[7] Georgia has been described as a hard-working and apolitical state employee. Responsible for putting the state's travel account up for competitive bid, she was prosecuted for doing her job well.

Specifically, Georgia awarded the state's travel contract to the company that submitted the lowest-cost bid. Prosecutors alleged she made this award because, unbeknownst to her, that company had contributed to the then Democrat Governor's re-election campaign. A 56-year-old civil servant, hired by a Republican Governor, with no identifiable interest in politics, Georgia was charged and convicted of violating 18 U.S.C. § 1346, commonly known as the honest services fraud statute, for conscientiously doing her job. Upon hearing oral argument in her appeal, the 7th Circuit panel of judges immediately reversed her conviction and, without waiting to issue a written opinion, ordered her release from prison without delay. Georgia has since been reinstated to the Wisconsin civil service, awarded back pay, and reimbursed for her legal expenses.

You may ask yourself, how could this happen? How could an innocent woman, a hard-working civil servant, end up spending four months in prison just for doing her job? Georgia Thompson is the face of overcriminalization—her story is evidence of the harm caused when Congress fails to draft statutes clearly and with adequate *mens rea* protection, when prosecutors stretch already broad statutes to reach everyday conduct never intended to be criminalized, and when judges inconsistently apply rules of interpretation.

The honest services fraud statute, responsible for victimizing countless law-abiding individuals, is a prime example of overcriminalization. Legal experts have criticized the honest services fraud statute as vague and overbroad. It fails to define or limit the phrase "intangible right of honest services," and it has been stretched to cover conduct that no reasonable legislator would deem criminal.[8] The failure of Congress to define criminal conduct in a clear and specific

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[7] The facts of Georgia Thompson's story are taken from multiple sources. *See, e.g.*, John Diedrich, *Freed official back on state job, Thompson's action no crime, judges write*, Journal Sentinel Online, Apr. 21, 2007; Adam Cohen, *A Woman Wrongly Convicted and a U.S. Attorney Kept His Job*, N.Y. TIMES, Apr. 16, 2007; *United States v. Georgia Thompson*, 484 F.3d 877 (7th Cir. 2007).

[8] In his dissent from denial of certiorari in *Sorich v. United States*, Justice Antonin Scalia argued that such an overbroad law could be unjustly applied to make virtually any unseemly conduct a crime:

> Without some coherent limiting principle to define what "intangible right of honest services" is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.

129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari). More than 20 years after the statute's enactment, the federal courts of appeals became hopelessly divided on how to interpret the honest services fraud

manner allows, and quite possibly encourages, prosecutors to charge all sorts of innocent conduct—from errors in judgment to behavior that is the slightest bit unsavory. Rather than enact a specific, precise criminal statute, Congress instead relies on prosecutorial discretion to shape the contours of criminal offenses. The story of Georgia Thompson, as well as Krister Evertson and George Norris, demonstrates that such reliance is misplaced.

Duplicative statutes, federalization of conduct traditionally belonging to the states, criminalization of regular business activity or social conduct and interactions—this is overcriminalization. When any of these elements combine with poor legislative drafting, inadequate *mens rea* requirements, or unfettered prosecutorial discretion, the result is inevitably the victimization of more law-abiding citizens.

The stories of Krister Evertson, George Norris, and Georgia Thompson are not unique. Today you will hear from two more victims—Abner Schoenwetter and Bobby Unser. Abner spent nearly six years in prison for shipping lobster tails in plastic bags, rather than cardboard boxes, in violation of a Honduran law that was deemed null and void by the Honduran government.[9] Bobby Unser got lost in a blizzard while snowmobiling and spent almost two days trekking through snow in search of aid.[10] After this near death experience, Bobby was prosecuted for unknowingly entering protected land with his snowmobile. The fact that he got lost in a blizzard was no defense in the eyes of the government.

Abner and Bobby add two more stories to the face of overcriminalization, but there are so many others whose stories we will never hear. The cost of overcriminalization does not stop with the personal freedom of its direct victims. In my over 25 years as a criminal defense attorney, I have seen families shattered, careers ruined, businesses fail, thousands of innocent workers become unemployed, and entire communities devastated—all done at the taxpayers' expense. Whether in the form of a costly investigation or prosecution, a lengthy sentence at an overcrowded prison, or the loss of tax revenue from businesses and workers, the true cost of overcriminalization is immeasurable. The constitutional obligations of due process and fair

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statute, prompting the Supreme Court to hear three separate honest services fraud cases in one term. *See Black v. United States*, 138 S. Ct. 2963 (2010); *Skilling v. United States*, 130 S. Ct. 2896 (2010); *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010). Ultimately, after over twenty years of prosecutors stretching this poorly written law as far as possible, the Court limited the scope of the honest services fraud statute to bribes and kickbacks.

[9] The facts of Abner Schoenwetter's story are taken from multiple sources. *See, e.g.*, ONE NATION UNDER ARREST (Paul Rosenzweig & Brian W. Walsh eds., 2010); Letter from Daniel J. Popeo, Chairman and General Counsel, Washington Legal Foundation, to The Honorable Alberto R. Gonzales, Attorney General of the United States (July 11, 2007) *available at* http://www.wlf.org/upload/07-12WLF%20Petition%20to%20DOJ.pdf; *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003).

[10] The facts of Bobby Unser's story are taken from multiple sources. *See, e.g.*, *United States v. Robert W. Unser*, 165 F.3d 755 (10th Cir. 1999); David Wallis, *Bobby Unser, Race car champion as scofflaw*, Salon.com, June 6, 1997.

notice demand reform and the critical need for fiscal responsibility makes that demand all the more urgent.

These personal stories and the NACDL-Heritage Foundation *Without Intent* report support the conclusion of a growing number of commentators and experts that the time has come for Congress to stop this dangerous trend, to acknowledge the threat to civil liberties by this unprincipled form of criminalization, and to carry out critical reforms that will protect against unjust prosecutions and convictions. The report offers five basic, good-government reforms that, if implemented, will provide that protection and potentially reverse the dangerous trend of haphazard federal criminalization.

The second panel will discuss these reforms further—reforms that have received broad support from a coalition of organizations ranging from the right to the left. A bi-partisan coalition is concerned that expansive and ill-considered criminalization has cast our nation's criminal law enforcement adrift and believes criminal lawmaking must require true blameworthiness and provide fair notice of potential criminal liability. Further, the coalition understands that this problem, which transcends political affiliation or ideology, demands principled, nonpartisan reforms such as those offered by the *Without Intent* report.

NACDL is confident that today's hearing will heighten awareness of overcriminalization and inspire future action. We welcome this hearing and urge the subcommittee to enact legislation embodying the aforementioned reforms.

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Mr. SCOTT. Thank you.
Mr. Unser.

TESTIMONY OF ROBERT "BOBBY" UNSER, PERSONAL IMPACT WITNESS, ALBUQUERQUE, NM

Mr. UNSER. Thank you, Chairman Scott and Ranking Member Gohmert and the rest of the Members of the Committee for inviting

me here to tell my story about what often happens to honest men and women because of bad criminal laws.

The bad law in my case said that I was a criminal if I wandered into a national wilderness that was off limits to motorized vehicles when a friend and I were lost in a blizzard. It didn't matter that we never intended to enter the wilderness. It didn't matter that the wilderness was not marked. It didn't matter that we didn't even know that there was a wilderness there.

I could have been imprisoned for up to 6 months for this law. Maybe I should be grateful that I wasn't sent to jail, and I guess I am. But someone else in the same situation might have ended up in prison. I am here to help make sure that does not happen again, hopefully.

Just before Christmas in 1997, my friend and I, Robert Gayton, planned to go to a snowmobile ride up in what's called the Jarosa Peak area near my ranch in Chama, New Mexico. That's on the edge of Colorado and New Mexico. It's all in just the State line in between, all the same mountains. The area was known as a snowmobiling location that was perfectly legal to snowmobile there.

Robert and I headed out around noon and rode for about an hour, until we reached the bowl above the tree line that was terrific for snowmobiling. It was exposed and a very high altitude, at about 11,000 feet. Our trouble started about an hour later, when a severe ground blizzard suddenly kicked up. In a ground blizzard, the wind is blowing so hard that all the snow around you creates what is called a whiteout.

That day the wind was blowing about 60 to 70 miles an hour, and at times we couldn't see any more than 2 or 3 feet in front of us, just like being in a closet. Almost immediately, we went from playing around to trying to get out of there and find shelter from the blizzard.

Less than 30 minutes after the blizzard started and the visibility went down to zero, Robert rode a snowmobile into an embankment and got stuck, which was a blessing in disguise. The good Lord took care of that one. We tried for a few minutes to get it moving, but I realized that it was unlikely that we could get it unstuck. And, being abandoned, the snowmobile was good. It was a blessing.

So I put Robert on behind me. I couldn't look back and try to guide him out of the mountains is what the deal was. Robert got on the back of my snowmobile. We started off again. At its best, the visibility was about 20 feet. That's less than from here to you.

And now we had another problem. I had a brand new snowmobile, and it kept breaking down. Brand new meaning very first trip ever on it. And I am a pretty good mechanic. And under normal circumstances I could have fixed it and kept it running maybe. But I couldn't get it up and running, and it was getting darker and darker. Starting to get dark, which happens at 5 o'clock in that time of the year. We made the decision to abandon it and attempted to get down the mountain to shelter on foot.

If we stayed in the high, exposed terrain above the tree line, we were going to die. There was not going to be any question about that. And it was going to be that night. So we had to get down somewhere low enough that there would be trees so that we could

build a snow cave. These are the things that I know because I was raised in the mountains.

We trudged through the snow in complete darkness, feeling our way down the mountain like two blind men. After a few hours of wandering—remember, no flashlights, no lights of any sort, no moon, nothing to walk by—we trudged through the snow in complete darkness, feeling our way down the mountain like two blind men. After a few hours of wandering, we finally found an area below the tree line where we could build a snow cave. We spent the night in that snow cave. It sheltered us from the wind, but, remember, it's going to get down around 30 below zero up there, plus or minus a little bit. It's not going to be warm, by any means. Snow cave's the only way to make it.

We didn't sleep all night, needless to say. The snow cave, just for a minute, had to be—we built it under a tree, a big Ponderosa pine tree, where the snow gets on the branches, lays the branches down. And I built the cave around the tree a little bit circular. And the branches made the roof of the cave. And then we pitched snow up on top of that in order to make the snow cave. Had to do it in the darkness, also.

The next morning we had no idea—no clear idea where we had come from and no idea where to go. So what had happened there is the blowing snow—I went out the next morning—we tried—I would have backtracked to the snowmobile because it was full of gas. Gasoline is safety in the mountains, because you can light a fire real easy. But I can't see our tracks because it's all filled back in with snow.

The judge didn't want to listen to this.

All the next day, we trudged through the snow that was never any shallower than our hips. I was very nauseated. And after a short while, I began vomiting repeatedly. Soon after, I started coughing up blood. I was in bad shape. Incidentally, I was only 2 weeks out of a back operation. I was back to Indianapolis, Indiana, got my back overhauled. And maybe I shouldn't have been snowmobiling. But under normal circumstances I could have done it.

So we were so cold and near the end of our strength that we did not stop to sleep for the end of the second day. We kept struggling on through that night. We were operating on auto pilot, exhausted, hungry, and suffering from dehydration and hypothermia and frostbite.

Before dawn, we found our oasis, an open barn that had a working space heater and a phone. Brand new barn somebody had built clear down at the bottom over another range of mountains. And there was a phone in there, believe it or not. Good Lord took care of me again. I called my brother, and then I ended up spending weeks in bed recovering from my experience. But with the help of my friends, family, and doctor, I was able to survive. It was a terrible memory. But all that really matters is that we both made it back alive.

After regaining my strength and returning to business, I started thinking about finding my lost snowmobile. It wasn't important before that because it was way up in the mountains somewhere. I planned to contact the Forest Service, because they have employees

who work out in the field almost daily and know the area. So I reached out to them.

We at first had a short first meeting with a Forest Service employee—this was in Albuquerque—and he told me that he would see what he could do to help. He knew, but didn't tell me, that the Forest Service had started a criminal investigation against me. I didn't know this at all. So I came down. It was really the next afternoon. I really thought that they were there to assist me, and I had no idea that they were basically Forest Service police, because they never showed me a badge or any credentials.

I met with them by myself and had a conference room and talked right after lunch until after 5 o'clock. I think it was around 5:30 that day. I told them everything, where we started, where we rode, where the ground blizzard started, and where I thought we spent the first night. Had to just guess at it because I didn't know. They asked me to guess where we might have been. I gave them several good guesses but made it clear that I didn't know exactly where I was because of the conditions.

After we had talked for several hours, one of the Forest Service agents—meaning a lady—reached under the table, opened her briefcase, and pulled something out. It was an official form document they had already filled out and saying they were going to charge me with a Federal crime. They claimed I had entered the national wilderness area in my snowmobile, which of course they had no way of knowing. We were only guessing at everything. So when I found out that they were going to prosecute me for driving my snowmobile into the wilderness area, I told them flat out there was no way I was going to admit to committing a crime—I certainly wasn't going to sign a ticket either—if you can even call it a crime in the first place. I was facing up to 6 months in prison and a $5,000 fine, and I had no other option but to fight the charges.

I fought the case all the way up to the Supreme Court of the United States but ended up on the short end of the stick because of the nature of the law itself. It seems that because the law was what's called strict liability the government hardly had to prove anything at all. Under strict liability laws, the government doesn't need to show that the defendant, me, intended to do something wrongful, something illegal, or even know that he was violating the law.

That doesn't seem like the American justice system to me. Why should I, who nearly died in the ground blizzard, have to show there was no true need for me to enter the wilderness? Didn't even know I was there. If someone with my ability to fight this case could have made so little headway against the government, then most people charged under bad laws like this will be truly hard pressed to defend themselves.

The long and short of it is that what happened to me was totally wrong. It should not have happened to me. It should not happen to anyone else in the United States. Laws should not be written so that the government can prosecute us for things we have no idea that's illegal or wrong.

Given how bad the situation currently is, I ask Congress to make the changes that this bipartisan group of organizations is recom-

mending. Real criminals, those who intentionally commit robberies, burglaries, and violent crimes, should be properly punished. No doubt about that. No one disputes it. But Americans who are working to do the right thing and stay out of trouble should not be caught up in these traps of overcriminalization.

I would like to answer any questions that you might have. I have a lot to say.

[The prepared statement of Mr. Unser follows:]

PREPARED STATEMENT OF ROBERT "BOBBY" UNSER

Congressional Testimony

Reining in Overcriminalization: Assessing the Problems, Proposing Solutions

Making an American Racing Legend Prove He Did Not Commit a "Crime"

Testimony Before
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives

September 28, 2010

Robert "Bobby" Unser

Thank you Chairman Scott, Ranking Member Gohmert, and the rest of the members of this Committee for inviting me here to tell my story about what often happens to honest, hard-working men and women because of bad criminal laws. The bad law in my case said that I was a criminal if I wandered into a certain part of the Colorado high country when a friend and I were lost in a blizzard. This unmarked wilderness area is off limits to motorized vehicles, and the blizzard came up when my friend and I were snowmobiling. It didn't matter that we never intended to enter the wilderness. It didn't matter that the wilderness was not marked. It didn't matter that we didn't even know that the wilderness area was there.

I could have been imprisoned for six months. Maybe I should be grateful that I wasn't sent to jail, and I guess I am. But someone else in my same situation might have ended up in prison. I'm here to help make sure that does not happen.

This is not the first time that I have come to Congress to tell my story. Another committee asked me to explain how and why I got prosecuted by the federal government for something that might (or might not, no one involved in this ever said they know for certain) have happened when I was lost and trying to figure out how to save my own life and the life of my friend, Robert Gayton. When I spoke before that other committee, we discussed whether federal officials should or should not have charged me under the law. Most of the Members of that committee said that the Forest Service officials made a mistake. I definitely agree, and every single person I have ever told my story to has also agreed.

But now I realize that the real problem was the law itself. The law should not give the U.S. Forest Service or any other government agency the power to make a federal criminal out of someone who never intended to do anything wrong and had no idea that he might have violated a law until weeks after it happened. Nothing I did caused any harm to anyone, and there was never any claim that it did.

I understand that this hearing is about overcriminalization, which to me means that there are thousands of federal laws that give prosecutors the power to make criminals out of people who were just going about their business trying to be respectable, honest citizens. But like most Americans, I'm no legal expert. I don't know, and I hope I never have to know, all of the details of the thousands and thousands of federal criminal laws and regulations that are on the books. So my testimony here will focus on my own story.

Before I begin, though, I want to say that it is important to me that this is a bipartisan hearing. One of the main reasons I was willing to come here and talk about my story again is because I was told that Mr. Scott and Mr. Gohmert were holding this hearing and working against overcriminalization in a bipartisan way. I have been bipartisan all of my life. I have never, ever voted either party line. I vote for the best person for the job, period. I've voted for Democrats, and I've voted for Republicans. I've given money to

Republicans, and I've given money to Democrats. And I will probably continue doing so the rest of my life.

I also understand that one of the things this hearing is about is a report by two organizations on opposite ends of the spectrum, the National Association of Criminal Defense Lawyers (NACDL) and the Heritage Foundation. I've followed politics and government for a long time. I never thought I'd see two organizations like that, along with the American Bar Association, the National Federation of Independent Business, and the ACLU (American Civil Liberties Union), all supporting the same thing. That's not a lineup probably anyone thought they would see.

This isn't a Republican problem or a Democrat problem. It's not about liberals or conservatives or progressives or whatever. It's not about who's rich or who's poor, or who's black, brown, or white. These bad laws can trap any American. Anyone can be the victim of overcriminalization, and bad laws and bad prosecutions ruin our criminal justice system.

And I'm sorry to say it, but this is a problem that has been caused by the United States Congress. Congress has been making all of these bad laws, and Congress has the power to stop doing that and get rid of them. I know that not everyone in Congress has voted for all of these bad laws. So I am very happy to see that Mr. Scott and Mr. Gohmert are working together in a bipartisan way to hold hearings on overcriminalization and decide how to end it. In my view, that's how it ought to be done.

The way you're going about this is very important to me. So thank you for hearing me out before I started into my story.

My three brothers and I were raised in New Mexico, and I have lived there most of my life. The four of us were always into athletics, the outdoors, and especially anything having to do with cars. All of us raced cars, and three of us raced or trained for the Indianapolis 500, which I ended up winning three times. But we got to know the New Mexico and Colorado Rockies real well growing up, and I never lost my love of the outdoors.

I have also been snowmobiling for decades. I've done it so much, and know so much about it, that I was the one who first convinced manufacturers to put shock absorbers on snowmobiles. I have come up with and helped them develop some of their biggest innovations over the years.

I have a place in Chama, New Mexico, up near the northern border with Colorado. Less than 20 miles north of Chama is a very popular place to go snowmobiling. It is in Colorado right off of Colorado Highway 17. Some folks call it the Jarosa Peak or Jarosa Mesa area. I have snowmobiled there with friends hundreds of times in my life.

Just before Christmas 1997, my friend Robert Gayton and I planned to go for a snowmobile ride at the Jarosa Peak area. Robert is a race car mechanic and a good race

car driver himself, but he had not grown up in the mountains and he had never snowmobiled before. So I decided to give him a short lesson on my property before we started. Because he was new to the sport, the plan was to keep the ride short and be back at my place in time for dinner.

The day was beautiful, crystal clear with the sort of gorgeous blue skies that you can't imagine unless you've been in the Rockies in the winter and seen one yourself. I lent Robert one of my best snowmobiles and decided to ride my brand-new one. I expected it to perform beautifully as well.

Now, I know that some environmentalists do not like having cars or motorcycles or snowmobiles anywhere in or near a national forest. But the fact is that a high percentage of the land in Colorado and New Mexico is national forest, and snowmobiling is perfectly legal in many areas. I knew it was legal where we were going, and everyone who snowmobiled in the area knew it was legal. The U.S. Forest Service had always been completely aware of the snowmobiling that was done in the Jarosa Peak area.

Around noon, we loaded up the two sleds, hooked up the trailer, and headed out. After a short drive, we were at the Red Lake Trail parking lot off of Colorado Highway 17. From there, it didn't take us long and we were off.

We took it easy at first, but Robert is talented and athletic and was doing pretty well on the snowmobile for a first-timer. The snow was deep Colorado powder and packed powder. It seemed like a perfect day.

Robert and I rode for about an hour, first about 5 miles up the logging road, and then along the path leading to the area that the judge in my trial called the Jarosa Peak area. There was actually a bowl up there that was terrific for snowmobiling. It was exposed and at very high altitude, about 11,000 feet, but there were no trees or other objects. It made for a safe place for Robert to learn the sport.

Our trouble started about an hour after we had left the parking lot. A severe ground blizzard suddenly kicked up. In a ground blizzard, it can be a clear blue sky above you but you can't see 20 feet away because the wind is blowing so hard that all of the snow around you creates what they call a "white out." That day, the wind was blowing about 60 to 70 miles an hour, and at times we could not see more than two or three feet in front of us. That powdery snow became little pellets that were driven pretty much horizontally into any part of your body that wasn't covered.

Almost immediately, we went from playing around, to trying to get out of there and find shelter from the blizzard. Already the winds were making the cold temperatures frigid and almost any sort of communication between Robert and me impossible. At times, you couldn't see the front end of your snowmobile when you were driving.

Less than 30 minutes after the blizzard started and the visibility went to zero, Robert rode his snowmobile into an embankment that he could not see and got it stuck. We tried for a

few minutes to get it moving again, but it was wedged into a tight place with its running track off the ground. I realized that it was unlikely we could get it unstuck and decided not to waste any more precious time we might end up needing.

Robert got on the back of my snowmobile and we started off again. At its best, the visibility was about 20 feet, but now we had another problem. Although my snowmobile was brand new, it kept breaking down. I'm a pretty good mechanic, and under normal circumstances I could have fixed it and kept it running. But these weren't normal conditions. When I took off my gloves to work on the snowmobile, the blizzard quickly turned my hands into ice. The wind wasn't helping matters either. I would get it working for a few minutes, and then it would break down again.

We were trying to make our way down the mountain, but the conditions were not cooperating. It was getting darker and darker and the snowmobile was continuing to struggle. We were beginning to get desperate. At about dusk, it was clear that the snowmobile wouldn't make it much further. By now we had been in the blizzard for about two hours. The wind was often so loud you could barely hear yourself think, let alone hear what the other fellow was saying.

I made one last effort to fix the snowmobile, but when I couldn't get it going after another half hour or so, I made the decision to abandon it. If we stayed in the high, exposed terrain above the tree line, we would certainly die that night. We had to get down somewhere low enough that there would be trees providing some stability for the snow so that we could build a snow cave. We had to make it there before the temperatures dropped any further, so we grabbed everything we could off of my machine.

After abandoning my snowmobile, we headed off on foot down the mountain in what was now complete darkness. That was one of the decisions that saved our lives. If we had stayed in those 60 to 70 mile per hour winds through the night above the tree line, we would certainly have frozen to death.

We trudged through the snow slowly but surely, feeling our way down the mountain like two blind men. The snow was sometimes hip-deep and sometimes waist-deep, but we moved as fast as we could under the conditions.

After a few hours of wandering, we finally found an area below the tree line where the snow was deep and there were sizable pine trees for constructing a cave. The wind was not quite as bad as it had been in the bowl, so we felt it was a good area to begin digging a snow cave. Robert had lost one of his gloves somehow, so the two of us used three hands to dig a cave big enough for both of us to fit. The cave was certainly makeshift, but we did the best we could in complete darkness.

We spent the night in that snow cave. It sheltered us from the wind and stored some of our body heat, but I don't think either of us slept one bit. Robert lay on a waterproof blanket throughout the night while I tried to stay warm in my waterproof snowmobiling suit. It was a long, long, long night.

The next morning, the wind had died down some, but we had no clear idea where we had come from and no idea where to go. Our decision then was whether to go back to try to find the snowmobile and get it started again or to walk our way out of the mountains. The wind made that decision pretty easy, though, because it had erased all of our footprints through the snow.

I didn't know it then, but when I didn't show up at the Christmas party I was supposed to be at the night we went snowmobiling, the party's host tried calling me at home the next morning. When he couldn't reach me, he drove over to my place. He found my front storm door closed but the main door standing open, and then saw that my bed had not been slept in the previous night. He called my brother Al Unser the race car driver, and Al got in his truck right away and started calling friends to start a search party. Pretty soon, about a dozen friends, neighbors, and good citizens were looking for Robert and me.

Having spent much of my life in and near the mountains, I knew that if we followed the downhill path of each creek, gully, or ditch we ran into, they would eventually lead us out of the mountains. All the next day, we trudged through the snow that was never any shallower than our hips. There were cliffs and canyons all throughout the area, and we had to find a fast, safe way down or around them. We even had to slide down on our backs with our helmets on a frozen stream that was nearer to straight up and down than it was to horizontal. Amazingly, neither of us was injured by that high-speed slide.

I knew there was a tourist lodge and dude ranch down at the base of those mountains, along Colorado Highway 17. I also knew it was about 15 miles away and 3000 feet down below us. We might be able to make it if we trudged through the snow all day long.

During that second day, we continually ran into snow drifts that were chest-high, and we took turns breaking through them. We had a few pieces of chocolate candy to eat, but I was in no shape to be eating anything. After eating only one of the candies, I suddenly felt nauseated. A short while after, I began vomiting repeatedly. I soon started vomiting and coughing up blood. Robert thought it was because of the candy I had eaten, and he decided not to have any of them even though they were our only food. It turns out that the candy was not the source of my stomach problems (I had contracted a terrible virus), but we did not know that at the time.

We continued our journey down the mountain slowly but surely. At one point on the trail, Robert broke through the thin ice covering one of the creeks we crossed and got soaked up to his knees. That caused the cold to set in on him very deeply. He got so cold and exhausted that he laid down against a tree and said he couldn't make it any farther. There was no way that I was going to let my friend die, so I basically forced him to eat the candy and to get up and keep moving. Later, as I got sicker, Robert was the one who encouraged me that we really would make it back alive.

We were so cold and so near the end of our strength that we did not stop to sleep at the end of the second day because we might not have been able to keep from freezing to

death. So we kept struggling on throughout that night. We were operating on autopilot, exhausted, hungry, and suffering from dehydration, hypothermia, and frostbite. I wasn't sure how close we were to civilization and help, but we just had to hope we would make it.

Before dawn, we found our oasis – an open barn that had a working space heater and a phone. I immediately called my brother Al. Then Robert and I collapsed. As Reader's Digest said, we had "trekked through almost 20 miles of some of the wildest country in the Colorado Rockies." I ended up spending weeks in bed recovering from my experience, but with the help of my friends, family, and doctor I was able to survive. I still feel the lasting effects on my health of this survival experience, but all that really matters is that Robert and I both made it back alive.

After regaining my strength and returning to business, I started thinking about finding my lost snowmobile. I have a lot of friends in law enforcement. When I told a friend who was at that time one of our New Mexico deputy sheriffs, he told me I should check with the Forest Service first. He said that there is a National Wilderness area that we might have wandered into after we got lost, and he told me not to try to find my missing sled on my own. I had planned to contact the Forest Service at some point anyway because they have employees who go out in the field almost every day and who know the area and are familiar with the terrain. A friend of a friend was a retired Forest Service employee, so we asked him to put us in contact with the right people.

We had a short first meeting with this Forest Service employee, and he told me that he would see what he could do to help. The next day, he called me to say he had contacted employees who could help me, and I should come back to their office to meet with them. He knew but didn't tell me that the Forest Service had started a criminal investigation against me.

I came down that afternoon to speak with them. I thought they were there to assist me and had no idea that they were basically police officers because they never showed me a badge or any other credentials. We met with them in a conference room and talked from right after lunch until the end of the day. I told them everything – where we started, where we rode to, where the ground blizzard started, and where we spent the first night. Then they pulled out a map of the area and asked me to guess where we might have wandered after we got lost. I gave them several guesses but made it clear that I obviously had no way of being certain where Robert and I had abandoned my snowmobile. I couldn't see five feet in front of me, so how could I possibly know where we had been walking?

After we had talked for about three and a half hours, one of the two Forest Service agents reached under the table into her briefcase and pulled something out. She handed me an official form document they had already filled out saying they were going to charge me with a federal crime. They claimed I had entered the National Wilderness area on my snowmobile, which at that point, of course, they had absolutely no way of knowing was true. No one had even seen my snowmobile by then.

I had thought they were my friends and were there to help me. I'm no legal expert, so maybe entrapment is not the right word, but there is no doubt that they tricked me. The judge in my case said the Forest Service agents used "subterfuge" against me.

I'm not a dumb fellow, so if I had had any reason to believe I might be in trouble with the law or the Forest Service, I certainly would not have waltzed right in to their office and started speculating about where Robert and I might have ridden after we got lost. My attorney's office is right down the street from me, and I would at least have asked him what my rights were.

So when I found out that they were going to prosecute me for driving my snowmobile into the wilderness area, I told them flat out that there was no way in the world I was going to admit I had committed a crime. I have never been a criminal and I wasn't going to admit to committing a crime – if you can even call it a crime in the first place.

Even though they had betrayed my confidence, the Forest Service employees tried to make nice and say they would charge me with only a small fine. Maybe they were using more "subterfuge" because they couldn't have known that for certain.

First of all, they could not assure me that I would only pay a small fine because the crime they charged me with carried a maximum penalty of a $5000 fine and six months in prison. Even if a small fine was all that they wanted, they weren't the ones who would try me in court and sentence me if I was found guilty. The prosecutors and judge would make those decisions.

Second, I later learned from my attorney and from my friends in law enforcement that the Forest Service agent who charged me that day had told several people that the Forest Service was in fact going to push for the maximum penalty. He was getting near retirement and was bragging that the final feather in his cap would be "taking down Bobby Unser." It's hard to believe that he was talking about me like I was Al Capone. He was treating me like I was some kind of outlaw, but I had never had a problem with the law in my life. I now have a criminal record because of this bad law, but I had no criminal record before. No law-abiding, hard-working, taxpaying American should be treated that way.

My reputation and relationship with law enforcement at all levels was sterling. I probably knew just about every member of the Rio Arriba County Sheriff's Department and New Mexico State Police that worked in my area. For years, I had let them use my place in Chama as an unofficial operating base against drug smugglers and other real criminals. I had some very high-tech radio equipment there that they could use to monitor the bad guys' communications and to make sure the bad guys couldn't do the same to them.

Given my clean background and the nature of the charges against me, there was no way that I was going to plead guilty to a federal crime. I told the Forest Service agents who charged me that I would fight this to the end, and that's exactly what I did.

I want to point out that once I was safe and the U.S. Forest Service had decided to prosecute me, they began sending a helicopter out, day after day, to fly over the area where Robert and I had been lost. They were looking for my snowmobile because they wanted to prove that I had entered the wilderness area so they could convict me. But even though the weather was clear with little wind the second day we were lost, the Forest Service never flew their helicopter in there one time to look for me when Robert and I were fighting to stay alive.

My trial never attempted to get to the truth of my case. In fact, it seemed like the American justice system had been turned on its head. I didn't have a jury trial because the maximum penalty for my crime was less than a year in prison, and rather than the government having to prove my guilt, I essentially had to prove my innocence. That didn't make a bit of sense to me. What kind of American law requires the person accused to prove his own innocence? Why should I – who nearly died in a ground blizzard – have to show that there was a "necessity" for me to enter the National Wilderness? I was fighting for my life for two days in sub-zero temperatures and didn't know whether I had entered the wilderness area or not. What proof was I supposed to offer?

I carefully described Robert and my story to the judge, assuming that the act of trying to save our lives would prove a good enough need to justify our actions whether we actually entered the wilderness area or not. This didn't turn out to be the case. The government presented evidence from Robert Martin, a heavy equipment operator who did work on contract for the U.S. Forest Service, which supposedly showed we had wrongfully crossed into the National Wilderness. He made several estimates on maps of where we might have gone after the ground blizzard got us lost, but never offered any proof of our whereabouts. In fact, he twice referred to his determination of our location as a "guess." In attempting to find my snowmobiles after the incident, Martin also admitted that he had trouble retracing my estimated path and claimed that his own sense of direction was off by at least 80 degrees. How could this evidence support a criminal case against anyone?

It turns out that it hardly mattered, however, because of the nature of the law itself. It seems that because the law was "strict liability," the government hardly had to prove anything at all. Under strict liability laws, the government doesn't need to show that the defendant intended to do something wrongful, something illegal, or even knew that he was violating the law. In my case, the government used this to its advantage. Once it presented even completely unclear and unreliable testimony that I might have driven into the National Wilderness, the prosecutor put the burden on me and my attorneys to prove that I had not actually entered the wilderness or that I had a true need to be in that wilderness. Despite our best efforts to present a convincing case on those two points, the judge convicted me, mostly because the law was so stacked against me. In the court of common sense I was as innocent as could be, but in this court of law I was a convicted criminal.

I appealed this matter up the ladder hoping to draw attention to the absurdity of the law and the unfairness of its application to defendants. Perry Pendley, an attorney with the Mountain States Legal Foundation, was so outraged when he heard about my case that he agreed to handle my appeals at little cost to me. He had handled similar cases, so I agreed. The federal court of appeals in Denver, however, upheld my conviction, and the U.S. Supreme Court refused to hear my case. If someone with the ability and help I had to fight this case could make so little headway against the government, then it will be completely impossible for most people charged under bad laws like this to defend themselves.

The long and short of it is that what happened to me was wrong. It should not happen to me, and it should not happen to anyone else in America. The Forest Service made a mistake in charging me. The judge at my trial made mistakes, including using the wrong scale of the little map he used to "measure" and try to plot out where he thought my snowmobile was found. And because the law Congress created was so unclear, the appeals court basically had no choice but to agree with the trial judge that the law was strict liability and that the government did not have to prove that I had any criminal intent to enter the National Wilderness in order to convict me.

Laws should not be written so that the government can prosecute us for things we have no idea are illegal or wrong. There was nothing I could have done on that day to keep from becoming a criminal short of staying at home in my house. Lord knows there are probably laws that the government could use to make me a criminal in my own home as well.

Given how bad the situation currently is, my request to you, Members of Congress, is that you will make the changes that this non-partisan group of organizations is recommending. Real criminals – those who intentionally commit robberies, burglaries, and violent crimes – should be properly punished. No one disputes that at all. But Americans who are working to do the right thing and stay out of trouble should not be caught up in these traps of overcriminalization.

Right now, it is way too easy for the government to convict me or another American for acts that no one would recognize as criminal. I, thank God, did not get any jail time for my offense. Someone else in my position without as many resources or as good an attorney could very well have spent six months in jail. That's not right. That's not just. And that's not the way that our criminal justice system should be if we want it to stay the best in the world.

[Charges against Mr. Unser:]

Charges against Bobby Unser after Being Stranded/ Lost in Colorado Mountains

- Unser was alleged to have violated the following sections of federal law:
    - 16 U.S.C. § 551 (1997) ("Protection of national forests; rules and regulations")
        - "The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests ... and he may make such rules and regulations ... to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this section, sections 473 to 478 and 479 to 482 of this title or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both."
    - 36 C.F.R. § 261.16(a) (1997) ("National Forest Wilderness") [now codified as 36 C.F.R. § 261.18(a)]
        - "The following are prohibited in a National Forest Wilderness (a) Possessing or using a motor vehicle, motorboat or motorized equipment except as authorized by Federal Law or regulation. . . ."

Mr. SCOTT. Thank you.
Mr. Schoenwetter.

TESTIMONY OF ABNER SCHOENWETTER, PERSONAL IMPACT WITNESS, PINECREST, FL

Mr. SCHOENWETTER. How does that sound?
Good afternoon. Thank you, Chairman Scott and Ranking Member Gohmert, for holding this hearing on overcriminalization.

I didn't know anything about overcriminalization until an unjust Federal prosecution almost destroyed me and my family. But I'm not here to get sympathy. I'm here to make sure other Americans don't have to go through the same destructive ordeal that we have been through.

I am now a convicted felon and just spent 6 years in Federal prison because I was a seafood importer and agreed to purchase a typical shipment of lobster. They were packaged in plastic bags, like all of the other shipments we had purchased in the previous 12 years. But the U.S. Government said the lobster should have been in cardboard boxes because an obscure Honduran regulation said so. That ended up being the reason I was sentenced to over 8 years in Federal prison. It may sound crazy, but it's true.

I grew up in Brooklyn and learned very early the value of hard work and staying on the right side of the law. Crime was all around you, so you either got caught up in it or you learned to do what was right, follow the law and stay out of trouble. I had good parents and a strong desire to make something better of myself, so I chose to stay out of trouble. But none of this could have prevented me from becoming a Federal criminal.

I started a small seafood import company in 1986. It was my little piece of the American dream. My nightmare started in early 1999, when my long-time partner, Bob Blandford, and I agreed to buy a load of Caribbean spiny lobsters from David Henson McNab, a Honduran fisherman and business associate.

The shipment was no different than any of the other hundreds of deals we had done over the years with David. What was different was that the ship was seized in port in Bayou La Batre, Alabama, by the National Marine Fishery Service, that's NMFS, a Federal agency.

Bob and I didn't know the reason for the seizure at the time. Our products had been subjected to FDA and Customs regulations, inspections, and random testing for 12 years; and we had never had any trouble at all. We purchased mostly from David McNab because he delivered the highest quality product on time and was always professional. We never even dealt in the lower-quality lobster that was often sold into the secondary market.

We eventually learned that the government seized the lobster for supposedly being in violation of Honduran fishing regulations. Keep in mind that we had never seen the lobster before the day it was seized at port. We had no reason to believe that there was anything wrong with it.

The government soon told us that they were only trying to make a civil case against David. But that was not true. We soon found out that we were being charged with smuggling and conspiracy based upon violations of Honduran fishing regulations that applied to us under a Federal law known as the Lacey Act.

The first regulation was the one about cardboard boxes. According to our prosecutors, the second regulation supposedly required that all lobsters caught and sold be at least 5½ inches in length. The third regulation supposedly prohibited possessing any egg-bearing lobsters. If found guilty, I faced hundreds of thousands of dollars in fines and decades in prison.

When I look back on it now, my biggest mistake was exercising my Sixth Amendment right to trial. I had done nothing wrong. I never intended to violate any law. None of us had ever heard of the Honduran regulations. Beyond that, the Honduran Government certified to the U.S. Government that all three regulations were invalid and unenforceable. But none of this mattered in our case.

First, armed agents from the FBI, IRS, NMFS searched my house in Pinecrest, Florida. They forced their way in around 7 in the morning, herding my wife, my mother-in-law, and my daughter into the living room in their nightclothes and ordering them to sit and be quiet. Needless to say, we were all frightened to death.

Not long after this, another group of Federal agents came to my house at 6 in the morning to arrest me. I was not home, but they, too, had their guns out. I was not a dangerous person. Importing lobsters has nothing to do with violence. And when they finally asked me to surrender, I did so voluntarily.

Fighting the unjust charges proved impossible. It all boiled down to a complex relationship between the Honduran regulations and American law. The issue was so complicated in fact that the judge was forced to hold separate hearings to determine the validity and meaning of the Honduran rules.

Our lawyers presented plenty of evidence showing that the regulations were invalid, including a letter from the Attorney General of Honduras. None of this evidence mattered to the court, however. Despite the absurdity of the law itself, the jury found me guilty of both conspiracy and importation contrary to law, and the judge later sentenced me to 97 months in prison. It took me 5 years to pursue my trial and appeal, and I am still under 3 years of supervised release. All in all, this will be a 14-year ordeal for me and my family, and I will always be a convicted felon.

Up until this point, I had been convinced that the justice system would sort out the whole mess. False hope, as it turned out. It's tough to say whether prison is tougher on the inmate or the inmate's family. In my case, prison certainly ground me down. It made me a far less trusting person and triggered a range of personal health problems that I am dealing with to this day. It also cost me my reputation, my livelihood, and my ability to vote. The toll on my family, however, was perhaps even more immense.

Last month, on August 27, 2010, I completed the last 5 months of my 6 years and 3 months of confinement. I struggle daily with how to readjust to life after prison and often find myself reflecting how to start my life over. But I owe it to my family and to others who may be targeted to tell my story. I am by no means a lawyer or expert in criminal justice policy, but, like most Americans, I think I have a good gut sense of what is right and what is wrong.

The law should draw clear, understandable lines between what is legal and what is criminal. When there are so many thousands of criminal laws on the books, none of us can be certain how our actions will be characterized or mischaracterized by the government. The law needs to be simplified, made clearer, and written in a way that gives average Americans an understanding of what they can and cannot do.

Simple changes such as these would go a long way toward protecting innocent people from unfair prosecution and unjust prison

sentences. Such changes might be too late to benefit my family, but my sincere hope is that they help protect other Americans from the devastating effects of overcriminalization.

Thank you for letting me speak, sir.

Mr. SCOTT. Thank you.

[The prepared statement of Mr. Schoenwetter follows:]

PREPARED STATEMENT OF ABNER SCHOENWETTER

PREPARED STATEMENT OF ABNER SCHOENWETTER

Congressional Testimony

Reining in Overcriminalization: Assessing the Problems, Proposing Solutions

The Devastating Consequences of Overcriminalization on a Small Businessman and His Family

Testimony Before
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives

September 28, 2010

Abner Schoenwetter

Before discussing any of the details of my personal story, I would first like to say thank you to Chairman Scott, Ranking Member Gohmert, and the members of the subcommittee for taking the time to hold a hearing on the problem of overcriminalization. I have to admit that up until a few years ago, I had never heard of the term overcriminalization or given much thought to what it meant. It wasn't until I began reading materials on criminal law during my time in prison that I quickly came to realize that I already knew much more about the topic than anyone would ever care to know.

I have been asked to testify before this subcommittee because I am what many people call a "victim" of overcriminalization. I really don't like to think of myself as a victim of anything, but there is no arguing that there is some accuracy to the label. No matter how you frame it, the truth is that I am a convicted felon who has just spent the last six years of my life in federal prison for entering into a contract to buy lobsters. The specifics of the case are slightly more complicated than that, but that was more or less the basis for my overall conviction. It may sound crazy, but sadly, it's true.

But I'm not testifying here today to complain about my personal predicament or to seek publicity for my case. I simply wish to prevent other Americans from having to go through the same terrible ordeal that my family and I have had to endure. If I can help just one family avoid the pain and suffering of watching a loved one go to prison because of vague and overbroad laws, then I will consider my appearance here a success. Similarly, if my story can somehow aid the overall effort to achieve meaningful criminal justice reform by alerting those of you here on Capitol Hill to the negative effect of poorly written laws, then I will have done what I came to Washington to do.

Looking at my story objectively, it is relatively hard to explain how this all happened to me. I am and have always been a quiet, hard-working, law-abiding, family man. I am first and foremost a husband and a father. I live for my three children and my wife and would do anything and everything to make them happy. I am also one of Florida's small businessmen… or at least I was. I have always valued hard work, dedication, and self-reliance, and have attempted to lead a life grounded in these principles. These are the values my parents instilled in me as a young boy, and they are the ideals that I have worked to pass along to my children. Strong values, however, do not prevent bad things from happening to good people. Life has a way of challenging everyone, and it challenged me in a way that I never could have expected – by catching me in an overcriminalization trap.

I have been in the commercial seafood business since 1986. I met one of my co-defendants, David Henson McNab, that year and we struck up a arrangement where I would buy his catches of lobster tails and resell them. Some of the seafood I purchased from him might well have been passed around your dinner table at home or ended up on your plate at a restaurant. We built a good business relationship over the course of the next fifteen years, and our relationship quickly blossomed into a friendship. Through hard work and determination, I was able to build my small company, Horizon Seafood, into a successful business. It by no means made me rich, but it did earn me enough to

provide for my wife and three children. It was my little piece of the American dream. Little did I know, however, that a single boatload of Honduran lobsters would soon turn my dream into a nightmare.

Between 1986 and 1992, David and I engaged in a number of successful business deals. It was during that time that I met my other co-defendant, Robert Blandford. Bob Blandford was a seafood broker who had developed many good customers for lobster tails. With my ability to purchase high-quality seafood and Bob's extensive customer base, we started a relationship that eventually became a partnership. There was no need for anything in writing. As is the custom in the seafood business, things were sealed with a handshake.

In 1995, Bob and I joined forces to purchase and distribute seafood, including lobster tails from David. We imported the lobsters under the banner of Bob's company, Seamerica. As was always the case in my dealings with David, his product was of the highest quality and always delivered on schedule. There was never a problem with his operation or personal character.

In early 1999, Bob and I agreed to buy a typical load of Caribbean spiny lobster from David to be delivered to his facility in Bayou La Batre, Alabama, in February. As usual, we planned to sell it to larger distributors throughout the United States. It was no different than any of the other hundreds of deals we did over the years. Every one of our shipments always cleared customs and passed FDA inspection even after being held up at times for random sampling and testing.

What was different this time was that David never delivered on the contract because the contents of his ship were seized by the National Marine Fishery Service (NMFS) in Bayou La Batre. Bob and I didn't know the reason for the seizure at the time, but we surely weren't happy about the missed delivery. It put us behind the eight ball on our sales to distributors and forced us to find other options for the lobster we needed. Because we had no reason to think otherwise, our attention at the time was purely on the business effects of the government seizure. We had no clue that the taking of the lobster by the NMFS would be the first step toward finding ourselves charged with felony conspiracy and smuggling charges.

As time passed, we learned more details about the seizure of David's lobsters. The NMFS had evidently received an anonymous fax (most likely from one of David's fishing competitors) stating that a shipment of "undersized (3 & 4 oz) lobster tails" was coming into Bayou La Batre at the exact time David was due in port. This supposedly violated some Honduran regulation, but not U.S. law. After the NMFS acted upon the tip, it held David's boat and its contents in port for a number of weeks before finally offloading the lobster and shipping it to a government-owned freezer in Florida.

During the next six months, we heard of negotiations between David's attorneys and the attorneys for the government. In fact, my lawyer was told that a deal had been struck between David and the federal government, whereby the government would confiscate

the percentage of lobster that was said to be in violation of Honduran law and release the balance to David for return to Honduras. The government also assured David's attorneys that this was strictly a civil matter and would not involve criminal charges.

Nothing could have been further from the truth. A short time later both Bob and I were called before a federal grand jury in Mobile, Alabama. The next thing I knew, armed agents from the FBI, IRS, and NMFS showed up at my house in Pinecrest, Florida, with search warrants. I was shocked, appalled, and scared all at the same time. As my office was based out of my house, my family was also there. It was 7:00 in the morning and my wife, my mother-in-law, and my daughter were herded in their night clothes into the living room and told to sit and be quiet. Needless to say, they were frightened to death.

Not long after this incident, a similar group of federal agents came to my house a 6:00 in the morning to arrest me. They found only my son and his girlfriend there as I was in North Carolina at the time. After threatening my son with arrest if he did not tell them where I was, he called me and I had my attorney contact them at the house and agree that I would self-surrender in Mobile, Alabama. The government was treating my family like I was a suspected murderer rather than a seafood purchaser. I couldn't believe it.

After my arrest, I eventually found out that I was being charged with smuggling and conspiracy based upon violations of Honduran fishing regulations that applied to me under a federal law known as the Lacey Act. I was being prosecuted by the United States government because the lobsters that I had contracted to buy were allegedly in violation of three Honduran administrative rules. The first regulation supposedly required that all lobsters be packaged in cardboard boxes rather than plastic bags for shipping purposes. The second supposedly required that all lobsters caught and sold be at least five and a half inches in length. The third supposedly prohibited the harvesting and sale of all egg-bearing lobsters. I was facing multiple years in prison and thousands of dollars in fines if found guilty.

I couldn't understand how I was wrapped up in all of this. I had never seen the lobsters on David's boat, nor did I know anything about these specific regulations, yet I was still being accused of multiple federal felonies. It just didn't make sense. How could I smuggle lobsters into the U.S. that I was openly and legally purchasing via contract? How could I conspire against Honduran law when I knew nothing about the regulations I supposedly violated? How could I have contributed to the violation of these regulations when I knew nothing about how or where the lobsters were caught in the first place? None of it made any sense.

Facing these charges, I immediately hired a lawyer and began weighing my options. I could cave into government pressure and accept the prosecutor's offer of three years in prison by pleading guilty to the bogus charges against me. Or else I could fight for myself, my family, my livelihood, and my reputation by standing up and defending my actions. Maybe it's the New Yorker in me, but there was only one choice my conscience would let me make. I had to fight the charges in court as hard as I could. I had to prove

to my country and those who mattered to me most that I was the same law-abiding and honest citizen I had always been throughout the first 54 years of my life.

Fighting the government, however, proved much more difficult than I expected. As a family man and father of three, I couldn't afford to hire a team of high-priced defense attorneys. The Government also pressured the court to dismiss the attorney I had chosen and trusted, a seafood law expert. They claimed that he had potential conflicts of interest, but I'm sure they didn't like that he knew seafood law extremely well. So I hired lawyers I had never met before from Mobile, Alabama. The prosecutors and judge did not seem interested in whether I knew anything about the Honduran regulations or David's fishing activities. As far as they were concerned, because I had contracted to buy lobsters from David, I was along for the ride.

Most of my trial dealt with the complex relationship between the Honduran regulations and American law. The issue was so complicated in fact that the judge was forced to hold a separate hearing to determine the validity and meaning of the Honduran rules. Our lawyers presented a great deal of evidence showing that the regulations were invalid and should therefore not be used against us. They presented a letter from the Attorney General of Honduras confirming that the size regulation had never been signed into law by the Honduran president. They also gathered testimony from a former Honduran Minister of Justice discussing how the egg-bearing regulation was primarily directed at turtles and was never meant to apply to lobsters. None of this evidence mattered to the court, however.

It still makes no sense to me that my criminal trial turned into a battle over the meaning of Honduran fishing regulations. I had always been an honest, law-abiding, tax-paying American citizen. Why was my fate determined based upon laws written by Honduran officials and bureaucrats? And why would Congress write a law like the Lacey Act that gives foreign countries the power to criminalize American citizens? It is bizarre. It is hard enough for the average person to know the difference between legal and illegal behavior under U.S. law without having to worry about the laws of every other nation on Earth. Did Congress really review the laws of Honduras and every other country and make a careful decision as to whether those laws should apply to Americans?

The portions of my trial that did not have to do with the validity of Honduran law focused almost exclusively on David and his actions. Very little time or evidence was presented to establish that I had any relationship to the violation of the fishing regulations. It simply seemed like the government just needed to prove I had a business relationship with David to link me to his alleged criminal behavior. No evidence was ever presented to show that I knew David was violating Honduran regulations, aided him in breaking those rules, or conspired to smuggle anything into the United States.

Despite this fact, the jury found me guilty of both conspiracy and importation contrary to law. I could not believe it. I was devastated on so many levels. My family was in shock. How could someone like me with no history of ever getting into trouble end up becoming a convicted felon?

Up until this point, I had been convinced that the justice system would sort out the whole mess. Throughout the trial, I had held out hope that the prosecutors and judge would come to their senses, recognize my innocence, and let me get back to my law-abiding life. All of that hope went out the window, however, when the jury found me guilty in November 2000 and the judge later sentenced me to 97 months in prison! In addition, I would have to serve 3 years under supervised release and pay a $15,000 fine and a $100,000 forfeiture, which I had to re-mortgage my house in order to pay.

I tried to remain optimistic in the wake of my trial and sentencing, but it was hard to fight back the fear about what likely lay ahead for me – separation from my family... the loss of my business ... prison. It was almost too much to bear. I found it difficult to focus on the appeal of my conviction and easy to go through my days in a general state of sadness. I soldiered on to the best of my ability, but I was no longer the same man.

As you might expect given the nature of my trial, my appeal to the 11th Circuit Court of Appeals in Atlanta also fell on deaf ears despite continued efforts to highlight the invalidity of the Honduran regulations upon which my conviction was based. My attorneys presented evidence that the Honduran Court of First Instance of Administrative Law had declared the lobster size regulation null and void and stated that it never had the force of law. They also presented evidence from the Honduran National Human Rights Commissioner showing that the lobster packaging regulations had actually been repealed in 1995 and that the egg-bearing provision had been retroactively repealed by the Honduran government. All of this evidence was directed to the U.S. State Department by the government of Honduras, which also filed a friend-of-the-court brief during our appeal.

Still, none of it mattered. Two out of the three appeals court judges affirmed my conviction, claiming that Honduran officials could not be trusted to interpret their own laws. They argued that it would be unwise for a court to overrule the American prosecutors' view of Honduran law. They claimed this was a political issue, not a legal one, and that for some reason prosecutors are better able to make decisions than courts are. I don't know how my friends and I were supposed to guess what some prosecutors would later decide Honduran law means. Despite the overwhelming evidence presented by my attorneys and the Honduran government that these three fishing regulations were invalid, the two judges in the majority could not be persuaded.

I should also mention here that the government's "star witness" at trial on Honduran law – Ms Liliana Paz, a mid-level Honduran bureaucrat who was falsely represented as a high-level official – had by then recanted her testimony three times. She had previously stated that the fishing regulations were valid although she had no authority to do so under Honduran law. All this was also ignored by the 11th Circuit.

Given the appeals court's devastating decision, I had only one last legal resort – an appeal to the U.S. Supreme Court. When they refused to hear my petition, reality began to sink in. I was going to spend the next several years of my life in prison and be permanently

branded a felon. Shortly after the appeal was turned down by the court, I again self-surrendered to the government to begin serving my sentence.

I don't want to dwell too long on my time in prison because it is as you would imagine – a mind-numbing, soul-crushing, life-draining experience. No matter how much advice you get from former inmates or how much you prepare yourself mentally for the experience, you cannot possibly ready yourself for that first night when the lights go out and the door shuts behind you. It scares you to death and makes you question yourself in ways you never thought possible.

Taking these facts into consideration, it is still difficult to say whether prison is tougher on the inmate or the inmate's family. In my case, prison certainly ground me down. It made me a far less trusting person and triggered a range of personal health problems that I am dealing with to this day. It also cost me my reputation, my livelihood, and my ability to vote. The toll on my family, however, was perhaps even more immense.

In the wake of my incarceration, each and every member of my immediate family began to suffer a wide range of medical and non-medical problems. My wife recently suffered a heart attack while I was in prison. She was also forced to file for bankruptcy due to the mounting costs of defending my court case, paying my criminal fines, and complying with government forfeiture requests. Meanwhile, my son was forced to change jobs and relocate back to Florida in order to help take care of my wife and daughters. The stress of becoming the new "head of the household" also caused him to undergo emergency surgery for debilitating stomach ulcers that continue to this day.

In addition to these family issues, both of my daughters also began to develop health issues of their own. During the course of this ordeal, my eldest daughter suffered a stroke at the age of only 31 that left her slightly incapacitated and in need of care from family members and health professionals. My youngest daughter began to develop anorexia as a result of my conviction, sentencing, and imprisonment. As one might expect, treatment of the disorder has been costly and has placed the family under even greater financial pressure.

In short, my family has desperately struggled to cope with the fallout of my conviction and entrance into federal prison. We have spent all of our personal savings on legal representation and fines. Although we are still in our house in Miami, the bank has foreclosed and there is nothing stopping it from seizing the property at a moment's notice.

On August 27, 2010, I completed the last five months of my six years and three months of confinement at home. I am now under three years of federally supervised release, and the most pressing challenges for me and my family still remain. I struggle daily with how to readjust to life after prison and often find myself reflecting on a number of important personal questions. How do I reconnect with family and friends? Will they view me in the same light as before my time in prison? How do I start my financial life over at age 64 with only Social Security income to depend on?

With time I hope to find the right answers to these questions and regain some semblance of my former life. In the meantime, however, I owe it to my family and myself to tell my story and alert people to the tragedies that overcriminalization can cause when the criminal law is not properly written or limited.

I am by no means a lawyer or expert in criminal justice policy, but like most Americans I think I have a good gut sense of what is right and what is wrong. And like most Americans, I think it should be the role of the law to draw clear, understandable lines between those activities that society labels as moral rights and those that it labels moral wrongs. When there are so many thousands of criminal laws on the books, none of us can be certain how our actions will be mischaracterized by the government. This is a problem that must be addressed.

The law needs to be simplified, made clearer, and written in a way that gives average Americans an understanding of what he or she can and cannot do. Simple changes such as these would go a long way toward protecting innocent people from unfair prosecution and unjust prison sentences. Such modifications might be too late to benefit my family, but my sincere hope is that they help protect other Americans from the devastating effects of overcriminalization.

TESTIMONY OF BRIAN W. WALSH, SENIOR LEGAL RESEARCH FELLOW, THE HERITAGE FOUNDATION, WASHINGTON, DC

Mr. WALSH. Good afternoon. Thank you, Chairman Conyers, Chairman Scott, and Ranking Member Gohmert and other Members of the Committee, first for holding this hearing on overcriminalization problems and solutions, and also for inviting me to testify.

My name is Brian Walsh, and as Chairman Scott said, I direct Heritage's projects on countering the abuse of criminal law and the criminal process, particularly at the Federal level. My work focuses on overcriminalization.

The problems of overcriminalization have been well documented academically and even statistically. But the real toll cannot adequately be captured by scholarship or numbers, no matter how skillful.

The approximately 4,500 criminal offenses in the U.S. Code, and tens of thousands in the Code of Federal Regulations, have proliferated beyond all reason and comprehension. Surely when neither the Justice Department nor Congress' own Research Service can even count the number of crimes in Federal law, the average person has no hope of knowing all he must do to avoid becoming a Federal criminal.

The damage this does to the American criminal justice system is incalculable. It used to be a grave statement to say that someone was "making a Federal case" out of something. Today, although the penalties for a Federal case are severe and frequently harsh, the underlying conduct punished is often laughable: Six months in Federal prison for (possibly) wandering into a national wilderness area when you are lost with a friend in a blizzard and fighting for your lives; 2 years in prison for "abandoning" materials that you have paid to properly store in ⅜-inch-thick stainless steel drums; 2 years in prison for having a small percentage of inaccuracies in your books and records for a home-based business; 8 years in Federal prison for agreeing to purchase a typical shipment of lobsters that you have no reason to believe violates any law, and indeed does not.

All of these sentences and the underlying prosecutions make a mockery of the word "justice" in "Federal criminal justice system." They consume scarce and valuable legal enforcement resources that could be spent investigating and prosecuting real criminals or in hearing legitimate civil and criminal cases. By imposing criminal punishment where there is no connection to any rational conception of moral wrongdoing, they severely undermine the public's confidence in and respect for criminal justice as a whole.

My written testimony, which I have submitted for the record, focuses on the report that you mentioned, Mr. Chairman, published jointly by the Heritage Foundation and the National Association of Criminal Defense Lawyers. I respectfully request that "Without Intent, How Congress Is Eroding the Criminal Intent Requirement in Federal Law" would be submitted to the record.

Mr. SCOTT. It will, without objection.

Mr. WALSH. Thank you.

In short, however, in the report we found that approximately 60 percent of nonviolent, nondrug criminal offenses considered in a

single Congress, the 109th, had mens rea or criminal-intent requirements that are wholly inadequate to protect from criminal punishment Americans who had no intention to commit a crime and no idea that their conduct was illegal or even wrongful. The percentage was approximately the same whether we looked at offenses that were introduced, passed, or enacted. In other words, these are flawed laws with inadequate criminal-intent requirements that fail to protect innocent persons like Mr. Unser and Mr. Schoenwetter.

We also found that over 50 percent of these 446 criminal offenses were not given oversight by the Judiciary Committees that have the express jurisdiction over and most expertise regarding criminal law and justice.

The one bright spot comes from your Committee, and that is that bills that are marked up or reported out by this Committee are statistically more likely to have criminal-intent requirements that protect innocent persons.

The "Without Intent" report was not limited to identifying the problems and causes of Federal criminalization. The study was conducted in the context of concerted efforts by the broad range of organizations in or working with the overcriminalization coalition to educate Congress on these problems and develop effective, practical solutions. These organizations have met with increasing frequency in the past 2 years with Members of Congress and their staffs, leading academics and legal practitioners, and with one another, to develop principled, nonpartisan reform proposals.

The "Without Intent" report borrowed heavily from the coalition's efforts and selected the five reforms that are best suited to redress the problems on which the study focused. Several members of the coalition have begun initial crafting and vetting of legislative language to begin discussing with Members of Congress. The hope is that Members will adopt some of the ideas in the draft language for their own reform bills, and the current expectation is that bills consistent with such reforms will have bipartisan support.

Briefly, the five reforms addressed by "Without Intent" are:

Enacting default rules of interpretation ensuring that mens rea requirements are adequate to protect against unjust conviction, much like the Model Penal Code already has.

Codifying the rule of lenity which grants defendants the benefit of the doubt when Congress fails to legislate clearly, and this reform is, of course, consistent with our American system's presumption of innocence for the defendant and also the burden of proof that it places on the government to prove every element of the crime beyond a reasonable doubt.

The next reform is to require adequate Judiciary Committee oversight over every bill proposing criminal offenses or penalties.

The next is to provide detailed written justification for and analysis of all new Federal criminalization.

And finally, it is to redouble efforts to draft every Federal criminal offense clearly and precisely.

These five reforms would substantially increase the strength of the protections against unjust conviction that Congress includes in criminal offenses and prevent further proliferation of Federal crimi-

nal law. Americans are entitled to no less attention to and no less protection of their most basic liberties.

The organizations that have been listed today as being in support of this hearing by no means see eye to eye on many important issues, but they have put their disagreements aside to establish common ground on the issue of overcriminalization and to develop a common framework for addressing its root causes. This is because there is no disagreement that Federal criminal law is seriously broken, and getting worse almost every week Congress is in session.

In an age of often intense and bitter partisanship, this surprising collaboration speaks volumes. It expresses the good faith of those who share overlapping conceptions of a fundamental goal: to make the criminal justice system as good as it can be and as good as Americans rightly expect it to be.

The organizations have differing ideas about how to get to that place, but the broad support for today's hearing is a sign of the similarly broad support for returning Federal criminal law to its proper foundations in the fundamental principles of justice.

At the end of the day, the most severe toll levied by overcriminalization is human. Racing legend Bobby Unser will be known for life, not only for his remarkable accomplishments, but also for his Federal criminal conviction. Krister Evertson is currently unable to care for or even visit his 82-year old mother in Alaska because he is on probation and living in a ramshackle aluminum trailer on the lot of an Idaho construction company. Abbie Schoenwetter and his family must now labor to overcome the unjustified and unneccesary impact of overcriminalization on their health, finances, and emotional well-being.

All of these human tragedies came about because an unjust law was written and placed into the hands of an unreasonable government official. These stories testify most eloquently to the irrational injustices of overcriminalization.

These victims and unknown victims like them around the country who have not yet had their stories told, comprise the thousands of human reasons why stopping and reversing the trend of overcriminalization fully merits this Committee's consideration.

Thank you again for inviting me to testify, and thank you for your principled, bipartisan stance against these injustices.

[The prepared statement of Mr. Walsh follows:]

PREPARED STATEMENT OF BRIAN W. WALSH*

CONGRESSIONAL TESTIMONY

Statement of
Brian W. Walsh
Senior Legal Research Fellow
Center for Legal & Judicial Studies
The Heritage Foundation

Before the Subcommittee on Crime, Terrorism, and Homeland Security,
Committee on the Judiciary,
United States House of Representatives

Delivered September 28, 2010

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

Thank you Chairman Scott, Ranking Member Gohmert, and Members of the Committee for inviting me here to testify.[1] More importantly, thank you for holding this hearing to address the serious injustices and other dangers caused by the problems of overcriminalization. My name is Brian Walsh, and I am the Senior Legal Research Fellow in The Heritage Foundation's Center for Legal & Judicial Studies. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

I direct Heritage's projects on countering the abuse of the criminal law and criminal process, particularly at the federal level. My work focuses on overcriminalization, which includes the proliferation of vague, overbroad criminal offenses that lack *mens rea* (guilty-mind or criminal-intent) requirements that are adequate to protect the innocent from unjust prosecution and punishment.

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[1] I would like to acknowledge the substantial contributions to this testimony of Tiffany Joslyn, Counsel for White Collar Crime Policy for the National Association of Criminal Defense Lawyers (NACDL), with whom I co-authored *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, The Heritage Foundation and National Association of Criminal Defense Lawyers (April 2010). Much of this testimony is adapted from *Without Intent*. Nevertheless, the views and opinions stated herein, as well as any errors or omissions, are my own.

*See Appendix, page 116, for an amended version of this statement.

The Heritage Foundation has been involved in and leading efforts to combat overcriminalization for most of the past decade. Several factors have motivated this work. The first was the long-term work of former U.S. Attorney General Ed Meese, my distinguished Heritage Foundation colleague, to reform federal criminal law. Among similar efforts, Ed Meese chaired the American Bar Association's Task Force on the Federalization of Criminal Law, which issued its consensus report in 1998.[2] The Task Force cataloged the enormous number of federal criminal offenses that encroach on the authority of the States as separate sovereigns to administer criminal justice in their geographic territory. It collected evidence that criminal-law legislation was often enacted into law despite being "misguided, unnecessary, and even harmful" because many lawmakers believe criminal-law legislation to be politically popular. Such findings corroborated work by leading academics identifying and analyzing the problems and dangers of overcriminalization.

But probably the primary motivation was the ever-increasing evidence that individuals like Bobby Unser and Abbie Schoenwetter, who are testifying at today's hearing, Georgia Thompson,[3] Krister Evertson,[4] and George and Kathy Norris,[5] were being prosecuted and, in many cases, spending time in federal prison for conduct that none of us would imagine is criminal. We have learned of scores and scores of such cases and, in most, it made no difference that the person never intended to violate any law and never knew that their actions were prohibited by law or otherwise wrongful. Yet their lives and livelihood were ruined as a result of unjust, poorly drafted criminal laws.

The problems of overcriminalization cut across all segments of American society. Placing thousands of vague, overbroad criminal laws in the hands of government officials means that no one is safe from unjust prosecution and punishment.[6] Many of these criminal laws punish conduct that the average person would not guess is prohibited. The body of criminal law thus fails to meet one of the primary requirements of due process: providing individuals with fair notice of what conduct can be punished criminally.

As a result of these problems, all that separates almost any productive, hard-working American from federal prison time are the laws of probability and the discretion of federal prosecutors. As criminal defense and civil rights attorney Harvey Silverglate has

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

[3] United States v. Thompson, 484 F.3d 877 (7th Cir. 2007) (overturning an egregious conviction under the federal "honest services" fraud statute, 18 U.S.C. 1346, against Wisconsin civil servant Georgia Thompson).

[4] *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2009) (written statement of Krister Evertson).

[5] *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2009) (written statement of Kathy Norris).

[6] *See* Harvey A. Silverglate, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT xxxv (2009) (observing that many federal statutes "have been stretched by prosecutors, often with the connivance of the federal courts, to cover a vast array of activities neither clearly defined nor intuitively obvious as crimes, both in commerce and in daily life").

characterized it in his recent book on overcriminalization, there are so many vague, overbroad criminal offenses in federal law that almost every hard-working American commits at least one federal felony a day.[7]

The dangerous state into which federal criminal law has fallen has compelled a strange-bedfellows array of individuals and organizations to come together to fight overcriminalization. The surprising range of organizations that, for example, expressly support the need for today's hearing is broad and impressive: the American Bar Association, American Civil Liberties Union, Families Against Mandatory Minimums, The Heritage Foundation, Manhattan Institute, National Association of Criminal Defense Lawyers, and National Federation of Independent Business. These organizations represent an important cross-section of the coalition working against overcriminalization. But they are a relatively small number of all of the individuals and organizations that are working together to understand the causes and effects of overcriminalization, educate Congress and the American people about its dangers, and develop practical and effective solutions. The Overcriminalization Working Group, for example, includes at least a dozen other organizations that routinely work together to educate the public and Congress on specific issues and develop principles that can be supported by a wide array of organizations.

These organizations do not see eye-to-eye on many important issues. But they have put their disagreements aside to establish common ground on the problems of overcriminalization and a common framework for addressing its root causes. This is because there is no disagreement that federal criminal law is seriously broken and getting worse every week.[8] In an age of often intense and bitter partisanship, this surprising collaboration speaks volumes. It expresses the good faith of those who share overlapping conceptions of a fundamental goal: to make the criminal justice system as good as it can be and as Americans rightly expect it to be. The organizations have differing ideas about how to get to that place, but the broad support for today's hearing is a sign of the similarly broad support for returning federal criminal law to its proper foundations in the fundamental principles of justice.

This was the spirit in which The Heritage Foundation and the National Association of Criminal Defense Lawyers came together to conduct an unprecedented study of Congress's legislative process that so often produces severely flawed criminal offenses and penalties. The study culminated in a joint report, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, which NACDL's Tiffany Joslyn and I co-authored. We focused on several fundamental problems.

The first problem, the erosion of *mens rea* requirements, has serious implications. It is a fundamental principle of criminal law that, before criminal punishment can be imposed, the government must prove both a guilty act (*actus reus*) and a guilty mind (*mens rea*). Despite this rule, omission of *mens rea* requirements has become commonplace in federal

[7] *See id.*

[8] *See, e.g.*, John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUNDATION L. MEMO. No. 26, June 16, 2008, at 1 (finding that from 2000 through 2007 Congress enacted an average of 56.5 crimes a year, or slightly more than one a week for every week of the year).

criminal statutes. Where Congress does include a *mens rea* requirement, it is often so weak that it does not protect defendants from punishment for making honest mistakes or engaging in conduct that was not sufficiently wrongful to give notice of possible criminal responsibility. The resulting criminal offenses fail to satisfy the necessary and well-established principle that criminal liability rests upon an "evil-meaning mind" and an "evil-doing hand."[9] Without an adequate *mens rea* requirement, the principle of fair notice is lost when criminal punishment is imposed for conduct that does not conform to what reason or experience would suggest may be illegal.[10]

Second, federal criminal offenses are frequently drafted without the clarity and specificity that have traditionally been required for the imposition of criminal liability. As the ABA Task Force found, federal criminal statutes often prohibit such exceedingly broad ranges of conduct, in language that is vague and imprecise, that few lawyers, much less non-lawyers, could determine with any degree of certainty what specific conduct is actually illegal. And even when the *actus reus* is described with clarity, the *mens rea* requirement may be imprecise. A common result of poor legislative drafting is uncertainty as to whether a *mens rea* term in a criminal offense applies to all of the elements of the offense or, if not, as to which elements it does apply.

The third problem, regulatory criminalization, occurs when Congress delegates its legislative authority to define criminal offenses to another body, typically an executive branch agency. This empowers the unelected officials who direct that agency to decide what conduct will be punished criminally, rather than requiring Congress to make that determination itself. Through this process, the executive branch of the federal government ends up playing a far more substantial role in causing overcriminalization than the limited role the Constitution grants to the President of signing or vetoing legislation.

In the usual case of regulatory criminalization, Congress passes a statute that establishes a criminal penalty for the violation of any regulation, rule, or order promulgated by the agency or an official acting on behalf of that agency. The statute might include *mens rea* terminology; for example, criminal responsibility might extend to "anyone who *knowingly* violates any regulation."[11] However, statutes authorizing regulatory criminalization often fail to include any *mens rea* terminology, and nothing guarantees that the executive agency promulgating the criminal regulations will include a *mens rea* requirement, let alone an adequate one.

The explosive growth that federal criminal law has undergone in recent decades should alone be sufficiently troubling to anyone in a free society. When coupled with the

[9]*See* Morissette v. United States, 342 U.S. 246, 251 (1952).

[10]*See, e.g.*, 18 U.S.C. § 707 (providing a criminal penalty of up to six months imprisonment for making unauthorized use of the logo of the 4-H Clubs).

[11]For example, one provision in the federal Lacey Act states that any person who "knowingly imports or exports any fish or wildlife or plays in violation of any provision of this chapter" shall be criminally punished. *See* 16 U.S.C. § 3373(d)(1)(A). Another provision of the Lacey Act incorporates every wildlife rule or offense present in "any law, treaty, or regulation of the United States or... any Indian tribal law." 16 U.S.C. § 3372(a)(1).

disappearance of adequate *mens rea* requirements, the proliferation of poorly drafted criminal offenses that are vague and overbroad, and the widespread delegation to unelected officials of Congress's authority to criminalize, the expanded federal criminal law becomes a broad template for the misuse and abuse of governmental power.

The *Without Intent* Report

For our joint *Without Intent* report, Heritage and NACDL studied Congress's legislative process for developing non-violent criminal offenses and penalties. This study began with the working hypothesis that debate and oversight of proposed legislation in the House and Senate Judiciary Committees might improve the clarity of criminal offenses in bills moving through Congress and strengthen their *mens rea* requirements. The Judiciary Committees have special expertise in criminal law, criminal justice legislation, and related matters, and according to House and Senate rules, only the Judiciary Committees have express jurisdiction over criminal law and punishment.

In order to test this hypothesis, the study considered two questions:

1. How well do the *mens rea* requirements in each offense studied protect innocent actors, defined as those who lack the intent to violate the law or the knowledge that their conduct is unlawful or sufficiently wrongful to put them on notice of possible criminal liability?
2. Is there a correlation between the protection afforded by a bill's *mens rea* requirements and its enactment, passage by a chamber, or consideration by a judiciary committee?

The *Without Intent* report itself provides the detailed findings of the study. I will only summarize them here.

The Report's Findings

The *Without Intent* report analyzed non-violent, non-drug criminal offenses in 203 pieces of legislation introduced during the course of the 109th Congress (2005-2006). Because many of the bills included more than one criminal offense meeting the study's criteria, the number of criminal offenses included in the study ended up being 446 in total. Each offense's *mens rea* requirement was analyzed and graded as Strong, Moderate, Weak, or None. If the *mens rea* fell between two categories, it was assigned an intermediate grade. In order to give the benefit of the doubt to congressional drafting, however, these intermediate ratings were characterized as having the higher, more protective grade for the purposes of the study.

After analysis of all 446 non-violent, non-drug criminal offenses introduced during the 109th Congress, our study found that approximately 57 percent of the studied offenses introduced, and approximately 63 percent of the studied offenses enacted, had inadequate (None or Weak) *mens rea* requirements. Just slightly more than 8 percent of all offenses studied had protective, properly-drafted *mens rea* requirements (Strong).

Looking at each level of *mens rea* protection, we found that 25 percent of all non-violent offenses introduced did not require a prosecutor, court, or jury to engage in a meaningful consideration of a criminal defendant's state of mind. In other words, one quarter of all criminal penalties introduced either had no *mens rea* requirement or contained terminology such as "should have known" that provides almost no *mens rea* protection for the accused. Another 32 percent used Weak *mens rea* requirements, such as those relying on the term "knowingly" to introduce the language of the offense and which excludes only accidental or inadvertent conduct from criminal punishment.

Approximately one-third of the studied offenses in the report had *mens rea* requirements in the Moderate category. The language of an offense classified as Moderate is more likely than not to prevent an individual from being found guilty if the individual did not intend to violate a law and did not know that his conduct was unlawful or sufficiently wrongful so as to put him on notice of possible criminal responsibility. Finally, as mentioned above, only one out of every 12 offenses introduced contained *mens rea* requirements protective enough to be categorized as Strong.

In addition to direct analysis of the criminal intent framework of every non-violent, non-drug offense introduced in the 109th Congress, the *Without Intent* report also explored how many of the 446 criminal offenses were referred to the House or Senate Judiciary Committee, that is, the congressional committees with the express jurisdiction and most expertise for properly vetting all new criminal laws. The report found that only 48 percent of the bills studied were referred to the respective judiciary committee.

The study also analyzed how referral or non-referral to the House and Senate Judiciary Committees, one of three specified actions taken by a Judiciary Committee (hearing, markup, or reporting out), and passage or enactment of the offense correlated with the overall strength of the *mens rea* requirements included in the bills reviewed. Collectively, the data provided very little evidence that these actions by Congress correlated with stronger, more protective *mens rea* requirements. The exception is statistically significant correlations were found with markup or reporting by the House Judiciary Committee. Offenses that had been subject to either of these two actions in the House Judiciary Committee tended have stronger, more protective *mens rea* requirements. No such relationship with congressional actions was found, however, in the Senate.

The Report's Conclusions

From these findings, the *Without Intent* report reaches several conclusions regarding the current state of the federal legislative process for criminal law creation. First and foremost, the report concludes that non-violent criminal offenses lacking adequate *mens rea* requirements are ubiquitous at every stage of the legislative process. Second, the report finds that Congress consistently neglects the special expertise of the House and Senate Judiciary Committees when drafting criminal offenses or penalties. Third, the report indicates that the proliferation of federal criminal law is rapidly expanding. Fourth, the report reveals that poor legislative draftsmanship is common place. And

finally, the report illustrates that criminal lawmaking authority is regularly and inappropriately delegated to non-congressional bodies.

With regard to the first conclusion, it is apparent from the legislation studied that bills with non-violent, non-drug criminal offenses lack adequate *mens rea* protections at all stages of the legislative process. Beyond the statistics mentioned for all non-violent criminal offenses introduced 109th Congress, similar drafting failures appear among offenses that were enacted into law and those that were passed by at least one chamber. Approximately 63 percent of the offenses passed by a chamber and 64 percent of the offenses actually enacted into law had wholly inadequate *mens rea* requirements. This data is indicative of a much larger problem that requires the immediate attention of congressional decision-makers.

The findings of the *Without Intent* report also reveal that Congress neglects the special expertise of the House and Senate judiciary committees when engaging in the legislative process. Over one-half (52 percent) of the criminal offenses in the study were neither referred to a judiciary committee nor subject to any oversight by either committee. In addition, the study frequently uncovered criminal offenses that were buried in much larger bills entirely unrelated to criminal law and punishment. The result of such circumvention of the Judiciary Committees is a lack of proper oversight from the Members of Congress (and their staffs) who are best-situated to evaluate and analyze new criminal legislation.

Next, the *Without Intent* report makes note of the fact that the federal criminal law is currently expanding at an increasingly exponential rate. From 2000 to 2007, Congress created 452 entirely new crimes, legislating at a rate of over one new crime each week for every week of every year.[12] Without adequate *mens rea* requirements, these federal criminal offenses greatly increase the danger that law-abiding individuals will find themselves facing prosecution and even prison time in the federal system. Moreover, these numbers do not accurately capture the full magnitude of the effect that regulatory criminalization plays in the grand scheme of overcriminalization.

On a qualitative note, the report also highlights the common observation that Congress frequently fails to speak clearly and with the necessary specificity when legislating criminal offenses. This ambiguity can have serious consequences in all legislative drafting. In the criminal context, however, the consequence can be particularly dire when legislative language is vague, unclear, or confusing: the misuse of governmental power to unjustly deprive individuals of their physical freedom.

In addition to these four conclusions, the sheer volume of regulatory criminalization authorized in the studied offenses demonstrates that congressional delegation of its authority to make criminal law occurs at every stage of the legislative process and, notably, more frequently in those studied offenses that were either passed or enacted into law. Specifically, 14 percent of all proposed non-violent offenses included some form of

[12] John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUNDATION L. MEMO. No. 26, June 16, 2008, at 1.

regulatory criminalization. That increases to 17 percent among only those offenses passed by either the House or Senate. The figure increases again to 22 percent when discussing offenses actually enacted. This phenomenon contributes greatly to the explosive growth of federal criminal law and the corresponding erosion of adequate *mens rea* requirements.

Recommended Reforms

The scope of the *Without Intent* report was not limited to identifying the problems and causes of federal overcriminalization. The study was conducted in the context of concerted efforts by the broad range of organizations in, or working with, the overcriminalization coalition to educate Congress on these problems and develop effective, practical solutions. These organizations have met with increasing frequency in the past two years with Members of Congress and their staffs, leading academics and legal practitioners, and with one another to identify and develop principled, non-partisan reform proposals.[13] The *Without Intent* report borrowed heavily from the coalition's efforts and selected the five reforms that are best suited to redress the problems on which the study focused. Several members of the coalition have begun initial crafting and vetting of legislative language to begin discussing with Members of Congress. The hope is that Members will adopt some of the ideas in the draft language for their own reform bills. The current expectation is that bills consistent with such reforms will have bipartisan support.

The five reforms addressed by *Without Intent* are:

1. Enact default rules of interpretation ensuring that *mens rea* requirements are adequate to protect against unjust conviction.
2. Codify the rule of lenity, which grants defendants the benefit of the doubt when Congress fails to legislate clearly.
3. Require adequate judiciary committee oversight of every bill proposing criminal offenses or penalties.
4. Provide detailed written justification for and analysis of all new federal criminalization.
5. Redouble efforts to draft every federal criminal offense clearly and precisely.

1. *Enact Default* Mens Rea *Rules*

Perhaps the most straightforward and effective reform to help ensure that innocent individuals are protected from unjust conviction under federal criminal offenses would be to codify default rules for the interpretation and application of *mens rea* requirements.[14]

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[13] *See generally* Brian W. Walsh, *Enacting Principled, Nonpartisan Criminal-Law Reform*, HERITAGE FOUND. SPECIAL REP. NO. 42, July 9, 2009.

[14] Although the Model Penal Code's formulation is not sufficiently protective of the innocent, it does include default *mens rea* provisions. *See* MODEL PENAL CODE § 2.02(1) (2009) ("Minimum Requirements

The first part of this reform would address the unintentional omission of *mens rea* terminology by directing federal courts to read a default *mens rea* requirement into any criminal offense that lacks one.[15] Adopting this reform would help law-abiding individuals know in advance which criminal offenses carry an unavoidable risk of criminal punishment and safeguard against unintentional congressional omissions of *mens rea* requirements.

The second part of this reform would direct courts to apply any introductory or blanket *mens rea* terms in a criminal offense to each element of the offense.[16] This reform would eliminate much of the uncertainty that exists in federal criminal law over the extent to which an offense's *mens rea* terminology applies to all of the offense's elements and greatly reduce the disparities that exist among the federal courts in the interpretation and application of *mens rea* requirements.

Implementing these two reforms would improve the *mens rea* protections throughout federal criminal law and force Congress to give careful consideration to *mens rea* requirements when adding or modifying criminal offenses.

2. *Codify the Rule of Lenity*

A related statutory reform that would reduce the risk of injustice stemming from criminal offenses that lack clarity or specificity would be to codify the common-law rule of lenity. The rule of lenity directs a court, when construing an ambiguous criminal law, to resolve the ambiguity in favor of the defendant.[17] Granting the benefit of the doubt to the defendant is consistent with the well-known rules that all defendants are presumed innocent and that the government bears the burden of proving beyond a reasonable doubt every element of the crime with which a defendant is charged.[18] Expressly requiring federal courts to apply the rule of lenity to federal criminal law would simply codify what the Supreme Court has called a fundamental rule of statutory construction and cited as a wise principle that it has long followed.[19] Despite the Supreme Court's statements of its importance, the rule has not been uniformly or consistently applied by the lower federal courts. It would require Members of Congress to legislate more carefully and thoughtfully, with the knowledge that courts would be forbidden from "filling in" any inadvertent gaps left in criminal offenses. A statutory rule of lenity would protect

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of Culpability"); *id.* § 2.02(3) ("Culpability Required Unless Otherwise Provided"); *id.* § 2.02(4) ("Prescribed Culpability Requirement Applies to All Material Elements").

[15] *Cf. id.* § 2.02(3) ("Culpability Required Unless Otherwise Provided").

[16] *Id.* § 2.02(4) ("When the law defining an offense 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.").

[17] *See, e.g.*, United States v. Santos, 128 S. Ct. 2020, 2025 (2008).

[18] *See* Taylor v. Kentucky, 436 U.S. 478, 483–87 (1978) (explaining the presumption of innocence and the government's burden of demonstrating the defendant's guilt beyond a reasonable doubt); Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence…is a basic component of a fair trial under our system of criminal justice.").

[19] In *United States v. Bass*, the Supreme Court referred to the rule of lenity as a "wise principle[] this court has long followed." 404 U.S. 336, 347 (1971); *see also id.* at 348; Bell v. United States, 349 U.S. 81, 83 (1955).

individuals from unjust criminal punishment under vague, unclear, and confusing offenses by reinforcing the principle of legality, which holds that no conduct should be punished criminally "unless forbidden by law [that] gives advance warning that such conduct is criminal."[20]

3. *Require Sequential Referral to the Judiciary Committees*

A third recommended reform is to change congressional rules and procedure to ensure that every bill that would add or modify criminal offenses or penalties is subject to automatic sequential referral to the judiciary committees. As this committee knows, sequential referral is the practice of sending a bill to multiple congressional committees. Whereas every new or modified criminal offense introduced in Congress should be subject to automatic referral to a judiciary committee, more than half of the offenses studied in *Without Intent* received no such referral. Among other benefits, this rule could stem the tide of criminalization by forcing Congress to adopt a measured and prioritized approach to criminal lawmaking. The House and Senate Judiciary Committees are uniquely positioned to evaluate questions that should be answered before Congress considers enacting any new criminal offense, including:

- Whether a new offense is consistent with the Constitution, particularly constitutional federalism's reservation of general police power to the 50 states; and

- Whether the approximately 4,450 statutory criminal offenses and tens of thousands of regulatory criminal offenses now in federal law already cover the conduct being criminalized.

To avoid overcriminalization, these questions must be answered before Congress considers enacting any new criminal offense.

Requiring sequential referral of all bills with criminal provisions to the judiciary committees would also reduce overcriminalization by increasing congressional accountability for new criminalization. As it now stands, no single committee can take overall responsibility for reducing the proliferation of new (and often unwarranted, ill-conceived, and unconstitutional) criminal offenses or for ensuring that adequate *mens rea* requirements are a feature of all new and modified criminal offenses. Automatic sequential referral would empower the judiciary committees to take responsibility for all new criminal provisions.

4. *Require Reporting on All New Criminalization*

The fourth reform is a reporting requirement for all new federal criminalization and would work hand-in-hand with the sequential referral reform. It would require the federal government to produce a public report that includes much of the information necessary to assess the purported justification, costs, and benefits of all new criminalization.

[20]Wayne R. LaFave, CRIMINAL LAW 11 (4th ed. 2003).

By requiring the federal government to perform basic but thorough reporting on the grounds and justification for all new and modified criminal offenses and penalties, this reform would raise the level of accountability for new criminalization. A more complete list is provided in *Without Intent*, but for every new or modified criminal offense or penalty Congress should report information such as the following:

- A description of the problem that the new or modified criminal offense or penalty is intended to redress, including an account of the perceived gaps in existing law, the wrongful conduct that is currently going unpunished or under-punished, and any specific cases or concerns motivating the legislation;
- An analysis of whether the criminal offenses or penalties are consistent with constitutional and prudential considerations of federalism;
- A discussion of any overlap between the conduct to be criminalized and conduct already criminalized by existing federal and state law;
- A comparison of the new law's penalties with the penalties under existing federal and state laws for comparable conduct;

Congress should also collect information on criminalization reported by the executive branch of the federal government. This information should be compiled and reported annually and, at minimum, should include:

- All new criminal offenses and penalties that federal agencies have added to federal regulations and an enumeration of the specific statutory authority supporting these regulations; and
- For each referral that a federal agency makes to the Justice Department for possible criminal prosecution, the provision of the United States Code and each federal regulation on which the referral is based, the number of counts alleged or ultimately charged under each statutory and regulatory provision, and the ultimate disposition of each count.

This reform proposal would require Congress to engage in more extensive deliberations over, and provide factual and constitutional justification for, every expansion of the federal criminal law.

5. *Focus on Clear and Careful Draftsmanship*

The final reform recommendation would not be reduced to legislative language: Congress must employ a slower, more focused and deliberative approach to the creation and modification of federal criminal offenses. The importance of legislative drafting cannot be overstated, for it is the drafting of the criminal offense that frequently determines whether a person who had no intent to violate the law and no knowledge that her conduct was unlawful or sufficiently wrongful to put her on notice of possible criminal liability

will endure prosecution and conviction and lose her freedom. A properly drafted criminal offense must:

- Include an adequate *mens rea* requirement;
- Define both the *actus reus* and the *mens rea* of the criminal offense in clear, precise, and definite terms; and
- Provide a clear statement of which *mens rea* terms apply to which elements of the offense.

Criminal offenses frequently fail to define the *actus reus* in a clear and understandable manner and often include an *actus reus* that is broad, overreaching, or vague. Similarly, specifying the proper *mens rea* requirement for a criminal offense requires great deliberation, precision, and clarity. Further, legislative drafters should almost never rely merely on a standard *mens rea* term in the introductory language of a criminal offense. Instead, the criminal offenses that provide the best protection against unjust conviction are those that include specific intent provisions and provide sufficient clarity and detail to ensure that the precise mental state required for each and every act and circumstance in the criminal offense is readily ascertainable.

Finally, Members of Congress drafting criminal legislation must resist the temptation to bypass this arduous task by handing it off to unelected regulators. The United States Constitution places the power to define criminal responsibility and penalties in the hands of the legislative branch. Therefore, it is the responsibility of that branch to ensure that no one is criminally punished if Congress itself did not devote the time and resources necessary to clearly articulate the precise legal standards giving rise to that punishment. This reform could be codified by, for example, Congress's prohibiting regulatory felonies or requiring first violations of regulatory offenses to be punishable by civil penalties only.

* * *

These five reforms would substantially increase the strength of the protections against unjust conviction that Congress includes in criminal offenses and prevent further proliferation of federal criminal law. Americans are entitled to no less attention to and no less protection of their most basic liberties.

Conclusion

The problems of overcriminalization have been well documented academically and even statistically, but the real toll cannot adequately be captured by scholarship or numbers, no matter how skillful. The approximately 4,500 criminal offenses in the U.S. Code, and the tens of thousands in the Code of Federal Regulations, have proliferated beyond reason and comprehension. Surely when neither the Justice Department nor Congress's own research service can even count the number of crimes in federal law, the average person has no hope of knowing what he must do to avoid becoming a federal criminal.

The damage this does to the American criminal justice system is incalculable. It used to be a grave statement to say that someone was "making a federal case" out of something. Today, although the penalties for a federal case are severe – and frequently harsh – the underlying conduct punished is laughable. Six months in federal prison for (possibly) wandering into a National Wilderness area when you are lost with a friend in a blizzard and fighting for your lives. Two years in prison for "abandoning" materials that you have paid to properly store in 3/8-inch-thick stainless steel drums. Two years in prison for having a small percentage of inaccuracies in your books and records for a home-based orchid business. Eight years in federal prison for agreeing to purchase a typical shipment of lobsters that you have no reason to believe violates any law – and indeed does not. All these sentences and the underlying prosecutions make a mockery of the word "justice" in "federal criminal justice system." They consume scarce and valuable legal enforcement resources that could be spent investigating and prosecuting real criminals or hearing legitimate civil and criminal cases. By imposing criminal punishment where there is no connection to any rational conception of moral wrongdoing, they severely undermine the public's confidence in and respect for criminal justice as a whole.

But at the end of the day, the most severe toll levied by overcriminalization is human. Racing legend Bobby Unser will be known for life, not only for his remarkable accomplishments, but also for his federal criminal conviction. Krister Evertson is currently unable to care for or even visit his 82-year-old mother in Alaska because he is on probation and living in a ramshackle aluminum trailer on the lot of an Idaho construction company. Abbie Schoenwetter and his family must now labor to overcome the unjustified and unnecessary impact of overcriminalization on their health, finances, and emotional well-being. All of these human tragedies came about because an unjust law was written and placed in the hands of an unreasonable government official.

These stories testify most eloquently to the irrational injustices of overcriminalization. They and unknown victims like them around the country who have not yet had their stories told comprise the thousands of human reasons why stopping and reversing the trend of overcriminalization fully merits this Committee's consideration. Thank you again for inviting me to testify, and thank you for your principled, bipartisan stance against these injustices.

Mr. SCOTT. Professor Smith.

TESTIMONY OF STEPHEN F. SMITH, PROFESSOR OF LAW, UNIVERSITY OF NOTRE DAME LAW SCHOOL, NOTRE DAME, IN

Mr. MCDONALD. Thank you, Chairman Scott, Chairman Conyers, and Judge Gohmert. It is a pleasure to be here to talk about this topic, and I commend all of you for your interest in it.

I want to address you from an academic perspective about the problem of overcriminalization. And, yes, I think it is a serious problem. So I wanted to talk about this from an academic perspective. I think there are two aspects to overcriminalization that it is important to focus on.

One is the usual one that we tend to focus on, which is the quantitative issue. The idea there is that we have too many criminal laws, certainly at the Federal level, and those criminal laws are entirely too broad in scope. There are too many infractions that are punishable as crimes. And that is what I call the quantitative aspect of overcriminalization.

There are also, I think, important qualitative aspects. And there the complaint isn't so much about the number of the crimes and the scope of the crimes, but just at how poorly conceived the criminal code is; how inadequately defined crimes are in terms of the conduct, or actus reas elements; the state of mind, or mens rea elements; the paucity of defenses that are necessary, and similar problems.

And in my scholarship, I talk about both of these. I tend to focus less on the quantitative aspects and more on the qualitative aspects. And to be clear, I want to make sure that you don't think that I don't agree with the idea that there are too many crimes, that crimes are too broad. I totally agree. I think the Federal Criminal Code would work a lot better, we would have a lot more fairness in our country. We would be a lot more effective at counterterrorism, for example, and securing our borders if Federal prosecutors focused on those issues of truly national concerns and stop playing district attorney, and if FBI agents stop playing beat cop. Leave these to the State court systems, these street crimes and violent crimes, to save the resources of the Federal Government for where they are truly needed—immigration, where that is a function of the Federal Government; those kinds of things. I think a narrower criminal code at the Federal level that focused the Federal enforcers on those things would be an enormous benefit to our great Republic.

The problem I have is I don't want to stick all of my bets on the Congress radically reducing the size of the criminal code. It would be great if it happened. Lots of things would be great if they happened. It would be great if I won the lottery. I don't think that is going to happen either. I don't play it, so how can I win it?

But I don't know that that is terribly realistic. So I have tended to focus my scholarship on the qualitative problems associated with overcriminalization. Can we fix the criminal code so that it more accurately defines crimes? Can we have more realistic punishments, as Chairman Conyers recognized? I think that is an underappreciated part of this problem, so I am glad the Chairman brought that up.

I think overpunishment is something that we need to be concerned about, and that ties directly into overcriminalization, because Federal prosecutors take these broad crimes and they enforce them, and they enforce them because they carry such high penalties, they enforce them because they often have mandatory minimums that ensure jail sentence.

And when we move these offenders from the State court system where drug courts are there, where they are exploring alternative punishments, when we move them from the flexible policies in the State court system into the Federal court system where we have a very rigid, one-size-fits-all approach—punishment, more punishment and even more punishment—I think that is a fundamental mistake. We are giving prosecutors incentives to bring these cases into the Federal system with all the attendant problems that causes—and we saw that in the Armstrong case with the crack, 100-to-1 crack cocaine rule which the Congress rightly repealed earlier this year. Enormous racial disparities in the prison population attributable to this arbitrary and unnecessarily harsh rule about the sentences for crack cocaine.

So I think the quantitative aspects are important, and that is where I tend to focus.

I do want to make a broader point so we don't get lost in the weeds, as professors are wont to do. And I think all of this fundamentally comes back to the role of moral blameworthiness in the country. These horror stories that we have heard today about overcriminalization are heartbreaking because a fundamental principle or a criminal law is that punishment requires moral blameworthiness, that nobody should be subject to conviction and punishment for a crime unless they committed a blameworthy act, unless they had reason to know their conduct was immoral or illegal.

And you can see from these examples that we heard today that our criminal law at the Federal level does not do that, that punishment is often imposed without blameworthiness and in excess of blameworthiness. The idea of overpunishment as well.

Crimes are not defined adequately. The mens rea requirements in particular in Federal criminal law are woefully insufficient. That is a real problem for a criminal law that is supposed to be limited to punishing blameworthy acts, because it is the guilty-mind requirement that really ensures that people won't be punished unless they had knowledge that they were committing a wrong, either a legal wrong or moral wrong.

There are a lot more aspects to this problem; I address them in my lengthy statement. I will stop there, and, again, I will be happy to answer your questions.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF STEPHEN F. SMITH

Testimony of Professor Stephen F. Smith,
Notre Dame Law School

before the

House Judiciary Committee's
Subcommittee on Crime, Terrorism, and Homeland Security

on

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

September 28, 2010

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

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

I. DEFINING "OVERCRIMINALIZATION"

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

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

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

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

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

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

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

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

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

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

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

II. A QUALITATIVE CRITIQUE OF OVERCRIMINALIZATION

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

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

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

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

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

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

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

A. *A "Code" in Name Only*

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

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

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

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

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

contents, 300 pages of an index.[9]

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

B. *Overlapping Crimes, Inconsistent Definitions and Penalties*

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

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

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

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

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

[12]*See* 15 U.S.C. § 1644.

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

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

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

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

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

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

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

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

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

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

C. *Judicial Crime-Creation*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. *Inadequate Mens Rea Requirements*

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

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

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Federalization, supra note 7, at 896-908.

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

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

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

[27]Id. at 252.

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

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

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

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

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

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

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

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

In many cases, even when Congress includes mens rea terms in the definition of crimes, it uses terminology, such as "willfully" and "maliciously," that have no intrinsic meaning and whose meaning may vary widely in different statutory contexts. Take, for example, "willfulness." "Willfulness" has a chameleon-like quality in federal criminal law: "The word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears. Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law . . . a 'willful' act is one undertaken with a 'bad purpose.'"[33]

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

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

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

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

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

[35] Id. at 119-20.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

criminalized entirely innocuous conduct.[47]

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

E. *Disproportionately Severe Penalties*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. *Inadequate Defenses*

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

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

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

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

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

[56]18 U.S.C. § 1623(c).

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

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

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

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

III. SOLUTIONS

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

A. *Criminal "Code" Review*

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

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

[59] Id. at 408.

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

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

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

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

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

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

B. *Legislative "Best Practices"*

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

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

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

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

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

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

C. *The Rule of Lenity*

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

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

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

D. *Mens Rea Reforms*

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

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

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

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

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

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

E. *Penalty Review*

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

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

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[65]MODEL PENAL CODE § 2.02(1).

[66]Id. § 2.02(3).

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

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

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

F. *Affirmative Defenses*

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

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

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

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

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

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

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

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

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

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

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

Mr. SCOTT. Professor Smith, we didn't repeal the crack and powder disparity. We adjusted it. We improved it. We didn't quite repeal it. We still have a little more work to do.

Professor Podgor.

TESTIMONY OF ELLEN S. PODGOR, LeROY HIGHBAUGH, SENIOR RESEARCH CHAIR AND PROFESSOR OF LAW, STETSON UNIVERSITY COLLEGE OF LAW, GULFPORT, FL

Ms. PODGOR. Thank you, Chairman Conyers, thank you Chairman Scott, Ranking Member Gohmert, for allowing me the opportunity to speak to you about this important topic of overcriminalization.

My name is Ellen Podgor, and I am a professor of law at Stetson University College of Law. I practiced law as both a prosecutor, a deputy prosecutor, and on the defense side, and I am now a professor of law, altogether stretching a period in excess of 30 years.

I have been teaching and authoring books and articles on the subjects of criminal law, white-color crime, and legal ethics for many years, and I feel that my background allows me to offer you a balanced perspective on overcriminalization issues that are being addressed by this Committee.

Clearly we are all opposed to crime. The goal to eradicate its existence is of the utmost importance. Laws that punish individuals when they commit crimes serve the important goals of deterring future criminality and isolating those who may present harm to society, and, as Representative Conyers points out, educating those who need the education.

But efforts toward achieving these goals are hampered by the reality that in some cases criminality is not clearly defined, and society is not properly notified of what conduct is prohibited by law. If we were speaking about murder, rape, robbery, or arson, or other common law—malem in se—types of crimes, we wouldn't be having this conversation.

We all know these crimes are wrong and that such conduct will result in harsh punishment. The problem arises with respect to malum prohibitum crimes; crimes enacted by Congress that have enormous breadth; crimes that often do not require that the accused acted with criminal intent; and in many cases, crimes that are scattered throughout the 50 titles of the Federal Code.

Overcriminalization is a twofold problem, and I agree with Professor Smith in that regard, the number of statutes and the breadth of the statutes. You have my written remarks that elaborate on how overcriminalization increases prosecutorial discretion and judicial creativity, all at the expense of the legislative function.

It is important that legislatures not assign their lawmaking function to the other branches.

I will speak briefly today about three solutions that I believe can assist you with solving this problem.

With over 4,450 Federal criminal statutes, with thousands more regulatory provisions that allow for criminal punishment, and with these numbers continually growing, something needs to be done.

First, there needs to be reform of the legislative drafting process. I recommend instituting reporting requirements, ascertaining whether there truly is a need for the new legislation, and whether constitutional authority was intended to cover that conduct. It would offer safeguards to haphazard legislative drafting and agency-focused initiatives. It also avoids federalism problems that may plague the law when eventually reaching court review.

Overcriminalization places financial stress on limited resources, and so there needs to be ample consideration of the costs of enacting new legislation and the resources that are available for implementation.

A final component of reforming the legislative drafting process is to require reflection on the overcriminalization problem on an annual basis. This can best be accomplished through data collection of new criminal statutes that are passed to examine how they are used. New statutes that are continually used in tandem with existing laws are suspect as to whether they are truly needed to remedy a gap in the law.

The second solution I recommend is to strengthen the mens rea terms in statutes and to provide a default mens rea for the situations when it might be unclear. It is important that Federal statutes provide a clear statement of mens rea, that the accused knew his or her conduct was illegal. The American Law Institute's Model Penal Code has a default mens rea, and the Federal Criminal Code should exceed what is required in the Model Penal Code as it criminalizes malem prohibitum conduct that is not always nefarious or presumptively considered illegal. Having a specific mens rea terminology in statutes and a default mens rea as a safety net may still leave gaps needing interpretation.

So the third solution I would recommend is to codify the rule of lenity. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. As Chief Justice Marshall in 1820 noted, it is the legislature, not the court, which is to define a crime and ordain its punishment.

Some States have moved in this direction; my own State, Florida, for example. Overcriminalization is a flaw of our criminal justice process that needs a remedy. I do understand that it is difficult to change the existing mentality of addressing immediate problems with criminalization. The solutions recommended here take an important step in restoring the importance of the legislative role. The cycle of recriminalizing conduct every time an event occurs needs to stop.

Thank you very, very much for this opportunity today.

[The prepared statement of Ms. Podgor follows:]

PREPARED STATEMENT OF ELLEN S. PODGOR

PREPARED STATEMENT OF ABNER SCHOENWETTER

Congressional Testimony

Reining in Overcriminalization: Assessing the Problems, Proposing Solutions

The Devastating Consequences of Overcriminalization on a Small Businessman and His Family

Testimony Before
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives

September 28, 2010

Abner Schoenwetter

Before discussing any of the details of my personal story, I would first like to say thank you to Chairman Scott, Ranking Member Gohmert, and the members of the subcommittee for taking the time to hold a hearing on the problem of overcriminalization. I have to admit that up until a few years ago, I had never heard of the term overcriminalization or given much thought to what it meant. It wasn't until I began reading materials on criminal law during my time in prison that I quickly came to realize that I already knew much more about the topic than anyone would ever care to know.

I have been asked to testify before this subcommittee because I am what many people call a "victim" of overcriminalization. I really don't like to think of myself as a victim of anything, but there is no arguing that there is some accuracy to the label. No matter how you frame it, the truth is that I am a convicted felon who has just spent the last six years of my life in federal prison for entering into a contract to buy lobsters. The specifics of the case are slightly more complicated than that, but that was more or less the basis for my overall conviction. It may sound crazy, but sadly, it's true.

But I'm not testifying here today to complain about my personal predicament or to seek publicity for my case. I simply wish to prevent other Americans from having to go through the same terrible ordeal that my family and I have had to endure. If I can help just one family avoid the pain and suffering of watching a loved one go to prison because of vague and overbroad laws, then I will consider my appearance here a success. Similarly, if my story can somehow aid the overall effort to achieve meaningful criminal justice reform by alerting those of you here on Capitol Hill to the negative effect of poorly written laws, then I will have done what I came to Washington to do.

Looking at my story objectively, it is relatively hard to explain how this all happened to me. I am and have always been a quiet, hard-working, law-abiding, family man. I am first and foremost a husband and a father. I live for my three children and my wife and would do anything and everything to make them happy. I am also one of Florida's small businessmen… or at least I was. I have always valued hard work, dedication, and self-reliance, and have attempted to lead a life grounded in these principles. These are the values my parents instilled in me as a young boy, and they are the ideals that I have worked to pass along to my children. Strong values, however, do not prevent bad things from happening to good people. Life has a way of challenging everyone, and it challenged me in a way that I never could have expected – by catching me in an overcriminalization trap.

I have been in the commercial seafood business since 1986. I met one of my co-defendants, David Henson McNab, that year and we struck up a arrangement where I would buy his catches of lobster tails and resell them. Some of the seafood I purchased from him might well have been passed around your dinner table at home or ended up on your plate at a restaurant. We built a good business relationship over the course of the next fifteen years, and our relationship quickly blossomed into a friendship. Through hard work and determination, I was able to build my small company, Horizon Seafood, into a successful business. It by no means made me rich, but it did earn me enough to

provide for my wife and three children. It was my little piece of the American dream. Little did I know, however, that a single boatload of Honduran lobsters would soon turn my dream into a nightmare.

Between 1986 and 1992, David and I engaged in a number of successful business deals. It was during that time that I met my other co-defendant, Robert Blandford. Bob Blandford was a seafood broker who had developed many good customers for lobster tails. With my ability to purchase high-quality seafood and Bob's extensive customer base, we started a relationship that eventually became a partnership. There was no need for anything in writing. As is the custom in the seafood business, things were sealed with a handshake.

In 1995, Bob and I joined forces to purchase and distribute seafood, including lobster tails from David. We imported the lobsters under the banner of Bob's company, Seamerica. As was always the case in my dealings with David, his product was of the highest quality and always delivered on schedule. There was never a problem with his operation or personal character.

In early 1999, Bob and I agreed to buy a typical load of Caribbean spiny lobster from David to be delivered to his facility in Bayou La Batre, Alabama, in February. As usual, we planned to sell it to larger distributors throughout the United States. It was no different than any of the other hundreds of deals we did over the years. Every one of our shipments always cleared customs and passed FDA inspection even after being held up at times for random sampling and testing.

What was different this time was that David never delivered on the contract because the contents of his ship were seized by the National Marine Fishery Service (NMFS) in Bayou La Batre. Bob and I didn't know the reason for the seizure at the time, but we surely weren't happy about the missed delivery. It put us behind the eight ball on our sales to distributors and forced us to find other options for the lobster we needed. Because we had no reason to think otherwise, our attention at the time was purely on the business effects of the government seizure. We had no clue that the taking of the lobster by the NMFS would be the first step toward finding ourselves charged with felony conspiracy and smuggling charges.

As time passed, we learned more details about the seizure of David's lobsters. The NMFS had evidently received an anonymous fax (most likely from one of David's fishing competitors) stating that a shipment of "undersized (3 & 4 oz) lobster tails" was coming into Bayou La Batre at the exact time David was due in port. This supposedly violated some Honduran regulation, but not U.S. law. After the NMFS acted upon the tip, it held David's boat and its contents in port for a number of weeks before finally offloading the lobster and shipping it to a government-owned freezer in Florida.

During the next six months, we heard of negotiations between David's attorneys and the attorneys for the government. In fact, my lawyer was told that a deal had been struck between David and the federal government, whereby the government would confiscate

the percentage of lobster that was said to be in violation of Honduran law and release the balance to David for return to Honduras. The government also assured David's attorneys that this was strictly a civil matter and would not involve criminal charges.

Nothing could have been further from the truth. A short time later both Bob and I were called before a federal grand jury in Mobile, Alabama. The next thing I knew, armed agents from the FBI, IRS, and NMFS showed up at my house in Pinecrest, Florida, with search warrants. I was shocked, appalled, and scared all at the same time. As my office was based out of my house, my family was also there. It was 7:00 in the morning and my wife, my mother-in-law, and my daughter were herded in their night clothes into the living room and told to sit and be quiet. Needless to say, they were frightened to death.

Not long after this incident, a similar group of federal agents came to my house a 6:00 in the morning to arrest me. They found only my son and his girlfriend there as I was in North Carolina at the time. After threatening my son with arrest if he did not tell them where I was, he called me and I had my attorney contact them at the house and agree that I would self-surrender in Mobile, Alabama. The government was treating my family like I was a suspected murderer rather than a seafood purchaser. I couldn't believe it.

After my arrest, I eventually found out that I was being charged with smuggling and conspiracy based upon violations of Honduran fishing regulations that applied to me under a federal law known as the Lacey Act. I was being prosecuted by the United States government because the lobsters that I had contracted to buy were allegedly in violation of three Honduran administrative rules. The first regulation supposedly required that all lobsters be packaged in cardboard boxes rather than plastic bags for shipping purposes. The second supposedly required that all lobsters caught and sold be at least five and a half inches in length. The third supposedly prohibited the harvesting and sale of all egg-bearing lobsters. I was facing multiple years in prison and thousands of dollars in fines if found guilty.

I couldn't understand how I was wrapped up in all of this. I had never seen the lobsters on David's boat, nor did I know anything about these specific regulations, yet I was still being accused of multiple federal felonies. It just didn't make sense. How could I smuggle lobsters into the U.S. that I was openly and legally purchasing via contract? How could I conspire against Honduran law when I knew nothing about the regulations I supposedly violated? How could I have contributed to the violation of these regulations when I knew nothing about how or where the lobsters were caught in the first place? None of it made any sense.

Facing these charges, I immediately hired a lawyer and began weighing my options. I could cave into government pressure and accept the prosecutor's offer of three years in prison by pleading guilty to the bogus charges against me. Or else I could fight for myself, my family, my livelihood, and my reputation by standing up and defending my actions. Maybe it's the New Yorker in me, but there was only one choice my conscience would let me make. I had to fight the charges in court as hard as I could. I had to prove

to my country and those who mattered to me most that I was the same law-abiding and honest citizen I had always been throughout the first 54 years of my life.

Fighting the government, however, proved much more difficult than I expected. As a family man and father of three, I couldn't afford to hire a team of high-priced defense attorneys. The Government also pressured the court to dismiss the attorney I had chosen and trusted, a seafood law expert. They claimed that he had potential conflicts of interest, but I'm sure they didn't like that he knew seafood law extremely well. So I hired lawyers I had never met before from Mobile, Alabama. The prosecutors and judge did not seem interested in whether I knew anything about the Honduran regulations or David's fishing activities. As far as they were concerned, because I had contracted to buy lobsters from David, I was along for the ride.

Most of my trial dealt with the complex relationship between the Honduran regulations and American law. The issue was so complicated in fact that the judge was forced to hold a separate hearing to determine the validity and meaning of the Honduran rules. Our lawyers presented a great deal of evidence showing that the regulations were invalid and should therefore not be used against us. They presented a letter from the Attorney General of Honduras confirming that the size regulation had never been signed into law by the Honduran president. They also gathered testimony from a former Honduran Minister of Justice discussing how the egg-bearing regulation was primarily directed at turtles and was never meant to apply to lobsters. None of this evidence mattered to the court, however.

It still makes no sense to me that my criminal trial turned into a battle over the meaning of Honduran fishing regulations. I had always been an honest, law-abiding, tax-paying American citizen. Why was my fate determined based upon laws written by Honduran officials and bureaucrats? And why would Congress write a law like the Lacey Act that gives foreign countries the power to criminalize American citizens? It is bizarre. It is hard enough for the average person to know the difference between legal and illegal behavior under U.S. law without having to worry about the laws of every other nation on Earth. Did Congress really review the laws of Honduras and every other country and make a careful decision as to whether those laws should apply to Americans?

The portions of my trial that did not have to do with the validity of Honduran law focused almost exclusively on David and his actions. Very little time or evidence was presented to establish that I had any relationship to the violation of the fishing regulations. It simply seemed like the government just needed to prove I had a business relationship with David to link me to his alleged criminal behavior. No evidence was ever presented to show that I knew David was violating Honduran regulations, aided him in breaking those rules, or conspired to smuggle anything into the United States.

Despite this fact, the jury found me guilty of both conspiracy and importation contrary to law. I could not believe it. I was devastated on so many levels. My family was in shock. How could someone like me with no history of ever getting into trouble end up becoming a convicted felon?

Up until this point, I had been convinced that the justice system would sort out the whole mess. Throughout the trial, I had held out hope that the prosecutors and judge would come to their senses, recognize my innocence, and let me get back to my law-abiding life. All of that hope went out the window, however, when the jury found me guilty in November 2000 and the judge later sentenced me to 97 months in prison! In addition, I would have to serve 3 years under supervised release and pay a $15,000 fine and a $100,000 forfeiture, which I had to re-mortgage my house in order to pay.

I tried to remain optimistic in the wake of my trial and sentencing, but it was hard to fight back the fear about what likely lay ahead for me – separation from my family… the loss of my business … prison. It was almost too much to bear. I found it difficult to focus on the appeal of my conviction and easy to go through my days in a general state of sadness. I soldiered on to the best of my ability, but I was no longer the same man.

As you might expect given the nature of my trial, my appeal to the 11th Circuit Court of Appeals in Atlanta also fell on deaf ears despite continued efforts to highlight the invalidity of the Honduran regulations upon which my conviction was based. My attorneys presented evidence that the Honduran Court of First Instance of Administrative Law had declared the lobster size regulation null and void and stated that it never had the force of law. They also presented evidence from the Honduran National Human Rights Commissioner showing that the lobster packaging regulations had actually been repealed in 1995 and that the egg-bearing provision had been retroactively repealed by the Honduran government. All of this evidence was directed to the U.S. State Department by the government of Honduras, which also filed a friend-of-the-court brief during our appeal.

Still, none of it mattered. Two out of the three appeals court judges affirmed my conviction, claiming that Honduran officials could not be trusted to interpret their own laws. They argued that it would be unwise for a court to overrule the American prosecutors' view of Honduran law. They claimed this was a political issue, not a legal one, and that for some reason prosecutors are better able to make decisions than courts are. I don't know how my friends and I were supposed to guess what some prosecutors would later decide Honduran law means. Despite the overwhelming evidence presented by my attorneys and the Honduran government that these three fishing regulations were invalid, the two judges in the majority could not be persuaded.

I should also mention here that the government's "star witness" at trial on Honduran law – Ms Liliana Paz, a mid-level Honduran bureaucrat who was falsely represented as a high-level official – had by then recanted her testimony three times. She had previously stated that the fishing regulations were valid although she had no authority to do so under Honduran law. All this was also ignored by the 11th Circuit.

Given the appeals court's devastating decision, I had only one last legal resort – an appeal to the U.S. Supreme Court. When they refused to hear my petition, reality began to sink in. I was going to spend the next several years of my life in prison and be permanently

branded a felon. Shortly after the appeal was turned down by the court, I again self-surrendered to the government to begin serving my sentence.

I don't want to dwell too long on my time in prison because it is as you would imagine – a mind-numbing, soul-crushing, life-draining experience. No matter how much advice you get from former inmates or how much you prepare yourself mentally for the experience, you cannot possibly ready yourself for that first night when the lights go out and the door shuts behind you. It scares you to death and makes you question yourself in ways you never thought possible.

Taking these facts into consideration, it is still difficult to say whether prison is tougher on the inmate or the inmate's family. In my case, prison certainly ground me down. It made me a far less trusting person and triggered a range of personal health problems that I am dealing with to this day. It also cost me my reputation, my livelihood, and my ability to vote. The toll on my family, however, was perhaps even more immense.

In the wake of my incarceration, each and every member of my immediate family began to suffer a wide range of medical and non-medical problems. My wife recently suffered a heart attack while I was in prison. She was also forced to file for bankruptcy due to the mounting costs of defending my court case, paying my criminal fines, and complying with government forfeiture requests. Meanwhile, my son was forced to change jobs and relocate back to Florida in order to help take care of my wife and daughters. The stress of becoming the new "head of the household" also caused him to undergo emergency surgery for debilitating stomach ulcers that continue to this day.

In addition to these family issues, both of my daughters also began to develop health issues of their own. During the course of this ordeal, my eldest daughter suffered a stroke at the age of only 31 that left her slightly incapacitated and in need of care from family members and health professionals. My youngest daughter began to develop anorexia as a result of my conviction, sentencing, and imprisonment. As one might expect, treatment of the disorder has been costly and has placed the family under even greater financial pressure.

In short, my family has desperately struggled to cope with the fallout of my conviction and entrance into federal prison. We have spent all of our personal savings on legal representation and fines. Although we are still in our house in Miami, the bank has foreclosed and there is nothing stopping it from seizing the property at a moment's notice.

On August 27, 2010, I completed the last five months of my six years and three months of confinement at home. I am now under three years of federally supervised release, and the most pressing challenges for me and my family still remain. I struggle daily with how to readjust to life after prison and often find myself reflecting on a number of important personal questions. How do I reconnect with family and friends? Will they view me in the same light as before my time in prison? How do I start my financial life over at age 64 with only Social Security income to depend on?

With time I hope to find the right answers to these questions and regain some semblance of my former life. In the meantime, however, I owe it to my family and myself to tell my story and alert people to the tragedies that overcriminalization can cause when the criminal law is not properly written or limited.

I am by no means a lawyer or expert in criminal justice policy, but like most Americans I think I have a good gut sense of what is right and what is wrong. And like most Americans, I think it should be the role of the law to draw clear, understandable lines between those activities that society labels as moral rights and those that it labels moral wrongs. When there are so many thousands of criminal laws on the books, none of us can be certain how our actions will be mischaracterized by the government. This is a problem that must be addressed.

The law needs to be simplified, made clearer, and written in a way that gives average Americans an understanding of what he or she can and cannot do. Simple changes such as these would go a long way toward protecting innocent people from unfair prosecution and unjust prison sentences. Such modifications might be too late to benefit my family, but my sincere hope is that they help protect other Americans from the devastating effects of overcriminalization.

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Mr. SCOTT. Mr. Weisman.

TESTIMONY OF ANDREW WEISSMANN, PARTNER, JENNER & BLOCK, LLP, NEW YORK, NY

Mr. WEISSMANN. Good afternoon. The perspective that I would like to share with you this afternoon is as a former member of law enforcement.

The proposals in the "Without Intent" report would bring much-needed clarity, in my view, to the criminal law. You have heard today from various panelists about how the proposals would benefit the public and not just putative defendants. A question can arise to what potential downsides are of these proposed reforms to law enforcement.

As a dedicated Federal prosecutor for up to 15 years, I can tell you that these proposals would have no drawbacks for law enforcement. Indeed, in my view, they would serve to benefit it. Let me give you two examples.

First, requiring criminal bills to state clearly the mens rea requirement would serve to assist prosecutors in guiding their decisions as to who to investigate and who to charge; it would benefit the courts in knowing how to charge a jury; and, benefit of course, defendants in being held accountable only for conduct that clearly violates the law.

One example I can give you is the prosecution of Big Five accounting firm Arthur Andersen in which I served as the lead attorney for the government. The Federal district judge was faced with an obstruction statute that required the defendant to act intentionally and "corruptly." The definition of the latter, however, was not spelled out in the statute, unless the court followed precedent that the Supreme Court only years later determined to be erroneous. The Supreme Court itself grappled with the term "corruptly" and what it meant.

The Federal Criminalization Reporting Statement advocated by the Heritage Foundation and the NACDL could have led to a much more just outcome. Instead of a company facing indictment for a crime whose elements were not in retrospect crystal clear, the government and grand jury would have been able to determine prior to indictment whether the conduct violated the terms of the statute. Further, if the grand jury went forward and voted an indictment, the company would have been able to defend itself at the trial based on the clear requirements of the criminal statute, and not have to wait two levels of appeal, which, in a corporate setting, can render any relief Pyrrhic. Indeed by the time the Supreme Court ruled in the Andersen case, the organization was basically out of business.

Thus, in answering whether the proposed reforms and regrets here today are wise, I submit one would need only imagine the answers of the prosecution, the defense, and the court in the Andersen case to the question whether they would have preferred that Congress specified clearly the intent standard in the obstruction statute. In short, lack of clarity in the criminal law can have real and dire consequences which are antithetical to the very goals of the justice system.

There is a second way in which proposed reforms would be beneficial. The rush to enact a criminal statute to address perceived criminal problems can be illusory. The issue is often not the absence of criminal statutes on the books, but of investigation and enforcement. Often the conduct at issue already runs afoul of existing criminal law. In such situations, enacting a new criminal statute is not only redundant, it can be counterproductive, since it focuses

our time and attention on a measure that actually will not serve to reduce the risk of recidivism.

For instance, in the immediate aftermath of high-profile national crises such as the corporate scandals, the meltdown on Wall Street that we've recently seen, or illegal immigration, there is a natural desire to take action that will reduce the risk of recidivism. Such actions often include the passage of additional criminal statutes. And while those statutes can be useful and sometimes extremely well crafted, in the heat of the moment they can be ill-advised, redundant, and vague.

For instance, in the white-collar context, hearings last year in the Senate addressed a bill that would have simultaneously created a uniform fiduciary duty on all financial institutions to their clients and criminalized breaches of that duty. But there already were abundant tools available to Federal prosecutors to prosecute such conduct.

As has been noted by various panelists, the United States Code contains numerous provisions that would criminalize such conduct; for instance, the mail and wire fraud statutes. To win a conviction, the prosecutor need only show the defendant used the mails or wires as a part of a scheme to defraud. Any e-mail could suffice.

Here an anecdote may be illustrative. When I was a prosecutor switching from organized crime prosecutions in New York City to prosecuting fraud on Wall Street, I sought advice from a senior white-collar prosecutor about the intricacies of the securities laws. His advice: Get to know the mail and wire fraud statutes really well. Everything else is gravy.

In conclusion, I would note that the line separating criminal conduct from all other is society's starkest boundary between right and wrong. It should be reserved for actions taken intentionally. The goal of reserving the criminal law today as truly deserving of the highest punishment of our society would be greatly served by enacting the proposals put forward to you by the Heritage Foundation and the NACDL.

Thank you.

[The prepared statement of Mr. Weissman follows:]

PREPARED STATEMENT OF ANDREW WEISSMANN

Written Testimony
United States House of Representatives Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security
"Reining In Overcriminalization: Assessing the Problems, Proposing Solutions."
September 28, 2010

Mr. Andrew Weissmann
Partner, Jenner & Block LLP

Good morning Chairman Conyers, subcommittee Chairman Scott, ranking member Gohmert, and members of the Committee and staff. I am Andrew Weissmann, a partner at the law firm of Jenner & Block in New York. I served for 15 years as an Assistant United States Attorney in the Eastern District of New York, including as Chief of the Criminal Division of that office. I had the privilege to represent the United States as the Director of the Department of Justice's Enron Task Force and Special Counsel to the Director of the FBI. I also am an adjunct Professor of Law at Fordham Law School, where I teach Criminal Procedure. I am testifying today on my own behalf.

The proposal outlined by both The Heritage Foundation and the National Association of Criminal Defense Counsel ("NACDL"), in their report entitled *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, is a win-win. It would bring much needed clarity and certainty to an area of the law where such attributes are critical. The fact that two groups which at times have such divergent views and constituencies are together strongly advocating this reform should be of particular note. It is to me, as it signals that this reform is one that would advance responsible government to the advantage of all citizens.

The perspective I would like to share with you is that of a former member of law enforcement. You have heard how the proposals would benefit the public, and not just putative defendants. Anyone who could be the subject of a criminal investigation or an overzealous prosecutor will benefit from these reforms. That encompasses all of us, individuals and corporations, the mighty and the disenfranchised. Although clear *mens rea* rules will benefit most those investigated or charged with a crime that is *malum prohibitum*, rather than *malum in se*, such rules will inure to the benefit of all citizens. A question can arise as to what the potential downsides are of these proposed reforms to the public or to law enforcement. As a dedicated federal prosecutor for years, these proposals would have no drawbacks for law enforcement. Indeed, as I will discuss, they would serve to benefit meaningfully law enforcement and consequently the public. Given my background, I focus my remarks on the implications for so-called white collar investigations, although the points I make are applicable to all *malum prohibitum* crimes.

First, the proposals would require criminal bills to state clearly the *mens rea* requirement for each element of the crime. Such a reform would only serve to assist prosecutors in guiding their decisions as to who to investigate and who to seek to charge. By also spelling out clearly what needs to be established beyond a reasonable doubt at trial, our federal judges too will benefit from not having to guess at Congressional intent. If their determination is later found to

be wrong by an appellate court, they and the parties have to hold retrials that are costly to the judicial system, strained law enforcement resources, and the public.

One notable example is the prosecution of international accounting firm Arthur Andersen, in which I served as a lead attorney for the government. The learned federal district court judge was faced with a statute -- the obstruction statute then in existence -- that required the defendant to act intentionally and "corruptly." The definition of the latter, however, was not spelled out in the statute and thus she followed precedent that the Supreme Court only years later determined to be erroneous.[1] The Supreme Court itself grappled with what the term "corruptly" meant in the context of that statute, and did not itself clarify if Congress meant the defendant had to know her conduct was illegal or merely "wrong."

The "federal criminalization reporting statement" advocated by The Heritage Foundation and NACDL could have led to a more just outcome, which mitigated or avoided entirely the problems created by an unclear statute. Instead of a company facing indictment for a crime whose elements were not in retrospect crystal clear, the government and grand jury would have been able to determine prior to indictment whether the conduct violated the clear terms of the obstruction statute. Further, if the grand jury went forward and voted an indictment, the company would have been able to defend itself at the trial based on the clear requirements of the criminal statute, and not have to await two levels of appeal, which in a corporate setting can render any relief pyrrhic. Indeed, by the time the Supreme Court ruled in the *Andersen* case, the organization was basically defunct and the government was in the unenviable position of deciding whether to expend addition scarce resources to re-prosecute a company that was no longer extant. And the company (and public), on the other hand, were left wondering if Andersen would have been prosecuted and convicted under the statute as clarified by the Supreme Court.

Thus, in answering whether the proposed reforms we address here today are wise, I submit one need only imagine the answers of the prosecution, the defense, and the court in the *Andersen* case to the question of whether they would have preferred that Congress specify clearly the intent standard in the obstruction statute. In short, lack of clarity in the criminal law can have real and dire consequences, which are antithetical to the goals of the justice system.

I would like to address a second way in which the proposed reforms would be beneficial. The rush to enact a new criminal statute to "address" perceived criminal problems can be illusory; the issue is often not the absence of criminal statutes on the books, but of detection, investigation, and enforcement. Often the conduct at issue already runs afoul of existing criminal law. In such situations, enacting a new criminal statute is not only redundant, it can be counterproductive since it focuses our time and attention on a measure that actually will not serve to reduce the risk of recidivism.

For instance, in the immediate aftermath of high-profile national crises that are perceived to be able to be ameliorated through criminal law enforcement -- from corporate scandals to illegal immigration, -- there is a natural desire to take action that will reduce the risk of

[1] 544 U.S. ___ , 125 S. Ct. 2129 (May 31, 2005).

recurrence. Such actions often include the passage of additional criminal statutes. Such statutes can often be useful and well-crafted, but in the heat of the moment they can also be ill advised, redundant, and vague.

As one example in the white-collar context, the hearings last year in the Senate on a bill that would have simultaneously created a uniform fiduciary duty on all financial institutions to their clients -- under all circumstances-- and criminalized breaches of that duty. While I don't question the good intentions of its proponents, the bill itself is a good illustration of the problems the current reforms would serve to ameliorate. Let me explain how.

First, it was not at all clear that new criminal penalties were needed. It is still not clear that all -- or even the core -- of the conduct that we find most troubling on Wall Street at this juncture is properly considered criminal. While it is tempting to think that we have not learned the lessons from Enron, we have yet to see the kind of systemic fraud that occurred in that institution.

Second, to the extent that there is misconduct at play -- and inevitably there will be some, since Wall Street is not immune from crime -- there are strong and abundant tools already at the government's disposal, if it were to choose to use them. Thus, even if the prescription for the current crisis is in part to impose jail time for certain Wall Street misconduct, that goal does not necessitate creating additional federal crimes. In my view neither Enron nor the current Wall Street conduct that causes us concern and even outrage were preventable but for the supposed dearth of federal criminal laws.

Much has been written about the sheer number of federal criminal statutes on the books, and without repeating those compendiums, it suffices to note the enormous growth of federal crimes, including so-called white collar crimes.[2] Most relevant here is the breadth of some existing federal criminal statutes that apply to financial fraud, specifically the mail and wire fraud statutes.[3]

For example, Chapter 63 of Title 18 of the United States Code contains eleven different provisions criminalizing different forms of mail and wire fraud. To win a conviction under the broadest of these sections, a prosecutor needs only to show (beyond a reasonable doubt, of course) that the defendant used the mails or the wires as part of a scheme to defraud. In our technological and bureaucratic age, almost every action taken by someone at a financial institution satisfies this jurisdictional hook -- any email or SEC filing can suffice. The simplicity and breadth of these statutes is widely recognized; prosecutors of financial fraud almost always bring charges under one of these provisions along with whatever other statutes are more narrowly tailored to the particular crime at issue. One anecdote is illustrative: when I switched from prosecuting organized crime bosses in New York City to going after financial fraud on Wall Street and sought advice on the workings of the intricate securities fraud criminal statutes, a

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[2] *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 514-15 (2001); Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 825-26 (2000); Am. Bar Ass'n, Criminal Justice Section, Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* 7, 51 (1998).

[3] *See* Stuntz, *supra* note 1, at 516-17.

senior white-collar prosecutor told me that the mail and wire fraud statutes were the only ones I would ever really need to know; everything else I might charge was gravy.

Given the breadth of the federal criminal statutes currently available to prosecutors of white-collar crime, it is unclear what conduct that we would think should be a crime does not already come within the current statutory regime. Where a material misstatement or omission regarding an investment is intentionally made, criminal liability is already provided under the mail and wire fraud statutes, as well as the federal laws criminalizing securities fraud. *See* 18 U.S.C. sections 1341, 1343 and 1348 and 15 U.S.C. section 78. Consequently enacting a new criminal law may serve to create the false impression of taking action to thwart a problem, when in fact it would be better to pay greater attention to any gaps in detection, investigation, and enforcement that could have addressed the problem.

Third, prior to creating a new fiduciary duty and criminalizing its breach, a wiser course would be to consider whether a new fiduciary duty with civil rather than criminal sanctions would adequately address the perceived harm. I am by no means suggesting it would or would not. But before Congress goes from 0 to 60, it is useful to consider whether lesser remedies could solve the problem. Such civil steps can serve to also identify unanticipated or unintended vagueness in the application of the statute, and can do so when only civil and not criminal sanctions are at issue. Even if it does not succeed, the experience of applying any new obligation in the civil context will give shape and content to the duty, thus lessening the fairness and notice concerns if the breach is ultimately criminalized.

For instance, even in the civil context, the definition of the scope of fiduciary duties can prove a challenge. Even after centuries of cases analyzing the duties of fiduciaries in different contexts, the inquiry into the exact nature of a fiduciary's obligation in a particular case is often highly fact-specific.[4] The poorly defined nature of whether and when there is a fiduciary duty would have particular resonance in the criminal context, where issues of vagueness and notice take on constitutional dimension.[5] For instance, issues left unaddressed in the proposed bill criminalizing breaches of fiduciary duty include whether every breach of duty of care would be a federal crime, such that a broker's intentional or reckless failure to read diligently all prospectuses or to call a client with updated financial prognoses every day could subject her to criminal sanction? A "federal criminalization reporting statement" would serve to lessen the risk of harm engendered by such vagaries.

In conclusion, I would note that the line separating criminal conduct from all other is society's starkest boundary between right and wrong. It has been reserved, and should continue to be reserved, for the most egregious misconduct, i.e. actions taken intentionally, as opposed to

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[4] *See, e.g., DeKwiatkowski v. Bear, Stearns, & Co.*, 306 F.3d 1293, 1306 (2d Cir. 2002) (collecting instances in which existence of fiduciary duty between broker and investor depended on facts distinguishing situation from the "ordinary case"); *In re Daisy Systems Corp.*, 97 F.3d 1171, 1178 (9th Cir. 1996) (rejecting conclusion that relation between investment banker and client is not a fiduciary one, as "existence of a fiduciary relation is a question of fact which properly should be resolved by looking to the particular facts and circumstances of the relationship at issue").

[5] *See Bouie v. City of Columbia*, 378 U.S. 347, 350, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) (stating that it is a "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime").

by accident, through negligence, or even recklessly. The goal of reserving the criminal law to those truly deserving of the highest punishment our society can impose would be greatly served by acting on the proposals put forward today.

Thank you.

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Mr. SCOTT. I want to thank all of our witnesses for the testimony. This is extremely helpful.

I will now recognize myself for questions for 5 minutes and will start with Ms. Podgor.

Without taking an hour to do it, as you usually do as a professor, can you just give us a description of why malem in se and malum prohibitum would require a mens rea requirement?

Ms. PODGOR. It all comes back to punishment. If we want people to actually know why they are being punished so that they don't commit the crimes, then it is very important that they know that they are committing the crime. And I think the witnesses who testified today are the perfect example of just that.

Whether it is malem prohibitum or malem in se, there needs to be a mens rea. The basic difference is that with malem in se crimes there usually is that mens rea. It is there.

In the malem prohibitum crimes, the ones that are passed by the legislature, we don't find that mens rea, and people just don't know that it is wrong. And if they don't know it is wrong, then even if we punish them, it is not going to serve that goal if it is not known. So if we want to succeed in stopping criminality, then we have to put the mens rea in so that people won't commit the crimes.

Mr. SCOTT. You mentioned the rule of lenity. With the presumption of innocence, why isn't the rule of lenity automatic?

Ms. PODGOR. The presumption of innocence goes to the factual decision in the case. The rule of lenity goes to the interpretation of the law. And when you have two constitutional possible interpretations of the law, the court is faced with the decision of which one they should go with. The rule of lenity allows them to go with the one that would be more persuasive for the defendant. And so it is different than just a presumption of innocence, which would be looking at the facts itself.

Mr. SCOTT. But when you add guilt beyond a reasonable doubt to that, why wouldn't the court be required to pick the one most favorable to the defendant?

Ms. PODGOR. Reasonable doubt only goes to whether the person has committed the crime itself from a factual stance: Do they have sufficient evidence of that particular crime? But if we don't know what the crime is, then the problem becomes: Have they committed it or not? Even if there is, we can't even get to the question of reasonable doubt. The reasonable doubt question would really be our second question after we determined what the law is.

Mr. SCOTT. Mr. Walsh, can you talk a little bit about the problem of allowing regulators to create crime without going through the normal legislative process when regulators can decide what is a crime and what is not?

Mr. WALSH. Certainly. One of the things coming from the report that we found when we were doing our study was that a large percentage or significant percentage of crimes that were passed by the legislature actually authorized the agencies to create even more crimes. There wasn't necessarily a limitation on how the agency had to do it. In other words, there wasn't a requirement of whether there would be criminal intent or what the scope of the conduct was that would be prohibited. So there is no telling, when Congress creates those types of crimes, how many additional crimes end up being created by that.

Which is one of the reasons why Professor John Coffey from Colombia has reported an estimate that up to 300,000 regulations may be enforced by criminal penalties.

So the issue becomes, of course, that if something is important enough to send a person to prison, it really should be the people's elected representatives to make that decision and not delegating it to unelected agency officials; I don't mean to say that in a demeaning way, but the bureaucrats in the executive branch. It really should be a decision made by those who are elected by the people.

So there is a separation of powers issue as well I think that is implicated there and that it is the job of the Congress to make a decision about what the law should be.

And especially in the area of criminal law, in particular when somebody's deepest rights and liberty are at stake, that is something that really implicates some constitutional issues about whether the agency in the executive branch should be making those decisions.

Mr. SCOTT. These are very important regulations, and we expect them to be for people to conform with the regulations. How do you enforce those regulations if you do not have the criminal code?

Mr. WALSH. You can absolutely do it if you have a meaningful criminal intent or mens rea requirement, because in that instance the individual is on notice based on something, whatever it might be. Maybe it is a person who is in a highly regulated industry and has been informed or knows of the standard industry practices, or there is actual evidence that the person is on notice that this is what the regulation is.

But apart from that, one of the ways to punish it is, in the first instance, civilly. So the first time that somebody violated one of these regulatory offenses and if there is no evidence of mens rea or criminal intent, then a civil punishment is appropriate in that context and would really fulfill the requirements of justice.

On a second offense, then you could actually say the person—especially if it is the same person with the same offense—they have been put on notice, and maybe subsequent offenses could be punished using criminal offenses and penalties.

Mr. SCOTT. Thank you.

Judge Gohmert.

Mr. GOHMERT. Thank you for all of your wonderful observations. Very helpful.

I have just been looking at some of these statutes that we are talking about, and it causes me great chagrin to note some of the laws. Like Mr. Unser, in your situation, apparently since we have passed a law that says the Forest Service can promulgate regulations and if you violate one of those, the law inserted the words "or such rules and regulations shall be punished by a fine not more than $500 in prison, not more than 6 months." It is the insertion of "or such rules and regulations" that apparently caught you, because there is a provision that the Department of Interior, some part thereof, says that possessing in a national forest wilderness, possessing or using a motor vehicle, motorboat, or motorized equipment is a crime. And also such terribly heinous activity as possessing or using a bicycle in a wilderness would get you the same 6 months. So be careful where you ride your bike. Unbelievable.

And I appreciate the comments that perhaps we ought to be restricting the threat of prison to those things we actually take up and actually come before the Judiciary.

Mr. Walsh, you indicated we have a better percentage of cases in which laws we pass actually included mens rea requirement or criminal intent. So hopefully that would be one area in which we can work.

But I wanted to follow up with a couple of other questions, too.

Mr. Schoenwetter, after the Attorney General of Honduras submitted his letter saying they didn't think that you had violated Honduran law, what was the prosecutor's response? Did you see or hear what the position of the prosecutor was?

Mr. SCHOWENWETTER. We had a witness against us, a Liliana Paz, who was a mid-level official who had testified that we did violate Honduran regulations. They were in effect. And the position of the prosecutors was that the Government of Honduras was changing their opinion of the case. In other words, they changed their position, not so much the prosecutors, but in the 11th Circuit, they inferred that in a place like Honduras, government officials could be paid off in order to change their position on different ideas. So they just disregarded that.

I would also like to say that we also had a letter from the President of Honduras to our President, asking not for myself but McNab, my co-defendant, who had some—he was well known in Honduras. The President wrote a letter on his behalf, asking for the President of the United States to intervene in this, and that was ignored also.

Mr. GOHMERT. Apparently the law which created the net that caught you, this saws it is unlawful for any person—and it goes through import, export, transport, sell or receive—fish or wildlife taken or transported, sold in violation of any law or regulation of any State or in violation of any foreign law.

You know, there was a time when most of us, and it sounds like all of the reasonable minds here would say—and in talking to Chairman Scott, we are just shocked, because our feeling is, what prosecutor would take a case like this? You know, if you told us a couple years ago no prosecutor in his right mind would take these cases, well, maybe that is right. But maybe we got a lot of prosecutors who are not in their right mind because they are taking these cases. We are just shocked.

I know, Professor Smith, from your comment, surely as a professor, if someone had come up and given you these hypotheticals, you would have said, No, I know enough prosecutors; no good prosecutor would take a case like that. But apparently there are a lot of prosecutors perhaps that aren't good that are taking them.

I appreciate the Chairman's indulgence.

But Mr. Unser, I wanted to ask you a clarification. Were there any markers that marked where you went into the wilderness area, to your knowledge?

Mr. UNSER. There were absolutely 1,000 percent none. Completely none. Excuse me, a frog in my throat. Charlie Bird——

Mr. GOHMERT. Did that come from the wilderness area? You have the right to remain silent.

Mr. UNSER. But he made a fool out of himself in the court himself by not understanding where the wilderness area was, what he was issuing me a ticket for.

In other words, when you talk about that Jurosa area, thousands of people snowmobile up there. Nobody gets a ticket. It is legal. He thought the wilderness area went clear out to there. He didn't even know that people had been snowmobiling in that area. But the wilderness area was in fact a long way west of there, and that came right out in the court.

It is in the court records now, that nobody can hide. It was just like a jury-rigged deal. He could lie as much as he wanted to lie, and the judge would accept it as much as he wanted to accept it. It is that simple.

Mr. GOHMERT. If you just watch TV, you know that normally when there is a law enforcement person who is going to ask you about something and they suspect that you have committed a crime, you get read your rights. Did anybody at any time before you were being charged or told you you were being charged advise you that you had a right to remain silent and not tell them where your snowmobile was that they suspected that you had violated the wilderness area?.

Mr. UNSER. Not only did they not do that—I have airplanes also. I have a special airplane that would do high-altitude and slow flight. I described to millions of people—in fact, it had to be hundreds of millions of people all over the world—those articles that I let out way before the court date went all over to every noncommunist country on this Earth. At least that is what it was rumored to be. And I described where I left my snowmobile as an example.

That snowmobile, it showed up 1 week before the trial, 1 week. That is in June, the summer. There is no snow. They finally showed up, theoretically had found my snowmobile in trees. The snowmobile was under trees. So I couldn't see it from my airplane, because Charlie Bird, the government cop, had had it moved. In other words, I sent pictures to——

Mr. GOHMERT. Somebody had moved it.

Mr. UNSER. Because why would I describe it being out in the open, when I don't know that I have committed any crimes? So I would have no reason to lie or tell a story. But it shows up 1 week before the trial. But they didn't give us a picture or even let us see that. And mens rea or warning——

Mr. GOHMERT. Did you give him his warnings that he had his right to remain silent after it was found? I don't mean to be facetious about something that is so serious, where people have lost their freedoms because of overzealousness, but if I could have one more moment of indulgence.

Professor Smith and Professor Weissmann, you both addressed the rule of lenity. Why do you think in these cases there is hostility toward not having an ambiguity afforded in the direction of the defendant? Do you have any explanation?

Mr. SMITH. Sure. I think there are a couple of things. One, there are some tough-on-crime judges who just would prefer criminals go to jail, and they don't want an interpretive rule that makes it hard for them to send criminals to jail. I think that is one part of it.

I think another part of it is the lack of judicial humility. They think they can make the decisions necessary. Most judges think they can decide reasonably, certainly as reasonably as this body,

and, in their view, probably more reasonably, what should and shouldn't be a crime. So they roll up their sleeves and put on their thinking caps and they take these ambiguous statutes and they misconstrue them and make the case come out right.

Now, it is important to remember that unlike when this Congress—when a Congress or legislature passes crimes, it is acting in advance of a legislative act. Courts are acting retrospectively. The conduct has happened, and they are deciding whether that past conduct should be a crime.

So they look at that conduct, and, you know, if it is a bad person, however one might describe that, they want to make the case come out right, which is to send that person to jail. And I don't know—and that is just an unprincipled approach to this. They are basically making crimes, which is fundamentally at odds with our system.

The legislature and only the legislature is supposed to declare crimes, and yet when courts take these ambiguous statutes in violation of the rule of lenity and expand them, they are declaring criminal acts that the Congress hasn't specifically made a crime.

I think they are also overriding legislative judgments about penalties as well. These are things that should be reserved for the legislature and not the other branches.

And Judge Gohmert, you brought up the issue of prosecutorial discretion. I think most prosecutors are professionals, but I think it is dangerous. You know the phrase "absolute power corrupts absolutely." Well, that is what overcriminalization fundamentally is about. It is about giving prosecutors, the executive branch, absolute power.

And it is not just the executive branch, it is each and every prosecutor. The hundreds of prosecutors across this country all have absolute power in their own areas. So any prosecutor with an ounce of sense, maybe even a half an ounce, would not have charged Mr. Unser with this offense, but he was still charged and convicted.

And these two examples here are examples of how prosecutorial discretion fails. And I think it is important for the Congress to realize it fails quite a lot.

The presumption of innocence I think has turned on its head. It is a legal construct. It didn't apply to prosecutors. Prosecutors, I think, decide, Well, Mr. Schowenwetter must have been up to no good, we can get him on this. And so what if we can't get him on this? We know he is up to no good.

It is that kind of speculation that drives prosecutorial decisions. And that is why I think it is so important that the crimes fully define the blameworthiness of the act, including the state of mind that is required, because then they are being forced to prove their suspicions in court. They are being forced to prove moral blameworthiness.

So if they were required to show that Mr. Schoenwetter knew he was breaking Honduran law, he would have been acquitted. But I think because that wasn't an element of the crime with which he was charged, they can say, Well, we think you knew, and if you didn't know you should have known. And so what if the President

and the Attorney General of that country say it is not a crime? We know it is.

It is that fundamental hubris that happens when you give prosecutors absolute power.

In Mr. Unser's case it is even a more basic issue. There is a key fact necessary to the blameworthiness of his act, that he is in a Federal wilderness area. The crime doesn't even require him to have that factual knowledge. No wonder these horror stories happen.

It is dangerous when you give any official, no matter how well intentioned, absolute power. That is what overcriminalization does. And I think it is high time for Congress to assert itself, its supremacy in this area, and to require courts to help counteract instead of facilitate overcriminalization.

Ms. PODGOR. I have nothing to add to that.

Mr. SCOTT. Thank you.

Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Scott, and your Ranking Member, who have done a good job on this Committee. We have covered so many subject areas over the years coming out of the Crime Committee.

I would like to ask this question of whether or not we should begin to put together some sort of place to house all of the Unser, Schoenwetter, cases in America. I mean, we have got two here. But can you imagine how many there might be if this Committee—not to invite for hearings, because we have become an inferior court of our own—but what about a place to capture this information that would serve as a reservoir for our five other experts that are here to begin to get a larger picture of this?

It seems to me that we have two cases. If you give me—well, I guess we would be talking about the next session of Congress now, because we are almost out by next week, it is predicted. But there ought to be a place where people can communicate any problems of this nature, and they would go into a specific place.

The problem is that right now Members of Congress get letters about these kinds of cases, the Unser case, the Schoenwetter case, but they are individual cases in their congressional district. I suppose Senators get the same thing in their State.

So what if we were to put these into, say, the Crime Committee, or another body designated by the Crime Committee, so that there would be a repository in the American legal system of what has happened, to give us a clearer picture; and we wouldn't have to hold an almost infinite number of hearings, hearing special cases of other peopling that are so aggrieved.

And can I invite our distinguished witnesses—Brian Walsh, do you want to take a crack at that please, sir?

Mr. WALSH. I think it is a terrific idea. I can't say it is quite to the level or to the extent that you have suggested yet, but there have been some efforts that we have undertaken in collaboration with others. I know that NACDL, for example, collects these types of cases. And also we have an Overcriminalized.com Web site where we have begun to publish these stories.

So it is an opportunity for us to have a sort of central place. People will e-mail us on a fairly regular basis, and not all of the stories

have been published yet, but we would certainly be interested in pursuing that.

One of the other features that we developed with NACDL was an e-mail list notification of new bills going through Congress that actually have these types of provisions in them; and people can subscribe to that, the Legislative Update Alert. But we are working to try to do exactly what you are suggesting. And we would be delighted to help the Committee to help develop that even further.

Professor Smith also encouraged me to mention "One Nation Under Arrest" which is a book we published that has some of these stories in them, about a couple dozen.

Mr. WEISSMAN. I agree with that. Oversight is an important function of this body, as you know, and that is fundamentally what you are talking about, oversight of how the executive branch is handling these cases. So I think that is important to do.

But I do want to caution, you have been focusing on these esoteric, highly technical crimes. It is easy to do that. And you get a lot of fair notice problems that is fairly serious there. But the problem of overcriminalization exists even with real crimes. I think this goes back to something Judge Gohmert mentioned. Even real crimes that we all would agree are heinous, immoral acts, you still have poor crime definitions causing problems there.

For example, the Federal child pornography statute. It requires, as passed by Congress, you have to know you are receiving something and you have to know that the thing you are receiving is a visual depiction. That is all Congress said about the mens rea requirements. What don't you have to know? What matters? You don't have to know that it is sexually explicit. You don't have to know that it is minors engaging in sex. Congress did not require mens rea. Those are the things that you need to know. Those are the facts that are essential to say it is blameworthiness.

And the Supreme Court construed that statute and they read in a mens rea requirement, so they fixed that problem. But the fact is it was a problem.

The fact, also going back to prosecutorial discretion, is the Justice Department argued in that case, the excitement video case, Oh, you don't have to know it is sexually explicit conduct involving minors. As long as you know it is a video, that is enough. I mean, that is insane.

But the point is simply to illustrate, again, the limitations of prosecutorial discretion and also to see that even when we are talking about real crimes, malem in se real crimes, crimes that should be punished, there, too, you have problems with crime definition.

So it is not just the technical regulatory offenses, it is all crimes. That is how deep and corrosive the problem of overcriminalization is.

Mr. CONYERS. You are quite right that merely collecting these without making that kind of analysis would be overlooking a very huge part of the problem.

What about the president of the Defense Lawyers Association? How does this strike you, sir.

Mr. LAVINE. Certainly we are in the process, working with Heritage Foundation and others, to try to collect the anecdotal evidence to support the reforms that we are asking Congress to enact. And

part of that deals with the two separate issues, as Professor Smith discussed. One is the overcriminalization issue itself and the requirement that statutes are particularly described with the conduct that the citizen should know is wrong, both the act itself and the mental state that goes along with it. That is what we have been talking about foe the last couple of hours and weeks with this report.

The other issue is overfederalization, if I may be so bold, as a perspective from a practicing lawyer who has been trying cases for over 36 years, 11 years as a prosecutor, 25 years as a defense lawyer. The reality is prosecutors don't often use the appropriate discretion, and when they don't, judges are not acting independently. Which is why we are suggesting the rule of lenity, and where you need to put this in perspective.

Judge Gohmert is a State court judge in east Texas where it was his—Judge Poe, it was the same thing. Nobody would say that these judges were not independent. But in some Federal circuits, the reality is otherwise. The judges rubber-stamp what prosecutors do.

So in the context of what we are attempting to do is to collect these anecdotal stories to eventually being able to present them to you, so that you can see not just the construct that we are talking about here, that we have really been using the "Without Intent" report to give you the basics of the 109th Congress and how that was a snapshot of things that were wrong in that context.

Obviously the problem is much larger than that. And when you see it here, you assume that judges would exercise discretion in Mr. Schoenwetter's case, and you assume prosecutors would exercise discretion in Mr. Unser's case, but the fact is they didn't.

And in the Georgia Thompson case we spoke about earlier, they didn't. And the reason they didn't is manifold. Maybe the local politics, maybe the regulatory agency is looking to justify its budget for that year and has to have so many scalps. Maybe that regulatory agency, I suspect in the Unser case, was pushing the local prosecutor and the judge did not have the independence—we might call it something else, might not be public—to say that this is wrong. There has to be a mental state and intentional construct to it. There has to be a conscious objective or desire to engage in conduct that is against the law.

So to answer your question shortly, yes, we will do everything we can to attempt to collect these and find maybe perhaps a way to get them to you in a repository that would help you to expand some of the issues we talked about here today.

Mr. CONYERS. Thank you so much.

Just close on this, Chairman Scott, and Judge Gohmert. I still think that the drug problem—am I right that we put a trillion dollars in fighting the so-called drug war over the last decades? We are not sure how much money we spent.

We are not sure how much money we spent. But the whole idea is that we have put an enormous amount of Federal money into this. States have also put an enormous amount of money, and yet the treatment of this offense as a health problem is minimized. Many people are imprisoned with a health problem which is only aggravated, certainly while they are there, and maybe even worse

when they get out. And it overlooks a sort of more commonsense approach.

So the last thing that I think makes this a good idea is that, more than anything else, we educate the American people; the citizens themselves begin to understand the kind of problems that we have taken up here today with all of you experts.

And so I thank you very much for the time, and I hope that we can continue this discussion after this hearing.

Mr. SCOTT. Thank you.

I just have one final question for Mr. Walsh.

You have presented Subcommittee staff with draft legislation as to what we should be doing about reform. Can you describe that legislation to us?

Mr. WALSH. The draft is based on the recommendation in the "Without Intent" report that basically would require Congress to analyze what it is that it is doing each time it criminalizes. So for any new or modified criminal offense or penalty that went through Congress, the recommendation would be in that legislation that there would have to be a report generated before there was floor debate on the criminal penalties.

There is already so much criminalization that it makes sense that if there is going to be any new criminalization, Congress should have to describe what is the problem we are trying to solve here, with specificity. How is the mens rea requirement supposed to work? What about existing Federal and State law? How does that overlap with the new law that is being proposed?

In addition, how does this impact the federalism implications? What are the implications for that, that both Mr. Lavine and Professor Smith have and others mentioned, during this panel? So that list of requirements would basically help Congress really to stop, look, and focus on the work that it is doing in criminalization, decide whether this is really needed? Is there really a motivating factor, or could this act already be charged?

Many times the crimes that we hear about that result in new criminalization are in fact already charged. One of the great examples of this is the carjacking offenses that ended up being Federal crimes, and yet those specific crimes that were used were a horrible tragic crime, but the perpetrators were both sentenced to life sentences in Maryland under State law. So there was already existing law; there wasn't a need for Federal law in this case.

So explaining what it is that Congress is doing. And in addition, the recommendation of NACDL and the Heritage Foundation that is embodied in that legislation would be that the agencies would have to describe all their new criminalization. Right now, there is so much of it that it is hard to really get a handle on when the agencies propose rules that have criminal penalties or offenses in them.

In addition, whenever these agencies make a referral to the Justice Department for prosecution, what is the criminal offense in statutory code that they are saying justifies this criminal referral? What is the regulation in the Code of Federal Regulations that justifies it? That basically puts them on notice and also puts Congress on notice of how these new laws and these new regulations are being used.

So that is the general gist of it. We think that there are some really good points in it that would be useful to the Committee for its consideration as it is considering legislation.

Mr. SCOTT. Thank you.

I had a conversation with somebody earlier today and we mentioned carjacking. And if you are the victim of carjacking, you do not call the FBI, you call the local police.

Mr. WALSH. That is right.

Mr. SCOTT. Judge Gohmert.

Mr. GOHMERT. Thank you, Chairman.

Looking at this—and of course, Mr. Walsh, the book you put together, "One Nation Under Arrest," really eye-opening. And I mentioned before, it makes Kafka's novels look tame compared to what we have done to people, all the uncertainty.

I look at a law like this that has so grievously, adversely affected Mr. Schoenwetter. When you include language in a law that says "in violation of any law or regulation of any State or in violation of any foreign law," we just embraced every foreign law in every country? I know this was passed before I ever got to Congress, but I bet there is language in some that have been passed more recently that include broad language like that, but we have no business embracing all foreign laws.

And I would tend to think that one of the solutions, from hearing our panelists, the testimony, is that I am not sure that we should have any law that is punishable by incarceration that is not made a law by the legislative body. Leaving that to regulators that are unelected, some of them are unappointed—they are certainly unconfirmed, they are just unaccountable—out there passing regulations as they see fit, heck, they may have even come up with the regulation that says you can't park a snowmobile under a tree for all we know. But if it is serious enough to take away someone's freedom, then it ought to be serious enough to come before Congress.

And then, of course, the criminal intent issue, to require that where there is no mention that there has to be some criminal intent. These statutes that captured the acts of Mr. Schoenwetter and Mr. Unser, there appears to be a knowing requirement—not knowing of any violation, but knowing that you are on a snowmobile or knowing that you are purchasing lobsters, and I am not sure how much sense that made. I would have thought perhaps that lobsters would be safer and cleaner in a plastic bag instead of cardboard. Who knew? But anyway, it just seems like if it is important enough to take away somebody's freedom, it ought to come from the legislative branch.

Chairman Conyers, I know that you and Chairman Scott have both made a great deal of effort over the last 3½ years to do oversight, but there is just so much to do. I think you did better, perhaps, than we did my first couple of years here, but I appreciate your efforts in that regard. But we can see there is just so much area that needs oversight. We better clean up the laws so that it is not quite so broad in the areas of abuse, so that there is not as much discretion as Professor Smith points out has created some of the problems.

But I appreciate former Attorney General Ed Meese's efforts in trying to push this and bringing this to the forefront. And regardless, you never know how politics is, whether Democrats or Republicans are in the majority after this, it doesn't matter, this is so serious. We are talking about people's freedom and the way it adversely affects people's faith in their government, or lack thereof. We have got to get this cleaned up. Thank you very much for helping us bring this to the front.

Mr. SCHOENWETTER. Chairman Scott, can I make a remark in regard to something Judge Gohmert said?

Mr. SCOTT. Yes.

Mr. SCHOENWETTER. You talk about the Lacey Act. What happened with us was—and this is to the best of my recollection—the Lacey Act was rewritten. The original Lacey Act said "any foreign law or regulation." The rewriting of it said "any foreign law." So we objected on the grounds that we were accused of violating regulations. It was semantics, of course. But the judge found that it was the intent of Congress to add "regulations" into that; that they just forgot to do it.

So actually, I think I spent—I was sentenced to 8 years in prison because Congress intended to put in "regulations" but decided it just was understood.

Mr. GOHMERT. So when I talked in terms of us allowing Federal unelected, unaccountable bureaucrats to make regulations that capture people, heaven knows how those regulator-makers in other countries were doing that. It sounds like in Honduras they certainly disagreed with our government's approach to their own laws. So I appreciate that point.

Thanks, Chairman.

Mr. SCHOENWETTER. Thank you, Judge Gohmert.

Mr. SCOTT. I just have one last question for Professor Podgor.

Would one short bill be sufficient to create a default of mens rea?

Ms. PODGOR. I think so. It is one provision within the Model Penal Code, so I see no reason why it couldn't be accomplished with one short bill.

Mr. SCOTT. I thank all of our witnesses for your testimony.

Without objection, the joint report "Without Intent, How Congress Is Eroding the Criminal Intent Requirement in Federal Law" by the Heritage Foundation and National Association of Criminal Defense Lawyers will be included in the record.

The memo, "Enacting Principled, Nonpartisan Criminal-Law Reform, A Memo to President-elect Obama" by Brian Walsh will also be included in the record.

The hearing record will remain open for 1 week for submission of additional materials. We may have written questions for you. If you would respond to them, if they are sent to you, as promptly as possible so your answers can be made part of the record.

Without objection, the Subcommittee stands adjourned. Thank you very much.

[Whereupon, at 5:06 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

The Heritage Foundation
LEADERSHIP FOR AMERICA
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CONGRESSIONAL TESTIMONY

Statement of
Brian W. Walsh
Senior Legal Research Fellow
Center for Legal & Judicial Studies
The Heritage Foundation

Before the Subcommittee on Crime, Terrorism, and Homeland Security,
Committee on the Judiciary,
United States House of Representatives

Delivered September 28, 2010

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

Thank you Chairman Scott, Ranking Member Gohmert, and Members of the Committee for inviting me here to testify.[1] More importantly, thank you for holding this hearing to address the serious injustices and other dangers caused by the problems of overcriminalization. My name is Brian Walsh, and I am the Senior Legal Research Fellow in The Heritage Foundation's Center for Legal & Judicial Studies. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

I direct Heritage's projects on countering the abuse of the criminal law and criminal process, particularly at the federal level. My work focuses on overcriminalization, which includes the proliferation of vague, overbroad criminal offenses that lack *mens rea*

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[1] I would like to acknowledge the substantial contributions to this testimony of Tiffany Joslyn, Counsel for White Collar Crime Policy for the National Association of Criminal Defense Lawyers (NACDL), with whom I co-authored *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, THE HERITAGE FOUNDATION & NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (April 2010) [hereinafter *Without Intent*], *available at* http://report.heritage.org/sr0077. Much of this testimony is adapted from *Without Intent*. Nevertheless, the views and opinions stated herein, as well as any errors or omissions, are my own.

(guilty-mind or criminal-intent) requirements that are adequate to protect the innocent from unjust prosecution and punishment.

The Heritage Foundation has been involved in and leading efforts to combat overcriminalization for most of the past decade. Several factors have motivated this work. The first was the long-term work of former U.S. Attorney General Ed Meese, my distinguished Heritage Foundation colleague, to reform federal criminal law. Among similar efforts, Ed Meese chaired the American Bar Association's Task Force on the Federalization of Criminal Law, which issued its consensus report in 1998.[2] The Task Force cataloged the enormous number of federal criminal offenses that encroach on the authority of the States as separate sovereigns to administer criminal justice in their geographic territory. It collected evidence that criminal-law legislation was often enacted into law despite being "misguided, unnecessary, and even harmful" because many lawmakers believe criminal-law legislation to be politically popular. Such findings corroborated work by leading academics identifying and analyzing the problems and dangers of overcriminalization.

But probably the primary motivation was the ever-increasing evidence that individuals like Bobby Unser and Abbie Schoenwetter, who are testifying at today's hearing, Georgia Thompson,[3] Krister Evertson,[4] and George and Kathy Norris,[5] were being prosecuted and, in many cases, spending time in federal prison for conduct that none of us would imagine is criminal. We have learned of scores and scores of such cases and, in most, it made no difference that the person never intended to violate any law and never knew that their actions were prohibited by law or otherwise wrongful. Yet their lives and livelihood were ruined as a result of unjust, poorly drafted criminal laws.

The problems of overcriminalization cut across all segments of American society. Placing thousands of vague, overbroad criminal laws in the hands of government officials means that no one is safe from unjust prosecution and punishment.[6] Many of these criminal laws punish conduct that the average person would not guess is prohibited. The body of criminal law thus fails to meet one of the primary requirements of due process: providing individuals with fair notice of what conduct can be punished criminally.

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

[3] United States v. Thompson, 484 F.3d 877 (7th Cir. 2007) (overturning an egregious conviction under the federal "honest services" fraud statute, 18 U.S.C. 1346, against Wisconsin civil servant Georgia Thompson).

[4] *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009) (written statement of Krister Evertson).

[5] *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009) (written statement of Kathy Norris).

[6] *See* Harvey A. Silverglate, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT xxxv (2009) (observing that many federal statutes "have been stretched by prosecutors, often with the connivance of the federal courts, to cover a vast array of activities neither clearly defined nor intuitively obvious as crimes, both in commerce and in daily life").

As a result of these problems, all that separates almost any productive, hard-working American from federal prison time are the laws of probability and the discretion of federal prosecutors. As criminal defense and civil rights attorney Harvey Silverglate has characterized it in his recent book on overcriminalization, there are so many vague, overbroad criminal offenses in federal law that almost every hard-working American commits at least one federal felony a day.[7]

The dangerous state into which federal criminal law has fallen has compelled a strange-bedfellows array of individuals and organizations to come together to fight overcriminalization. The surprising range of organizations that, for example, expressly support the need for today's hearing is broad and impressive: the American Bar Association, American Civil Liberties Union, Families Against Mandatory Minimums, The Heritage Foundation, Manhattan Institute, National Association of Criminal Defense Lawyers, and National Federation of Independent Business. These organizations represent an important cross-section of the coalition working against overcriminalization. But they are a relatively small number of all of the individuals and organizations that are working together to understand the causes and effects of overcriminalization, educate Congress and the American people about its dangers, and develop practical and effective solutions. The Overcriminalization Working Group, for example, includes at least a dozen other organizations that routinely work together to educate the public and Congress on specific issues and develop principles that can be supported by a wide array of organizations.

These organizations do not see eye to eye on many important issues. But they have put their disagreements aside to establish common ground on the problems of overcriminalization and a common framework for addressing its root causes. This is because there is no disagreement that federal criminal law is seriously broken and getting worse every week.[8] In an age of often intense and bitter partisanship, this surprising collaboration speaks volumes. It expresses the good faith of those who share overlapping conceptions of a fundamental goal: to make the criminal justice system as good as it can be and as good as Americans rightly expect it to be. The organizations have differing ideas about how to get to that place, but the broad support for today's hearing is a sign of the similarly broad support for returning federal criminal law to its proper foundations in the fundamental principles of justice.

This was the spirit in which The Heritage Foundation and the National Association of Criminal Defense Lawyers (NACDL) came together to conduct an unprecedented study of Congress's legislative process that so often produces severely flawed criminal offenses and penalties. The study culminated in a joint report, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, which NACDL's Tiffany Joslyn and I co-authored.[9] We focused on several fundamental problems.

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[7] *See id.*

[8] *See, e.g.*, John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUNDATION L. MEMO. No. 26, June 16, 2008, at 1 (finding that from 2000 through 2007 Congress enacted an average of 56.5 crimes a year, or slightly more than one a week for every week of the year).

[9] *Without Intent*, *supra* note 1.

The first problem, the erosion of *mens rea* requirements, has serious implications. It is a fundamental principle of criminal law that, before criminal punishment can be imposed, the government must prove both a guilty act (*actus reus*) and a guilty mind (*mens rea*). Despite this rule, omission of *mens rea* requirements has become commonplace in federal criminal statutes. Where Congress does include a *mens rea* requirement, it is often so weak that it does not protect defendants from punishment for making honest mistakes or engaging in conduct that was not sufficiently wrongful to give notice of possible criminal responsibility. The resulting criminal offenses fail to satisfy the necessary and well-established principle that criminal liability rests upon an "evil-meaning mind" and an "evil-doing hand."[10] Without an adequate *mens rea* requirement, the principle of fair notice is lost when criminal punishment is imposed for conduct that does not conform to what reason or experience would suggest may be illegal.[11]

Second, federal criminal offenses are frequently drafted without the clarity and specificity that have traditionally been required for the imposition of criminal liability. As the ABA Task Force found, federal criminal statutes often prohibit such exceedingly broad ranges of conduct, in language that is vague and imprecise, that few lawyers, much less non-lawyers, could determine with any degree of certainty what specific conduct is actually illegal. And even when the *actus reus* is described with clarity, the *mens rea* requirement may be imprecise. A common result of poor legislative drafting is uncertainty as to whether a *mens rea* term in a criminal offense applies to all of the elements of the offense or, if not, as to which elements it does apply.

The third problem, regulatory criminalization, occurs when Congress delegates its legislative authority to define criminal offenses to another body, typically an executive branch agency. This empowers the unelected officials who direct that agency to decide what conduct will be punished criminally, rather than requiring Congress to make that determination itself. Through this process, the executive branch of the federal government ends up playing a far more substantial role in causing overcriminalization than the limited role the Constitution grants to the President of signing or vetoing legislation.

In the usual case of regulatory criminalization, Congress passes a statute that establishes a criminal penalty for the violation of any regulation, rule, or order promulgated by the agency or an official acting on behalf of that agency. The statute might include *mens rea* terminology; for example, criminal responsibility might extend to "anyone who *knowingly* violates any regulation."[12] However, statutes authorizing regulatory criminalization often fail to include any *mens rea* terminology, and nothing guarantees

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[10] *See* Morissette v. United States, 342 U.S. 246, 251 (1952).

[11] *See, e.g.*, 18 U.S.C. § 707 (providing a criminal penalty of up to six months imprisonment for making unauthorized use of the logo of the 4-H Clubs).

[12] For example, one provision in the federal Lacey Act states that any person who "knowingly imports or exports any fish or wildlife or plays in violation of any provision of this chapter" shall be criminally punished. *See* 16 U.S.C. § 3373(d)(1)(A). Another provision of the Lacey Act incorporates every wildlife rule or offense present in "any law, treaty, or regulation of the United States or... any Indian tribal law." 16 U.S.C. § 3372(a)(1).

that the executive agency promulgating the criminal regulations will include a *mens rea* requirement, let alone an adequate one.

The explosive growth that federal criminal law has undergone in recent decades should alone be sufficiently troubling to anyone in a free society. When coupled with the disappearance of adequate *mens rea* requirements, the proliferation of poorly drafted criminal offenses that are vague and overbroad, and the widespread delegation to unelected officials of Congress's authority to criminalize, the expanded federal criminal law becomes a broad template for the misuse and abuse of governmental power.

The *Without Intent* Report

For our joint *Without Intent* report, Heritage and NACDL studied Congress's legislative process for developing non-violent criminal offenses and penalties. This study began with the working hypothesis that debate and oversight of proposed legislation in the House and Senate Judiciary Committees might improve the clarity of criminal offenses in bills moving through Congress and strengthen their *mens rea* requirements. The Judiciary Committees have special expertise in criminal law, criminal justice legislation, and related matters, and according to House and Senate rules, only the Judiciary Committees have express jurisdiction over criminal law and punishment.

In order to test this hypothesis, the study considered two questions:

1. How well do the *mens rea* requirements in each offense studied protect innocent actors, defined as those who lack the intent to violate the law or the knowledge that their conduct is unlawful or sufficiently wrongful to put them on notice of possible criminal liability?

2. Is there a correlation between the protection afforded by a bill's *mens rea* requirements and its enactment, passage by a chamber, or consideration by a Judiciary Committee?

The *Without Intent* report itself provides the detailed findings of the study. I will only summarize them here.

The Report's Findings

The *Without Intent* report analyzed non-violent, non-drug criminal offenses in 203 pieces of legislation introduced during the course of the 109th Congress (2005-2006). Because many of the bills included more than one criminal offense meeting the study's criteria, the number of criminal offenses included in the study ended up being 446 in total. Each offense's *mens rea* requirement was analyzed and graded as Strong, Moderate, Weak, or None. If the *mens rea* fell between two categories, it was assigned an intermediate grade. In order to give the benefit of the doubt to congressional drafting, however, these intermediate ratings were characterized as having the higher, more protective grade for the purposes of the study.

After analysis of all 446 non-violent, non-drug criminal offenses introduced during the 109th Congress, our study found that approximately 57 percent of the studied offenses introduced, and approximately 63 percent of the studied offenses enacted, had inadequate (None or Weak) *mens rea* requirements. Just slightly more than 8 percent of all offenses studied had protective, properly drafted *mens rea* requirements (Strong).

Looking at each level of *mens rea* protection, we found that 25 percent of all non-violent offenses introduced did not require a prosecutor, court, or jury to engage in a meaningful consideration of a criminal defendant's state of mind. In other words, one quarter of all criminal penalties introduced either had no *mens rea* requirement or contained terminology such as "should have known" that provides almost no *mens rea* protection for the accused. Another 32 percent used Weak *mens rea* requirements, such as those relying on the term "knowingly" to introduce the language of the offense and which excludes only accidental or inadvertent conduct from criminal punishment.

Approximately one-third of the studied offenses in the report had *mens rea* requirements in the Moderate category. The language of an offense classified as Moderate is more likely than not to prevent an individual from being found guilty if the individual did not intend to violate a law and did not know that his conduct was unlawful or sufficiently wrongful so as to put him on notice of possible criminal responsibility. Finally, as mentioned above, only one out of every 12 offenses introduced contained *mens rea* requirements protective enough to be categorized as Strong.

In addition to direct analysis of the criminal intent framework of every non-violent, non-drug offense introduced in the 109th Congress, the *Without Intent* report also explored how many of the 446 criminal offenses were referred to the House or Senate Judiciary Committee, that is, the congressional committees with the express jurisdiction and most expertise for properly vetting all new criminal laws. The report found that only 48 percent of the bills studied were referred to the respective Judiciary Committee.

The study also analyzed how referral or non-referral to the House and Senate Judiciary Committees, one of three specified actions taken by a Judiciary Committee (hearing, markup, or reporting out), and passage or enactment of the offense correlated with the overall strength of the *mens rea* requirements included in the bills reviewed. Collectively, the data provided very little evidence that these actions by Congress correlated with stronger, more protective *mens rea* requirements. The exception is that statistically significant correlations were found with markup or reporting by the House Judiciary Committee. Offenses that had been subject to either of these two actions in the House Judiciary Committee tended have stronger, more protective *mens rea* requirements. No such relationship with congressional actions was found, however, in the Senate.

The Report's Conclusions

From these findings, the *Without Intent* report reaches several conclusions regarding the current state of the federal legislative process for criminal law creation. First and foremost, the report concludes that non-violent criminal offenses lacking adequate *mens*

rea requirements are ubiquitous at every stage of the legislative process. Second, the report finds that Congress consistently neglects the special expertise of the House and Senate Judiciary Committees when drafting criminal offenses or penalties. Third, the report indicates that the proliferation of federal criminal law is rapidly expanding. Fourth, the report reveals that poor legislative draftsmanship is commonplace. And finally, the report illustrates that criminal lawmaking authority is regularly and inappropriately delegated to non-congressional bodies.

With regard to the first conclusion, it is apparent from the legislation studied that bills with non-violent, non-drug criminal offenses lack adequate *mens rea* protections at all stages of the legislative process. Beyond the statistics mentioned for all non-violent criminal offenses introduced in the 109th Congress, similar drafting failures appear among offenses that were enacted into law and those that were passed by at least one chamber. Approximately 63 percent of the offenses passed by a chamber and 64 percent of the offenses actually enacted into law had wholly inadequate *mens rea* requirements. This data is indicative of a much larger problem that requires the immediate attention of congressional decision-makers.

The findings of the *Without Intent* report also reveal that Congress neglects the special expertise of the House and Senate Judiciary Committees when engaging in the legislative process. Over one-half (52 percent) of the criminal offenses in the study were neither referred to a Judiciary Committee nor subject to any oversight by either committee. In addition, the study frequently uncovered criminal offenses that were buried in much larger bills entirely unrelated to criminal law and punishment. The result of such circumvention of the Judiciary Committees is a lack of proper oversight from the Members of Congress (and their staffs) who are best situated to evaluate and analyze new criminal legislation.

Next, the *Without Intent* report makes note of the fact that the federal criminal law is currently expanding at an increasingly exponential rate. From 2000 to 2007, Congress created 452 entirely new crimes, legislating at a rate of over one new crime each week for every week of every year.[13] Without adequate *mens rea* requirements, these federal criminal offenses greatly increase the danger that otherwise law-abiding individuals will find themselves facing prosecution and even prison time in the federal system. Moreover, these numbers do not accurately capture the full magnitude of the effect that regulatory criminalization plays in the grand scheme of overcriminalization.

On a qualitative note, the report also highlights the common observation that Congress frequently fails to speak clearly and with the necessary specificity when legislating criminal offenses. This ambiguity can have serious consequences in all legislative drafting. In the criminal context, however, the consequence can be particularly dire when legislative language is vague, unclear, or confusing: the misuse of governmental power to unjustly deprive individuals of their physical freedom.

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[13] John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUNDATION L. MEMO. NO. 26, June 16, 2008, at 1.

In addition to these four conclusions, the sheer volume of regulatory criminalization authorized in the studied offenses demonstrates that congressional delegation of its authority to make criminal law occurs at every stage of the legislative process and, notably, more frequently in those studied offenses that were either passed or enacted into law. Specifically, 14 percent of all proposed non-violent offenses included some form of regulatory criminalization. That increases to 17 percent among only those offenses passed by either the House or Senate. The figure increases again to 22 percent when discussing offenses actually enacted. This phenomenon contributes greatly to the explosive growth of federal criminal law and the corresponding erosion of adequate *mens rea* requirements.

Recommended Reforms

The scope of the *Without Intent* report was not limited to identifying the problems and causes of federal overcriminalization. The study was conducted in the context of concerted efforts by the broad range of organizations in, or working with, the overcriminalization coalition to educate Congress on these problems and develop effective, practical solutions. These organizations have met with increasing frequency in the past two years with Members of Congress and their staffs, leading academics and legal practitioners, and with one another to identify and develop principled, non-partisan reform proposals.[14] The *Without Intent* report borrowed heavily from the coalition's efforts and selected the five reforms that are best suited to redress the problems on which the study focused. Several members of the coalition have begun initial crafting and vetting of legislative language to begin discussing with Members of Congress. The hope is that Members will adopt some of the ideas in the draft language for their own reform bills. The current expectation is that bills consistent with such reforms will have bipartisan support.

The five reforms addressed by *Without Intent* are:

1. Enact default rules of interpretation ensuring that *mens rea* requirements are adequate to protect against unjust conviction.

2. Codify the rule of lenity, which grants defendants the benefit of the doubt when Congress fails to legislate clearly.

3. Require adequate Judiciary Committee oversight of every bill proposing criminal offenses or penalties.

4. Provide detailed written justification for and analysis of all new federal criminalization.

5. Redouble efforts to draft every federal criminal offense clearly and precisely.

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[14] *See generally* Brian W. Walsh, *Enacting Principled, Nonpartisan Criminal-Law Reform*, HERITAGE FOUNDATION SPECIAL REP. NO. 42, July 9, 2009.

1. *Enact Default* Mens Rea *Rules*

Perhaps the most straightforward and effective reform to help ensure that innocent individuals are protected from unjust conviction under federal criminal offenses would be to codify default rules for the interpretation and application of *mens rea* requirements.[15] The first part of this reform would address the unintentional omission of *mens rea* terminology by directing federal courts to read a default *mens rea* requirement into any criminal offense that lacks one.[16] Adopting this reform would help law-abiding individuals know in advance which criminal offenses carry an unavoidable risk of criminal punishment and safeguard against unintentional congressional omissions of *mens rea* requirements.

The second part of this reform would direct courts to apply any introductory or blanket *mens rea* terms in a criminal offense to each element of the offense.[17] This reform would eliminate much of the uncertainty that exists in federal criminal law over the extent to which an offense's *mens rea* terminology applies to all of the offense's elements and greatly reduce the disparities that exist among the federal courts in the interpretation and application of *mens rea* requirements.

Implementing these two reforms would improve the *mens rea* protections throughout federal criminal law and force Congress to give careful consideration to *mens rea* requirements when adding or modifying criminal offenses.

2. *Codify the Rule of Lenity*

A related statutory reform that would reduce the risk of injustice stemming from criminal offenses that lack clarity or specificity would be to codify the common-law rule of lenity. The rule of lenity directs a court, when construing an ambiguous criminal law, to resolve the ambiguity in favor of the defendant.[18] Granting the benefit of the doubt to the defendant is consistent with the well-known rules that all defendants are presumed innocent and that the government bears the burden of proving beyond a reasonable doubt every element of the crime with which a defendant is charged.[19] Expressly requiring federal courts to apply the rule of lenity to federal criminal law would simply codify what the Supreme Court has called a fundamental rule of statutory construction and cited as a

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[15] Although the Model Penal Code's formulation is not sufficiently protective of the innocent, it does include default *mens rea* provisions. *See* MODEL PENAL CODE § 2.02(1) (2009) ("Minimum Requirements of Culpability"); *id.* § 2.02(3) ("Culpability Required Unless Otherwise Provided"); *id.* § 2.02(4) ("Prescribed Culpability Requirement Applies to All Material Elements").

[16] *Cf. id.* § 2.02(3) ("Culpability Required Unless Otherwise Provided").

[17] *Id.* § 2.02(4) ("When the law defining an offense 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.").

[18] *See, e.g.*, United States v. Santos, 128 S. Ct. 2020, 2025 (2008).

[19] *See* Taylor v. Kentucky, 436 U.S. 478, 483–87 (1978) (explaining the presumption of innocence and the government's burden of demonstrating the defendant's guilt beyond a reasonable doubt); Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence... is a basic component of a fair trial under our system of criminal justice.").

wise principle that it has long followed.[20] Despite the Supreme Court's statements of its importance, the rule has not been uniformly or consistently applied by the lower federal courts. It would require Members of Congress to legislate more carefully and thoughtfully, with the knowledge that courts would be forbidden from "filling in" any inadvertent gaps left in criminal offenses. A statutory rule of lenity would protect individuals from unjust criminal punishment under vague, unclear, and confusing offenses by reinforcing the principle of legality, which holds that no conduct should be punished criminally "unless forbidden by law [that] gives advance warning that such conduct is criminal."[21]

3. *Require Sequential Referral to the Judiciary Committees*

A third recommended reform is to change congressional rules and procedure to ensure that every bill that would add or modify criminal offenses or penalties is subject to automatic sequential referral to the Judiciary Committees. As this Committee knows, sequential referral is the practice of sending a bill to multiple congressional committees. Whereas every new or modified criminal offense introduced in Congress should be subject to automatic referral to a Judiciary Committee, more than half of the offenses studied in *Without Intent* received no such referral. Among other benefits, this rule could stem the tide of criminalization by forcing Congress to adopt a measured and prioritized approach to criminal lawmaking. The House and Senate Judiciary Committees are uniquely positioned to evaluate questions that should be answered before Congress considers enacting any new criminal offense, including:

- Whether a new offense is consistent with the Constitution, particularly constitutional federalism's reservation of general police power to the 50 states; and

- Whether the approximately 4,450 statutory criminal offenses and tens of thousands of regulatory criminal offenses now in federal law already cover the conduct being criminalized.

To avoid overcriminalization, these questions must be answered before Congress considers enacting or modifying any criminal offense or penalty.

Requiring sequential referral of all bills with criminal provisions to the Judiciary Committees would also reduce overcriminalization by increasing congressional accountability for new criminalization. As it now stands, no single committee can take overall responsibility for reducing the proliferation of new (and often unwarranted, ill-conceived, and unconstitutional) criminal offenses or for ensuring that adequate *mens rea* requirements are a feature of all new and modified criminal offenses. Automatic sequential referral would empower the Judiciary Committees to take responsibility for all new criminal provisions.

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[20] United States v. Bass, 404 U.S. 336, 347 (1971); *see also id.* at 348; Bell v. United States, 349 U.S. 81, 83 (1955).

[21] Wayne R. LaFave, CRIMINAL LAW 11 (4th ed. 2003).

4. *Require Reporting on All New Criminalization*

The fourth reform is a reporting requirement for all new federal criminalization and would work hand-in-hand with the sequential referral reform. It would require the federal government to produce a public report that includes much of the information necessary to assess the purported justification, costs, and benefits of all new criminalization.

By requiring the federal government to perform basic but thorough reporting on the grounds and justification for all new and modified criminal offenses and penalties, this reform would raise the level of accountability for new criminalization. A more complete list is provided in *Without Intent*, but for every new or modified criminal offense or penalty, Congress should report information such as the following:

- A description of the problem that the new or modified criminal offense or penalty is intended to redress, including an account of the perceived gaps in existing law, the wrongful conduct that is currently going unpunished or under-punished, and any specific cases or concerns motivating the legislation;

- An analysis of whether the criminal offenses or penalties are consistent with constitutional and prudential considerations of federalism;

- A discussion of any overlap between the conduct to be criminalized and conduct already criminalized by existing federal and state law; and

- A comparison of the new law's penalties with the penalties under existing federal and state laws for comparable conduct.

Congress should also collect information on criminalization reported by the executive branch of the federal government. This information should be compiled and reported annually and, at minimum, should include:

- All new criminal offenses and penalties that federal agencies have added to federal regulations and an enumeration of the specific statutory authority supporting these regulations; and

- For each referral that a federal agency makes to the Justice Department for possible criminal prosecution, the provision of the United States Code and each federal regulation on which the referral is based, the number of counts alleged or ultimately charged under each statutory and regulatory provision, and the ultimate disposition of each count.

This reform proposal would require Congress and the federal agencies to engage in more extensive deliberations over, and provide factual and constitutional justification for, every expansion of the federal criminal law.

5. *Focus on Clear and Careful Draftsmanship*

The final reform recommendation would not be reduced to legislative language: Congress must employ a slower, more focused and deliberative approach to the creation and modification of federal criminal offenses. The importance of legislative drafting cannot be overstated, for it is the drafting of the criminal offense that frequently determines whether a person who had no intent to violate the law and no knowledge that her conduct was unlawful or sufficiently wrongful to put her on notice of possible criminal liability will endure prosecution and conviction and lose her freedom. A properly drafted criminal offense must:

- Include an adequate *mens rea* requirement;
- Define both the *actus reus* and the *mens rea* of the criminal offense in clear, precise, and definite terms; and
- Provide a clear statement of which *mens rea* terms apply to which elements of the offense.

Criminal offenses frequently fail to define the *actus reus* in a clear and understandable manner and often include an *actus reus* that is broad, overreaching, or vague. Similarly, specifying the proper *mens rea* requirement for a criminal offense requires great deliberation, precision, and clarity. Further, legislative drafters should almost never rely merely on a standard *mens rea* term in the introductory language of a criminal offense. Instead, the criminal offenses that provide the best protection against unjust conviction are those that include specific intent provisions and provide sufficient clarity and detail to ensure that the precise mental state required for each and every act and circumstance in the criminal offense is readily ascertainable.

Finally, Members of Congress drafting criminal legislation must resist the temptation to bypass this arduous task by handing it off to unelected regulators. The United States Constitution places the power to define criminal responsibility and penalties in the hands of the legislative branch. Therefore, it is the responsibility of that branch to ensure that no one is criminally punished if Congress itself did not devote the time and resources necessary to clearly articulate the precise legal standards giving rise to that punishment. This reform could be codified by, for example, Congress's prohibiting regulatory felonies or requiring first violations of regulatory offenses to be punishable by civil penalties only.

* * *

These five reforms would substantially increase the strength of the protections against unjust conviction that Congress includes in criminal offenses and prevent further proliferation of federal criminal law. Americans are entitled to no less attention to and no less protection of their most basic liberties.

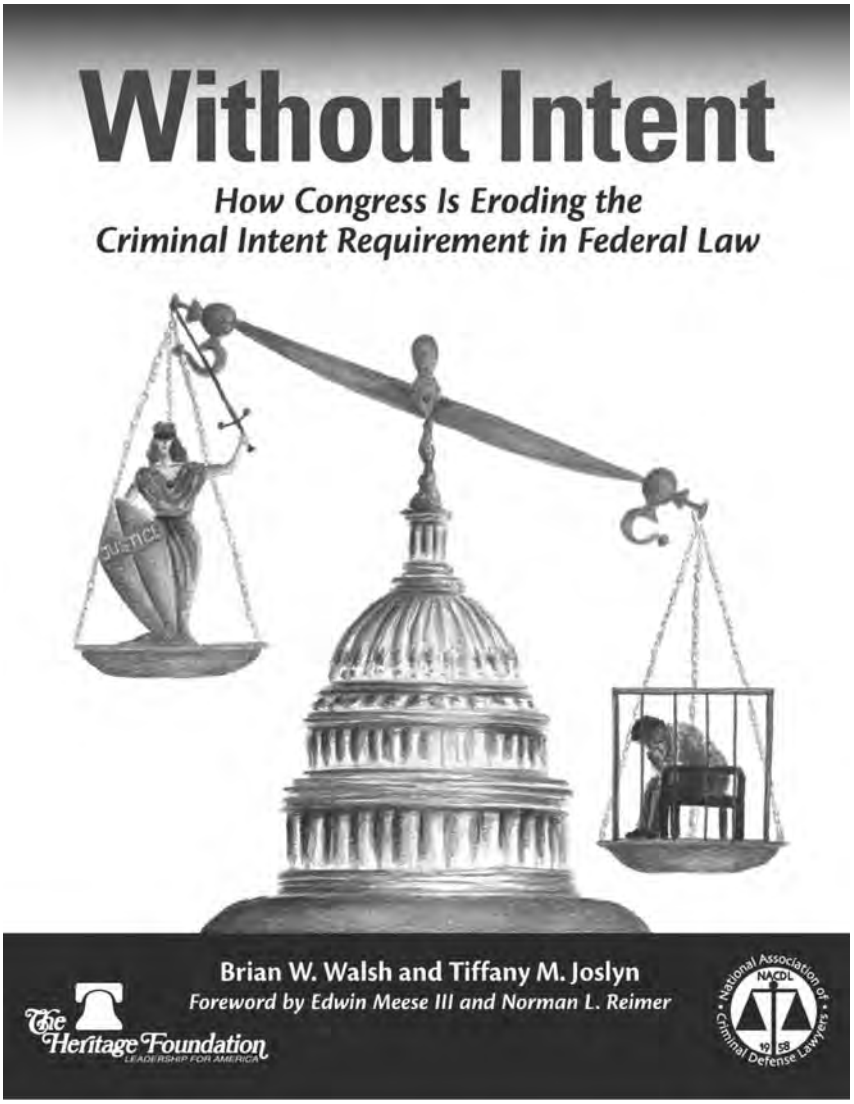
Conclusion

The problems of overcriminalization have been well-documented academically and even statistically, but the real toll cannot adequately be captured by scholarship or numbers, no matter how skillful. The approximately 4,500 criminal offenses in the U.S. Code, and the tens of thousands in the Code of Federal Regulations, have proliferated beyond reason and comprehension. Surely when neither the Justice Department nor Congress's own research service can even count the number of crimes in federal law, the average person has no hope of knowing what he must do to avoid becoming a federal criminal.

The damage this does to the American criminal justice system is incalculable. It used to be a grave statement to say that someone was "making a federal case" out of something. Today, although the penalties for a federal case are severe – and frequently harsh – the underlying conduct punished is often laughable. Six months in federal prison for (possibly) wandering into a National Wilderness area when you are lost with a friend in a blizzard and fighting for your lives. Two years in prison for "abandoning" materials that you have properly stored in 3/8-inch-thick stainless steel drums. Two years in prison for having a small percentage of inaccuracies in your books and records for a home-based orchid business. Eight years in federal prison for agreeing to purchase a typical shipment of lobsters that you have no reason to believe violates any law – and indeed does not. All these sentences, and the underlying prosecutions, make a mockery of the word "justice" in "federal criminal justice system." They consume scarce and valuable legal enforcement resources that could be spent investigating and prosecuting real criminals or hearing legitimate civil and criminal cases. By imposing criminal punishment where there is no connection to any rational conception of moral wrongdoing, they severely undermine the public's confidence in and respect for criminal justice as a whole.

But at the end of the day, the most severe toll levied by overcriminalization is human. Racing legend Bobby Unser will be known for life, not only for his remarkable accomplishments, but also for his federal criminal conviction. Krister Evertson is currently unable to care for or even visit his 82-year-old mother in Alaska because he is on probation and living in a ramshackle aluminum trailer on the lot of an Idaho construction company. Abbie Schoenwetter and his family must now labor to overcome the unjustified and unnecessary impact of overcriminalization on their health, finances, and emotional well-being. All of these human tragedies came about because an unjust law was written and placed in the hands of an unreasonable government official.

These stories testify most eloquently to the irrational injustices of overcriminalization. They and unknown victims like them around the country who have not yet had their stories told comprise the thousands of human reasons why stopping and reversing the trend of overcriminalization fully merits this Committee's consideration. Thank you again for inviting me to testify, and thank you for your principled, bipartisan stance against these injustices.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April 2010

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About the Organizations

The **National Association of Criminal Defense Lawyers** (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL's core mission is to: Ensure justice and due process for persons accused of crime; Foster the integrity, independence and expertise of the criminal defense profession; and Promote the proper and fair administration of criminal justice.

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, *amicus* advocacy, and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's 11,000 direct members—and more than 90 state, local and international affiliates with an additional 40,000 members—include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America's criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

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Foreword

A core principle of the American system of justice is that individuals should not be subjected to criminal prosecution and conviction unless they intentionally engage in inherently wrongful conduct or conduct that they know to be unlawful. Only in such circumstances is a person truly blameworthy and thus deserving of criminal punishment. This is not just a legal concept; it is the fundamental anchor of the criminal justice system. The Heritage Foundation and the National Association of Criminal Defense Lawyers (NACDL) share a common concern that expansive and ill-considered criminalization has cast the nation's criminal law enforcement adrift from this anchor. In the absence of a clearly articulated nexus between a person's conduct and his mental culpability, criminal laws subject the innocent to unjust prosecution and punishment for honest mistakes or actions that they had no reason to know are illegal.

In recent decades, the federal government has increasingly employed criminal statutes to regulate behavior. Congress has invoked this most awesome power of government—the power to prosecute and imprison—as a regulatory mechanism, something never contemplated by the nation's founders. By the end of 2007, the United States Code included over 4,450 federal crimes; an estimated tens of thousands more are located in the federal regulatory code. But something fundamental is often lacking from this tidal wave of penal provisions: meaningful *mens rea* requirements. *Mens rea* is a Latin term describing a culpable mental state, without which there can be no crime. Lamentably, Congress has enacted scores of laws with weak or no *mens rea* requirements, the result of a legislative process that is haphazard at best and arbitrary at worst. In doing so, it has eroded the principle of fair notice beyond recognition and dangerously impaired the justification for criminal punishment that has for centuries been based on an individual's intent to commit a wrongful act. This trend undermines confidence in government and risks pervasive injustice.

The Heritage Foundation is a research and educational institution whose mission is to formulate and promote conservative public policies based upon the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense. NACDL is the preeminent organization in the United States advancing the goals of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing and to seek a rational and humane criminal justice system. While Heritage and NACDL by no means share a common overall agenda, the two organizations are united in the belief that criminal lawmaking must return to its fundamental roots by requiring true blameworthiness and providing fair notice of potential criminal liability. Penal statutes that do not provide for a clear and meaningful *mens rea* requirement are unacceptable. This report is an effort to demonstrate the depth and breadth of this problem.

Through an analysis of legislation introduced in the 109th Congress, this report shows just how far federal criminal lawmaking has drifted from its doctrinal anchor. It establishes that the legislative process regularly results in the passage of laws that lack adequate *mens rea* requirements. Further, it shows that the legislative process itself is flawed and disjointed. The absence of any uniform or consistent process to calibrate the intent requirements in penal provisions virtually guarantees the enactment of laws that lack meaningful or consistent *mens rea* components. Finally, this report proposes commonsense, workable solutions that can stem, and possibly reverse, this troubling trend.

Heritage and NACDL are proud to have collaborated on this project. We are confident that it will heighten awareness concerning a burgeoning problem that transcends political affiliation or ideology. We are equally confident that fostering that awareness will promote principled reform.

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Acknowledgements

This study and report are the results of a collaborative project between the National Association of Criminal Defense Lawyers (NACDL) and The Heritage Foundation. The authors would like to thank the Board of Trustees of The Heritage Foundation and the Board of Directors of NACDL, as well as President Cynthia Hujar Orr and the officers of NACDL, for their support.

Many individuals provided invaluable guidance and oversight for this project, particularly Edwin Meese, Chairman of Heritage's Center for Legal & Judicial Studies, and Norman L. Reimer, Executive Director of NACDL. The success of this project would not have been possible without the dedicated efforts and insightful analysis provided by Robert Alt, Shana-Tara Regon, and Ivan Dominguez. Todd Gaziano, Kyle O'Dowd, Jack King, Quintin Chatman, Christopher Norfleet, Levi Swank, and Drew Sarrett provided invaluable input and assistance at multiple stages of the project, and Stephanie Martz had a key role in the development of the study's initial concept. Numerous law clerks and interns from both organizations provided valuable assistance as well.

David Muhlhausen and Heritage's Center for Data Analysis worked efficiently to develop and conduct the statistical analyses and conclusions supporting some of this study's findings. The authors also wish to acknowledge the hard work provided by the members of the art, creative services, design, marketing, and editorial departments of both organizations.

Finally, the authors wish to thank Jon May, Jeffrey Parker, Ellen Podgor, Irwin Schwartz, Earl Silbert, Alixandra Smith, and Andrew Weissmann for reviewing early drafts of the report and offering candid and helpful feedback.

Despite these acknowledgements, any errors or omissions in the study or report are solely the responsibility of the authors.

Fact Sheet

Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law

- A core principle of the American system of justice is that no one should be subjected to criminal punishment for conduct that he did not know was illegal or otherwise wrongful.
- This principle of fair notice, which has been a cornerstone of our criminal justice system since the nation's founding, is embodied in the requirement that, with rare exceptions, the government must prove the defendant acted with *mens rea*—a "guilty mind"—before subjecting him to criminal punishment.
- Members of the 109th Congress (2005–2006) proposed 446 criminal offenses that did not involve violence, firearms, drugs and drug trafficking, pornography, or immigration violations.
- Of these 446 proposed non-violent criminal offenses, 57 percent lacked an adequate *mens rea* requirement. Worse, during the 109th Congress, 23 new criminal offenses that lack an adequate *mens rea* requirement were enacted into law.
- Congress's expertise for crafting criminal offenses resides in the House and Senate Judiciary Committees. Only these committees have express jurisdiction over federal criminal law, yet of the 446 criminal offenses studied, over one-half were not sent to the House or Senate Judiciary Committees for review and deliberation.
- By consistently neglecting the special expertise of the two judiciary committees when drafting criminal offenses, Congress is endangering civil liberties.
- Without reforms like those recommended in this report, innocent individuals are at risk of unjust conviction under federal criminal offenses that have inadequate *mens rea* requirements.

Recommendations

Congress should:

- Enact default rules of interpretation ensuring that guilty-mind requirements are adequate to protect against unjust conviction.
- Codify the rule of lenity, which grants defendants the benefit of the doubt when Congress fails to legislate clearly.
- Require adequate judiciary committee oversight of every bill proposing criminal offenses or penalties.
- Provide detailed written justification for and analysis of all new federal criminalization.
- Redouble efforts to draft every federal criminal offense clearly and precisely.

Executive Summary

For centuries, "guilty mind," or *mens rea*, requirements restricted criminal punishment to those who were truly blameworthy and gave individuals fair notice of the law. No person should be convicted of a crime without the government having proved that he acted with a guilty mind—that is, that he intended to violate a law or knew that his conduct was unlawful or sufficiently wrongful so as to put him on notice of possible criminal liability. In a sharp break with this tradition, the recent proliferation of federal criminal laws has produced scores of criminal offenses that lack adequate *mens rea* requirements and are vague in defining the conduct that they criminalize.

The National Association of Criminal Defense Lawyers and The Heritage Foundation jointly undertook an unprecedented look at the federal legislative process for all studied non-violent criminal offenses introduced in the 109th Congress in 2005 and 2006. This study revealed that offenses with inadequate *mens rea* requirements are ubiquitous at all stages of the legislative process: Over 57 percent of the offenses introduced, and 64 percent of those enacted into law, contained inadequate *mens rea* requirements, putting the innocent at risk of criminal punishment. Compounding the problem, this study also found consistently poor legislative drafting and broad delegation of Congress's authority to make criminal law to unaccountable regulators.

According to several scholars and legal researchers, Congress is criminalizing everyday conduct at a reckless pace. This study provides further evidence in support of that finding. Members of the 109th Congress proposed 446 non-violent criminal offenses and Congress enacted 36 of them. These totals do not include the many offenses concerning firearms, possession or trafficking of drugs or pornography, immigration violations, or intentional violence. The sheer number of criminal offenses proposed demonstrates why so many of them were poorly drafted and never subjected to adequate deliberation and oversight.

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

These failings appear to be related to the reckless pace of criminalization. Congress is awash with criminal legislation, and the House and Senate Judiciary Committees lack the time and opportunity to review each criminal offense and correct weak *mens rea* requirements. Over half (52 percent) of the offenses in the study were never referred to either judiciary committee. This is despite these committees' special expertise in crafting criminal offenses, knowledge of the priorities and resources of federal law enforcement, and express jurisdiction over federal criminal law.

One encouraging finding is that oversight by the House Judiciary Committee does improve the quality of *mens rea* requirements. Oversight includes marking up a bill or reporting it out of committee for

consideration by the full House of Representatives. Based upon this analysis, and upon the specific criminal law jurisdiction and expertise of the House and Senate Judiciary Committees, automatic referral of all bills adding or modifying criminal offenses to these two committees is likely to improve *mens rea* requirements. More importantly, automatic referral could stem the tide of criminalization by forcing Congress to adopt a measured and prioritized approach to criminal lawmaking. By neglecting the expertise of the judiciary committees, Congress endangers civil liberties.

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

To begin to solve the problems identified in the study, this report offers five specific recommendations for reform. Congress should:

1. Enact default rules of interpretation to ensure that *mens rea* requirements are adequate to protect against unjust conviction.

Congress should enact statutory law that directs federal courts to grant a criminal defendant the benefit of the doubt when Congress has failed to adequately and clearly define the *mens rea* requirements for criminal offenses and penalties. First, this reform would address the unintentional omission of *mens rea* terminology by directing federal courts to read a protective, default *mens rea* requirement into any criminal offense that lacks one. Second, it would direct courts to apply any introductory or blanket *mens rea* terms in a criminal offense to each element of the offense. In this way, it would improve the *mens rea* protections throughout federal criminal law, provide needed clarity, force Congress to give careful consideration to *mens rea* requirements when adding or modifying criminal offenses, and help ensure that fewer individuals are unjustly prosecuted and punished.

2. Codify the common-law rule of lenity, which grants defendants the benefit of doubt when Congress fails to legislate clearly.

The rule of lenity directs a court, when construing an ambiguous criminal law, to resolve the ambiguity in favor of the defendant. In a recent U.S. Supreme Court decision, *United States v. Santos*, Justice Antonin Scalia explained that this "venerable rule vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." Giving the benefit of the doubt to the defendant is consistent with the traditional rules that all defendants are presumed innocent and that the government bears the burden of

proving every element of a crime beyond a reasonable doubt. Codifying this venerable common-law rule would serve the rights of all defendants at every stage of the criminal process. This reform would also protect Congress's lawmaking authority because it would restrict the ability of federal courts to legislate from the bench and reduce the frequency with which those courts must speak because Congress has failed to legislate clearly.

3. Require judiciary committee oversight of every bill that includes criminal offenses or penalties.

Congressional rules should require every bill that would add or modify criminal offenses or penalties to be subject to automatic referral to the relevant judiciary committee. A "sequential" referral requirement would give the House or Senate Judiciary Committee exclusive control over a bill until it reports the bill out or the time limit for its consideration expires, and only at that point could the bill move to another committee. The judiciary committees have special expertise in crafting criminal offenses, knowledge of the priorities and resources of federal law enforcement, and express jurisdiction over federal criminal law. While automatic referral may not produce stronger, more protective *mens rea* requirements, it should result in clearer, more specific, and higher quality criminal offenses. More importantly, this rule could help stem the tide of criminalization by forcing Congress to adopt a measured and prioritized approach to criminal lawmaking. Further, it would increase congressional accountability for new criminalization and ultimately reduce overcriminalization.

4. Require detailed written justification for and analysis of all new federal criminalization.

This reform would require the federal government to produce a standard public report assessing the purported justification, costs, and benefits of all new criminalization. This report must include:

- A description of the problem that the criminal offense or penalty is intended to redress, including an account of the perceived gaps in existing law, the wrongful conduct that is currently unpunished or under-punished, and any specific cases or concerns motivating the legislation;
- A direct statement of the express constitutional authority under which the federal government purports to act;
- An analysis of whether the criminal offenses or penalties are consistent with constitutional and prudential considerations of federalism;
- A discussion of any overlap between the conduct to be criminalized and conduct already criminalized by existing federal and state law;
- A comparison of the new law's penalties with the penalties under existing federal and state laws for comparable conduct;
- A summary of the impact on the federal budget and federal resources, including the judiciary, of enforcing the new offense and penalties to the degree required to solve the problem that the new criminalization purports to address;
- A review of the resources that federal public defenders have available and need in order to adequately defend indigent defendants charged under the new law; and

- An explanation of how the *mens rea* requirement of each criminal offense should be interpreted and applied to each element of the offense.

This reform would also require Congress to collect information on regulatory criminalization, including an enumeration of all new criminal offenses and penalties that federal agencies have added to federal regulations, as well as the specific statutory authority supporting these regulations.

Mandatory reporting would increase accountability by requiring the federal government to perform basic analysis of the grounds and justification for all new and modified criminal offenses and penalties.

5. Draft every criminal offense with clarity and precision.

One overarching reform recommendation is a slower, more focused, and deliberative approach to the creation and modification of federal criminal offenses. When drafting criminal offenses, Members of Congress should always:

- Include an adequate *mens rea* requirement;
- Define both the *actus reus* (guilty act) and the *mens rea* (guilty mind) of the offense in specific and unambiguous terms;
- Provide a clear statement of whether the *mens rea* requirement applies to all the elements of the offense or, if not, which *mens rea* terms apply to which elements of the offense; and
- Avoid delegating criminal lawmaking authority to regulators.

The importance of sound legislative drafting cannot be overstated, for it is the drafting of a criminal offense that frequently determines whether a person acting without intent to violate the law and lacking knowledge that his conduct was unlawful or sufficiently wrongful to put him on notice of possible criminal liability will endure a life-altering prosecution and conviction—and lose his freedom.

It is equally important that Members of Congress resist the temptation to bypass the arduous task of drafting criminal legislation by delegating it to unelected regulators. It is the legislative branch's responsibility to ensure that no individual is punished if Congress itself did not devote the time and resources necessary to clearly and precisely articulate the law giving rise to that punishment.

These five reforms would help ensure that every proposed criminal offense receives the attention due whenever Congress determines how to focus the greatest power government routinely uses against its own citizens: the criminal law. Coupled with increased public awareness and scrutiny of the criminal offenses Congress enacts, these reforms would strengthen the protections against unjust conviction and prevent the dangerous proliferation of federal criminal law. With their most basic liberties at stake, Americans are entitled to no less.

WITHOUT INTENT

Without Intent

How Congress Is Eroding the Criminal Intent Requirement in Federal Law

Few protections against unjust criminal conviction and punishment are as essential as ensuring that every criminal offense includes a meaningful *mens rea*, or "guilty mind," requirement.[1] With rare exception, no person should be convicted of a crime without the government having proved that he acted with a guilty mind—that is, that he intended to violate a law or knew that his conduct was unlawful or sufficiently wrongful so as to put him on notice of possible criminal liability. Absent a meaningful *mens rea* requirement, a defendant's other legal and constitutional rights cannot protect him from unjust punishment for making honest mistakes or engaging in conduct that he had no reason to know was illegal.

For crimes involving inherently wrongful conduct—such as murder, arson, rape, theft, and robbery—the law properly allows the inference of a guilty mind if the government proves that the conduct was committed voluntarily. With such crimes, the law properly assumes that inherent wrongfulness forecloses the possibility of punishing individuals who are not truly culpable.

Many criminal offenses, however, lack that kind of protection. Hundreds of federal statutory offenses, and an estimated tens of thousands of federal regulatory offenses, criminalize conduct that is *not* inherently wrongful. Rather, such conduct is wrongful only because it is prohibited by law, or *malum prohibitum*. *Malum prohibitum* offenses cover a broad range of conduct, such as failure to comply with specific regulatory or reporting requirements. Unlike with crimes involving inherently wrongful conduct, the conduct itself usually does not justify the inference that a criminal defendant knew that his acts were prohibited, that he intended to violate the law, or that he had any knowledge that his conduct was wrongful in any way. Therefore, to ensure that only persons who are truly culpable can be convicted and punished, the definitions of *malum prohibitum* offenses must include protective *mens rea* requirements. Unfortunately, many of the thousands of *malum prohibitum* offenses in federal law do not.

With rare exception, no person should be convicted of a crime without the government having proved that he acted with a guilty mind—that is, that he intended to violate a law or knew that his conduct was unlawful or sufficiently wrongful so as to put him on notice of possible criminal liability.

This report presents the results of a study of legislation containing criminal offenses introduced in a recent Congress. The study asked whether Members of Congress included meaningful *mens rea* requirements in the scores of non-violent and non-drug criminal offenses[2] (hereinafter "non-violent offenses") that Congress considered. Its results are striking: Over 57 percent of the offenses considered by the 109th Congress contained inadequate

mens rea requirements, putting the innocent at risk of criminal punishment.[3] Compounding the problem, this study also found consistently poor legislative drafting and broad delegation of Congress's authority to make criminal laws to unelected officials in administrative agencies—that is, criminalization by regulation.

The study asked whether Members of Congress included meaningful* mens rea *requirements in the scores of non-violent and non-drug criminal offenses that Congress considered. Its results are striking: Over 57 percent of the offenses considered by the 109th Congress contained inadequate* mens rea *requirements, putting the innocent at risk of criminal punishment.

The study identified three main causes of Congress's failure to include meaningful *mens rea* requirements in criminal offenses. First, there is the fragmented and disjointed process for creating and modifying criminal offenses. Despite the House and Senate Judiciary Committees' expertise and subject-matter jurisdiction, over half (52 percent) of the offenses in the study were not referred to either committee for oversight.

Second is the flood of proposed criminal offenses. Crafting offenses that properly channel government's power to impose criminal punishment demands substantial debate and deliberation. Yet in the 109th Congress, so many bills (203) were proposed containing so many non-violent offenses (446) that it is unreasonable to expect that any substantial proportion of these offenses could have received adequate legislative oversight and scrutiny. These numbers would rise even higher if they included the enormous number of bills containing criminal offenses that concern firearms, possession or trafficking of drugs or pornography, immigration violations, and intentional violence. The sheer number of criminal offenses proposed demonstrates why so many of them were poorly drafted and were never the subject of adequate deliberation and oversight.

Third, Congress's choice to delegate its criminal lawmaking authority to executive agencies has grown more common. This study identified at least 63 offenses that, if enacted, would hand over this authority to unelected agency officials. That constitutes 14 percent of the offenses included in the study. The study's totals and percentages do not account for the many additional criminal offenses that federal agencies would be authorized to create in this manner.

One encouraging finding is that oversight by the House Judiciary Committee does improve the quality of *mens rea* requirements. Oversight includes the committee marking up a bill or reporting it out of committee for consideration by the full House of Representatives. Based upon this analysis, and upon the specific criminal law jurisdiction and expertise of the House and Senate Judiciary Committees, automatic sequential referral[4] of all bills adding or modifying criminal offenses to these two committees is likely to improve *mens rea* requirements.

The number of new criminal offenses proposed and enacted in the 109th Congress was by no means exceptional.[5] The recent proliferation of federal criminal law has produced scores of criminal offenses that lack adequate *mens rea* requirements and are vague in defining the conduct that they criminalize. The study reported here supports the conclusion of a growing number of commentators and experts that the time has come for Congress to stop this dangerous trend, to acknowledge the threat represented to individual and business civil liberties by this unprincipled form of criminalization, and to carry out critical reforms to federal criminal law that will protect individuals and businesses from the risk of unjust prosecution and conviction.

I. Criminal Punishment Requires Culpability and Fair Notice

The greatest power that any civilized government routinely uses against its own citizens is the power to prosecute and punish under criminal law. As Columbia law professor Herbert Wechsler famously put it, criminal law "governs the strongest force that we permit official agencies to bring to bear on individuals."[6] This necessarily distinguishes the criminal law from all other areas of law and makes it uniquely susceptible to abuse and injustice. More than any other area of law, the criminal law, in its prohibitions and commands, as well as its power to punish, must be firmly grounded in fundamental principles of justice. Such principles are expressed in both substantive and procedural protections.

One fundamental principle is embodied in the doctrine of fair notice. The fair notice doctrine requires that, in order for a person to be punished criminally, the offense with which she is charged must provide adequate notice that the conduct in which she engaged was prohibited. The Supreme Court has recognized that fair notice is a component of the Constitution's due process protections. For example, in the course of reversing the convictions of civil rights protestors because the law under which they were convicted was "void for vagueness" (a species of the fair notice doctrine), the Supreme Court stated: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[7] It is thus a fundamental principle of due process that "a criminal law must give fair warning of the conduct it makes a crime."[8]

Related to fair notice is the principle that the government must prove both "an evil-meaning mind" and "an evil-doing hand" before criminal punishment may justly be imposed.[9] This dual requirement is typically referred to by the Latin terms *mens rea* and *actus reus*, which translate to "guilty mind" and "guilty act." Whereas the *actus reus* is generally objective and physical in nature, the *mens rea* is generally subjective and psychological.[10] Both are necessary in order to impose criminal punishment; neither alone is sufficient. The *mens rea* requirement has been a part of Anglo-American law for over six centuries,[11] and requiring the government to prove that a defendant had a guilty mind at the time she committed a guilty act "is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[12] The Supreme Court has described this principle as being "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[13] Because the federal criminal justice system does not permit courts to define criminal offenses under common law, defining the conduct and mental state constituting a federal crime is the responsibility of Congress.[14]

The traditional distinction between *malum in se* conduct and *malum prohibitum* conduct is essential to a clear understanding of the modern role of *mens rea* requirements. Conduct that is inherently evil or wrongful is *malum in se*, or "evil in itself." Historically, *malum in se* offenses comprised the bulk of all criminal offenses, such as murder, arson, theft, robbery, and rape. By their very nature, these acts are wrongful, independent of their status under law. Therefore, fair notice of illegality can reasonably be imputed to the average person. Clearly, no person who kills another intentionally, rather than by accident or inadvertence, should be able to claim ignorance of the law as a defense. With few exceptions, the average person can be presumed to know that inherently wrongful acts are also unlawful.

The fair notice doctrine requires that, in order for a person to be punished criminally, the offense with which she is charged must provide adequate notice that the conduct in which she engaged was prohibited.

Conversely, *malum prohibitum* conduct is not inherently evil or necessarily wrongful, but rather "prohibited evil." *Malum prohibitum* offenses include jaywalking, fishing without a permit, or

shipping products safely but in a manner inconsistent with federal or state regulations. Although there may be legitimate reasons for prohibiting such conduct, the acts themselves, independent of the prohibition, are not inherently wrongful.[15]

Historically, it was presumed that the law, and especially the criminal law, was "definite and knowable,"[16] even by the average person. Ignorance of the law was therefore no defense to criminal punishment. The small number of criminal offenses, and the fact that the majority of offenses criminalized *malum in se* conduct, made this presumption both reasonable and just.

With over 4,450 federal statutory crimes and an estimated tens of thousands more in federal regulations, neither criminal law professors nor lawyers who specialize in criminal law can know all of the conduct that is criminalized. Ordinary individuals are at an even greater disadvantage.

With the enormous growth in *malum prohibitum* offenses, however, this presumption has become a trap for the unwary. As criminal law professor Joshua Dressler has stated:

> Whatever its plausibility centuries ago, the "definite and knowable" claim cannot withstand modern analysis. There has been a "profusion of legislation making otherwise lawful conduct criminal (*malum prohibitum*)." Therefore, *even a person with a clear moral compass is frequently unable to determine accurately whether particular conduct is prohibited*. Furthermore, many modern criminal statutes are exceedingly intricate. In today's complex society, therefore, a person can reasonably be mistaken about the law.[17]

Indeed, with over 4,450 federal statutory crimes and an estimated tens of thousands more in federal regulations,[18] neither criminal law professors nor lawyers who specialize in criminal law can know all of the conduct that is criminalized. Ordinary individuals are at an even greater disadvantage.

Accordingly, one of the critical functions served by an adequate *mens rea* requirement is to protect those who are reasonably mistaken about or unaware of the law. As one travels along the continuum from pure *malum in se* conduct, such as murder, towards entirely *malum prohibitum* conduct, such as fishing without a permit, the fair notice provided by the conduct itself diminishes to the point of vanishing. It is an obvious injustice to punish an individual for conduct that is not inherently wrongful if she did not know, and had no reasonable prospect of knowing, that her conduct was prohibited by law. This is why the principle that finding a person criminally responsible requires a *mens rea*, or guilty mind, and not just an *actus reus*, or guilty act, is essential to a just system of criminal law. When the *actus reus* is one that is *malum prohibitum*, fair notice is diminished or eliminated, and the burden to compensate for that deficiency falls squarely upon the *mens rea* requirement.

When society, through its elected representatives, specifies the particular conduct and mental state that constitute a crime, "it makes a critical moral judgment about the wrongfulness of such conduct, the resulting harm caused or threatened to others, and the culpability of the perpetrators."[19] Therefore, a proper and adequate *mens rea* requirement should reflect the differences in culpability that result when individuals with different mental states engage in the same prohibited conduct. This point is well illustrated by the differing *mens rea* requirements that apply to homicide, or the killing of a human being. Even with the same bad act—a killing—different levels of *mens rea* define different offenses, which carry different punishments. Thus, in federal law, manslaughter is the unlawful killing of a human being "without malice" and carries a maximum sentence of 15 years in prison.[20] Murder in the second degree requires "malice aforethought"[21] and carries a maximum sentence of life imprisonment.[22] Murder in the first degree requires both "malice aforethought" and that the killing be "willful, deliberate, malicious, and premeditated"; it carries a maximum sentence of death.[23] *Mens rea* requirements such as these not only help to assign appropriate levels of punishment, but also to protect from unjust

Homicide Offense	Mens Rea Requirement	Maximum Penalty
Murder in the first degree (18 U.S.C. § 1111(a))	"malice aforethought" and "willful, deliberate, malicious, and premeditated"	Death
Murder in the second degree (18 U.S.C. § 1111(a))	"malice aforethought"	Life imprisonment
Manslaughter (18 U.S.C. § 1112)	"without malice"	15 years

criminal punishment those who committed prohibited conduct accidentally or inadvertently.

Homicide presents a relatively straightforward example because the killing of a human being is so grievous an act. Lesser wrongs may require even more attention to the *mens rea* requirements associated with them. The wrongful conduct at the heart of many *malum prohibitum* offenses is falsehood or deceit. Such conduct generally carries with it some degree of culpability, but not everything that is a "sin" is necessarily punishable as a crime.[14] If all "immoral" behavior were subject to criminal punishment, the only things protecting any individual from criminal conviction and punishment would be chance and the whims of prosecutors. A criminal offense should require more than a mere act of falsehood to ensure that only those who act with the degree of culpability meriting criminal punishment can be convicted.

As the Supreme Court has recognized, "All are entitled to be informed as to what the State commands or forbids."[15] By its own terms, a criminal offense should prevent conviction of an individual acting without intent to violate the law and lacking knowledge that her conduct was unlawful or sufficiently wrongful so as to put her on notice of possible criminal liability. A person who acts without such intent and knowledge does not deserve government's greatest punishment or the extreme moral and societal censure such punishment carries. Especially today, when the number of *malum prohibitum* offenses in federal law has surged, careful consideration must be given to the fundamental principles of culpability and fair notice when defining the *mens rea* and *actus reus* that constitute a federal crime. In the federal system, this critical responsibility falls on the shoulders of Congress, which must therefore engage in careful drafting, deliberation, and debate before creating or modifying federal criminal offenses.

Mens rea requirements not only help to assign appropriate levels of punishment, but also to protect from unjust criminal punishment those who committed prohibited conduct accidentally or inadvertently.

II. The Proliferation of Criminal Offenses with Inadequate *Mens Rea* Requirements Undermines Federal Criminal Law

Congress routinely creates and amends federal criminal offenses. Federal statutes alone include over 4,450 criminal offenses, a number that does not take into account the thousands of criminal offenses dispersed throughout federal regulations.[16] The almost inevitable response to any newsworthy problem is the introduction of federal legislation containing new criminal provisions or increased criminal penalties.[17] This knee-jerk tendency, and the resulting over-federalization of criminal law, is frequently a product of political considerations.[18] As a result, practitioners, academics, and even the Department of Justice itself have struggled to document the actual number of federal statutory offenses.[19]

The sheer size of the federal criminal law is so great that no one has even been able to find and provide a definitive count of the thousands of statutory criminal offenses in federal law. Several researchers, however, have made estimates of the number of criminal offenses in federal statutes and reached general conclusions about the nature of those offenses. In 1998, the American Bar Association's Task Force on the Federalization of Crime published a report finding that federal criminalization had proceeded at a rapid pace since the Department of Justice had estimated, over 10 years earlier, that there were more than 3,000 crimes in the U.S. Code.[10] It found that, of the federal criminal provisions passed into law during the 132-year period from the end of the Civil War to 1996, fully 40 percent were enacted in the 26 years from 1970 to 1996.[11] The ABA Task Force explained, however, that

The sheer size of the federal criminal law is so great that no one has even been able to find and provide a definitive count of the thousands of statutory criminal offenses in federal law.

> an exact count of the present "number" of federal crimes contained in the statutes (let alone those contained in administrative regulations) is difficult to achieve, and the count [is] subject to varying interpretations. In part, the reason is not only that the criminal provisions are now so numerous and their location in the books so scattered, but also that federal criminal statutes are often complex. One statutory section can comprehend a variety of actions, potentially multiplying the number of federal "crimes" that could be enumerated. (For example, the language of 18 U.S.C. § 2113 encompasses bank robbery, extortion, theft, assaults, killing hostages, and storing or selling anything of value knowing it to have been taken from a bank, etc.) Depending on how all this subdivisible and dispersed law is counted, the true number of federal crimes multiplies.[12]

Further complicating an accurate count, the ABA Task Force said, are the "large number of sanctions...dispersed throughout the thousands of administrative 'regulations' promulgated by various governmental agencies under congressional statutory authorization. Nearly 10,000 regulations mention some sort of sanction, many clearly criminal in nature, while many others are designated 'civil.'"[13] Demonstrating the diffused and confusing nature of federal criminal law, a "handful of regulations purport to criminalize conduct without connecting the prohibition to a congressional statute."[14]

Ten years after the ABA Task Force report, a study by Professor John S. Baker estimated that the United States Code included at least 4,450 federal crimes at the end of 2007.[15] Of these, 452 had been added in the eight years from 2000 through 2007, an average rate of 56.5 new crimes per year. This rate, observed Baker, is

> roughly the same rate at which Congress created new crimes in the 1980s and 1990s. ... So for the past twenty-five years, a period over which the growth of the federal criminal law has come under increasing scrutiny, Congress has been creating over 500 new crimes per decade.[16]

The rate at which Congress creates criminal offenses increases during election years, Baker found.[17] Although Baker's study acknowledges the same difficulties cited by the ABA Task Force in obtaining an accurate count, the data demonstrate that, from 2000 through 2007, Congress created, on average, one new crime a week for every week of every year.[18]

Beyond the rate at which new criminal offenses are being enacted, three additional concerns quickly emerge when studying the legislative process for criminal offenses:

1) Lack of attention paid to and erosion of *mens rea* requirements;
2) Poor legislative drafting; and
3) Delegation of criminal lawmaking authority through regulatory criminalization.

All three of these practices contribute to the problems of overbroad criminal liability and the lack of fair notice that the law is supposed to provide.

The first, the erosion of *mens rea* requirements, has serious implications. As previously discussed, it is a fundamental principle of criminal law that, before criminal punishment can be imposed, the government must prove both a guilty act (*actus reus*) and a guilty mind (*mens rea*). Despite this rule, omission of *mens rea* requirements has become commonplace in federal criminal statutes. Where Congress does include a *mens rea* requirement, it is often so weak that it does not protect defendants from punishment for making honest mistakes or engaging in conduct that was not sufficiently wrongful to give notice of possible criminal responsibility. The resulting criminal offenses fail to satisfy the necessary and well-established principle that criminal liability rests upon an "evil-meaning mind" and an "evil-doing hand."[39]

If the erosion of *mens rea* requirements in federal criminal statutes were not sufficiently problematic in its own right, its harms are compounded by poor legislative draftsmanship and regulatory criminalization. A *mens rea* requirement cannot serve its purpose when its meaning or application is not clear on the face of the statute. Worse, *malum prohibitum* offenses, which constitute many of the criminal offenses in the federal code and almost all offenses created through regulation, often contain weak *mens rea* requirements or none at all. Absent a meaningful *mens rea* requirement, the principle of fair notice is lost when criminal punishment is imposed for conduct that does not conform to what reason or experience would suggest may be illegal.[40]

Second, federal criminal offenses are frequently drafted without the clarity and specificity that have traditionally been required for the imposition of criminal liability. As the ABA Task Force found, federal criminal statutes often prohibit such exceedingly broad ranges of conduct, in language that is vague and imprecise, that few lawyers, much less non-lawyers, could determine what specific conduct they prohibit and punish. And even when the *actus reus* is described with clarity, the *mens rea* requirement may be imprecise. A common result of poor legislative drafting is uncertainty as to whether a *mens rea* term in a criminal offense applies to all of the elements of the offense or, if not, to which elements it does apply.

Consider, for example, 18 U.S.C. § 1346, commonly referred to as the "honest services fraud" statute, which defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." This definition applies to all the forms of fraud proscribed by Chapter 63 of the United States Code, including mail and wire fraud. The honest services fraud statute, if inserted into the definition of federal wire fraud, results in the following criminal offense:

> Whoever, having devised or intending to devise any scheme or artifice [to deprive another of the intangible right of honest services] . . . transmits or causes to be transmitted by means of wire, radio, or television communication interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.[41]

Many legal experts have criticized this resulting offense as being vague and overbroad. It fails to define or limit the phrase "intangible right of honest services," and more than 20 years after the statute's enactment, the federal courts of appeals are hopelessly divided on how to interpret this phrase. The only hope for resolution comes from the Supreme Court's recent decision to hear three cases challenging charges brought and convictions obtained under the honest services fraud statute.[42]

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One example of poor draftsmanship found during this study is an offense in S. 2509, the National Insurance Act of 2006. Section 1713(b) of this

legislation would create several new criminal offenses relating to "insurance fraud." One of these offenses reads:

> Any insurance person who is engaged in the business of insurance who knowingly and intentionally permits the participation described in paragraph (1) shall be fined as provided in this title or imprisoned not more than 5 years, or both.[43]

The referenced paragraph, in turn, states:

> [A]ny individual who has been convicted of any criminal felony involving dishonesty or breach of trust, and who participates in the business of insurance shall be fined…or imprisoned not more than 5 years, or both.[44]

The phrase "business of insurance" is given a broad definition by existing law.[45] The term "participate," however, is not defined by statute and could be read to include the work or involvement of employees who have incidental contact with the "business of insurance." The phrase "dishonesty or breach of trust" is also undefined and potentially very broad. From the text of this offense, it seems likely that an insurance agent who hires either a messenger to deliver insurance documents to a client or a surveyor who assists in evaluating real property would be at risk of criminal punishment if the messenger or surveyor had been convicted of a felony for lying under oath in a domestic matter 20 years earlier. No one, however, could say for sure with any degree of certainty, and even venturing an opinion would, at a minimum, require significant research and analysis by a lawyer. Under the plain text of the offense, it appears that the insurer need not have knowledge of this prohibition—much less understand it—in order to be convicted and punished for violating it.

Remarkably, it is only after years of litigation and the opinions of three different courts, including the highest court in the land, that individuals, lawyers, and judges finally have a clear determination of what the government is required to prove in order to impose criminal liability under this one-sentence criminal provision.

In a recent case, *Flores-Figueroa v. United States*, the Supreme Court considered the difficulties of interpretation caused by a poorly drafted *mens rea* requirement in the federal aggravated identity theft statute.[46] The contested offense provides an additional two years of imprisonment for any individual who, in the course of or in relation to certain other felonies, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person."[47] The offense's title, "Aggravated identity theft," indicates that it is targeted at theft, which the law typically defines as an act by which a person obtains property belonging to another *with intent to deprive the owner* of the value of the property and to appropriate it to his own use. The defendant in this case admitted that he intended to obtain identification numbers that were phony, and pled guilty to crimes related to that intent, but he asserted that he had no knowledge that the numbers on the identification cards actually belonged to another person. The government never contested that point. Instead, it argued that it need not prove "that the defendant *knew* that the 'means of identification' he or she unlawfully transferred, possessed, or used, in fact, belonged to 'another person.'"[48]

The Supreme Court rejected that argument, holding that the statute requires the government "to show that the defendant knew that the means of identification at issue belonged to another person."[49] The Court reached this conclusion based on its view of the basic rules of grammar and the most natural meaning of the statute's plain language.[50]

Citing Justice Alito's concurring opinion, the majority acknowledged, however, that "the inquiry into a sentence's meaning is a contextual one."[51] Justice Alito's opinion explained that when interpreting a criminal statute such as this, "it is fair to begin with a general presumption that the specified *mens rea* applies to all the elements of an offense, but it must be recognized that there are instances in which context may well rebut that presumption."[52]

In support of this point, he cited two examples in which the contextual features of particular statutes suggest that the defendant need not *know* particular elements of the crimes.[9] Conversely, Justice Alito observed that "the Government has not pointed to contextual features that warrant interpreting [the aggravated identity theft statute] in a similar way."[10] The majority agreed.[11] Remarkably, it is only after years of litigation and the opinions of three different courts, including the highest court in the land, that individuals, lawyers, and judges finally have a clear determination of what the government is required to prove in order to impose criminal liability under this one-sentence criminal provision.

The third problem, regulatory criminalization, occurs when Congress delegates its legislative authority to define criminal offenses to another body, typically an executive branch agency. Delegation empowers the unelected officials who direct that agency, such as the Department of the Treasury or the Environmental Protection Agency, to decide what conduct will be punished criminally, rather than requiring Congress to make that determination itself. In this way, the executive branch of the federal government plays a substantial role in causing overcriminalization, far beyond the President's constitutional authority to veto or sign legislation.

In the usual case of regulatory criminalization, Congress delegates its criminal lawmaking authority by passing a statute that establishes a criminal penalty for the violation of any regulation, rule, or order promulgated by the agency or an official acting on behalf of that agency. Some of these provisions include *mens rea* terminology; for example, criminal responsibility might extend to "anyone who *knowingly* violates any regulation."[12] However, statutes authorizing regulatory criminalization often fail to include any *mens rea* terminology, and nothing guarantees that the resulting criminal regulations will themselves include a *mens rea* requirement, let alone adequate ones.

Beyond the constitutional concerns inherent in this delegation of criminal lawmaking authority, the actual practice of regulatory criminalization significantly increases the scope and the complexity of federal criminal law. In addition to the thousands of criminal offenses spread through the 49 titles of the United States Code, according to estimates tens of thousands of criminal offenses are similarly scattered throughout the over 200 volumes of federal regulations.[13] These regulations almost always proscribe conduct that is, at least in part, *malum prohibitum*. As a result, vast expanses of conduct are criminalized without any systematic congressional oversight and without providing any form of notice to the ordinary person that his everyday activities may be subject to criminal punishment.

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The practice of regulatory criminalization compounds the problems created by unclear, imprecise legislative drafting. Some or all of the elements of a particular criminal offense may be codified in regulations far removed from the actual statute that contains the *mens rea* requirement. Further, the elements that make up the complete offense can be spread across numerous regulations. For example, section 506(g)(2) of H.R. 3968 would impose a criminal penalty on any person "who knowingly…violates any other environmental protection requirement set forth in title III or any regulation issued by the Secretaries to implement this Act, any provision of a permit issued under this Act (including any exploration or operations plan on which such permit is based), or any condition or limitation thereof."[14] While the *mens rea* requirement, "knowingly," is located in the statutory provision, all of the prohibited conduct would be defined in any number of regulations and even individual permits issued as part of the regulatory and statutory scheme.

A similar example can be found in the Lacey Act,[15] which imposes civil and criminal penalties for violations of any law, treaty, or regulation of the United States or Indian tribal law concerning the taking of fish, wildlife, or plants. A sample of the statutory language establishing these criminal

offenses can be found in 16 U.S.C. § 3373(d)(1)(A), which provides a criminal penalty for any person who "knowingly imports or exports any fish or wildlife or plants in violation of any provision of this chapter," and in 16 U.S.C. § 3372(a)(1), which states that "[i]t is unlawful for any person…to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law." Again, *mens rea* terminology is included in the original statutory provision, but the specific prohibited conduct is spread across numerous laws, regulations, and even treaties.

As these examples demonstrate, even when Congress includes a *mens rea* requirement in a statute, that language, located in the federal code, can be so far removed from the language in federal regulations defining the prohibited conduct that it is difficult to determine what *mens rea* requirement, if any, applies to each element of the criminal offense.

The explosive growth that federal criminal law has undergone in recent decades should alone be sufficiently troubling to anyone in a free society. When coupled with the disappearance of adequate *mens rea* requirements, the proliferation of poorly drafted criminal offenses that are vague and overbroad, and the widespread delegation to unelected officials of Congress's authority to criminalize, the expanded federal criminal law becomes a broad template for the misuse and abuse of governmental power.

III. Rationale and Summary of Methodology

A. Rationale for the Study of the Legislative Process

This study fills a quantitative gap, addressing the increasing concern on the part of many academics and experts[6] over the number and scope of federal criminal offenses that lack adequate *mens rea* requirements. The study pursued two primary objectives:

This study fills a quantitative gap, addressing the increasing concern on the part of many academics and experts over the number and scope of federal criminal offenses that lack adequate mens rea *requirements.*

1) To determine whether the *mens rea* requirements of non-violent criminal offenses in bills enacted into law differ in quality and protectiveness from the *mens rea* requirements of non-violent criminal offenses in the entire set of bills introduced; and

2) To determine whether any routine action or stage in the federal legislative process results in *mens rea* requirements that are more or less protective of individuals who act without a sufficiently culpable mental state to warrant criminal punishment.

This study began with the working hypothesis that debate and oversight of proposed legislation in the House and Senate Judiciary Committees might improve the clarity of criminal offenses in bills moving through Congress and strengthen their *mens rea* requirements. The judiciary committees have special expertise in criminal law, criminal justice legislation, and related matters, and according to House and Senate rules, only the judiciary committees have express jurisdiction over criminal law and punishment.

In order to test this hypothesis, the study considered two questions:

1) How well do the *mens rea* requirements in each offense studied protect innocent actors, defined as those acting without

intent to violate the law and lacking the knowledge that their conduct is unlawful or sufficiently wrongful to put them on notice of possible criminal liability?

2) Is there a correlation between the protection afforded by a bill's *mens rea* requirements and its enactment, passage by a chamber, or consideration by a judiciary committee?

This study considers a *mens rea* requirement to be adequate if it is more likely than not to prevent the government from punishing a person who did not have a sufficiently culpable mental state to justify such punishment—that is, if the person did not know that her conduct was unlawful, did not intend to violate a law, and did not engage in conduct that was sufficiently wrongful to put her on notice of possible criminal liability. As used in this report, the term "unlawful" means prohibited by any law, whether that law is criminal, civil, or administrative in nature. The analysis does not assume that for criminal punishment to be imposed a person must know that she violated a law that carries a criminal penalty.

B. Summary of Methodology

The authors and their researchers analyzed the non-violent criminal offenses in 203 bills (128 from the House and 75 from the Senate) introduced during the course of the 109th Congress. Because many of the bills included more than one criminal offense meeting the study's criteria, the number of criminal offenses included in the study (446) is greater than the number of bills. Each offense's *mens rea* requirement was analyzed and graded as Strong, Moderate, Weak, or None. If a *mens rea* requirement fell between two categories, it was assigned an intermediate grade, for example, None-to-Weak. However, in order to give the benefit of the doubt to congressional drafting, these offenses were considered as having the higher, more protective grade for the purposes of this study's data reporting and statistical analyses. For example, an offense having a *mens rea* requirement falling between Weak and Moderate is categorized in the online appendix as Weak-to-Moderate but is treated as Moderate for all other purposes.

The analysis and grading were based on the level of protection provided by the actual language of the offense and were guided by Supreme Court decisions that set forth (relatively) clear statements defining or interpreting the mens rea terminology most commonly used in federal statutes.

The analysis and grading were based on the level of protection provided by the actual language of the offense and were guided by Supreme Court decisions that set forth (relatively) clear statements defining or interpreting the *mens rea* terminology most commonly used in federal statutes. When assessing each offense, the study did not adopt the perspective of how an ideal prosecutor would (or would not) charge the offense and did not consider whether prosecutorial discretion might protect potential defendants from unjust conviction. Similarly, the study did not consider how an ideal court would rule on a motion to dismiss or whether a court would apply a limiting construction to an offense (for example, the common-law rule of lenity) to aid a particular defendant.[11]

The researchers also collected data on several of the major actions that can be taken on legislation by Congress (referral to a judiciary committee, passage by a chamber, and enactment into law) and by a judiciary committee (hearing, markup, amendment, and reporting). The Heritage Foundation's Center for Data Analysis (CDA) then analyzed whether statistical, and possibly causal, correlations exist between these actions and the protectiveness of *mens rea* requirements.

The Methodological Appendix included at the end of this report provides a more complete description of the study's methodology.

IV. *Mens Rea* Data Analysis, Calculations, and Findings

This section presents a detailed explanation of the study's analysis, including examples of offenses from each category, a description of the resulting data, and the results of the statistical analyses.

A. *Mens Rea* Category Totals

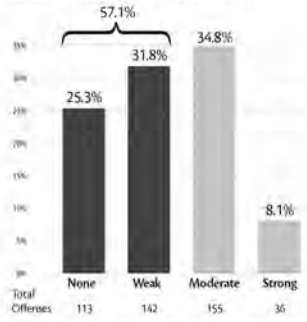
The total numbers of offenses in each of the four *mens rea* categories are summarized in Charts 1 and 2 below.

Chart 1

Majority of Offenses Had Inadequate *Mens Rea* Requirements

Of the 446 studied offenses, 255 (57 percent) were categorized as having either None or Weak *mens rea* requirements.

Studied Offenses, by *Mens Rea* Grade



***Mens Rea* Grade, by Congressional Chamber**

	None	Weak	Moderate	Strong	Total
House	82	90	83	22	277
Senate	31	52	72	14	169
Total	113	142	155	36	446

Source: Calculations by The Heritage Foundation and the National Association of Criminal Defense Lawyers.

Chart 1 reports the number and proportion of offenses in each *mens rea* category.

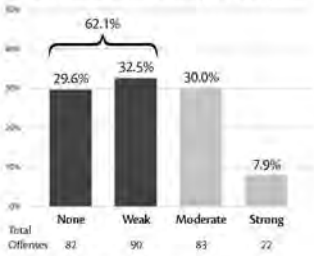
Chart 2 presents the data from Chart 1 broken down by chamber.

Chart 2

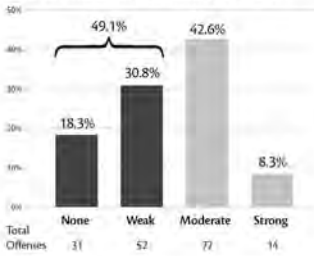
Inadequate *Mens Rea* Requirements More Likely in House Bills

Sixty-two percent of offenses in House bills contained inadequate *mens rea* requirements (None or Weak), compared to 49 percent of offenses in Senate bills.

Studied Offenses in the House (277 Total)



Studied Offenses in the Senate (169 Total)



Source: Calculations by The Heritage Foundation and the National Association of Criminal Defense Lawyers.

Almost three-fifths (57 percent) of all offenses studied had inadequate (None or Weak) *mens rea* requirements. By chamber, 62 percent of the House offenses and 49 percent of the Senate offenses had inadequate *mens rea* requirements. Just slightly more than 8 percent of all offenses studied had protective, properly drafted *mens rea* requirements (Strong). The remainder of the offenses fell into the Moderate category, meaning that they provide an intermediate level of protectiveness against unjust criminal punishment.

As discussed above, this study analyzed the entire sample of proposed offenses in order to determine whether specific legislative actions might improve or undermine *mens rea* requirements. Although enactment may seem the most important part of the process, Congress typically enacts only a small percentage of all bills introduced. For example, in the 110th Congress, 11,081 bills were introduced, of which only 442 (4.0 percent) were enacted into law. In the 109th Congress, 10,537 bills were introduced, of which 464 (4.4 percent) were enacted into law.[42]

Of the 203 bills studied, 13 (6.4 percent) were enacted into law, an enactment rate that is 45 percent higher than the rate for all bills introduced in the 109th Congress. In light of Congress's documented propensity for enacting criminal offenses, this may suggest that Congress is more likely to pass a bill if it contains non-violent offenses or, conversely, that Members of Congress are more likely to add non-violent offenses to bills that Congress is likely to pass. This study did not attempt to substantiate either of these hypotheses.

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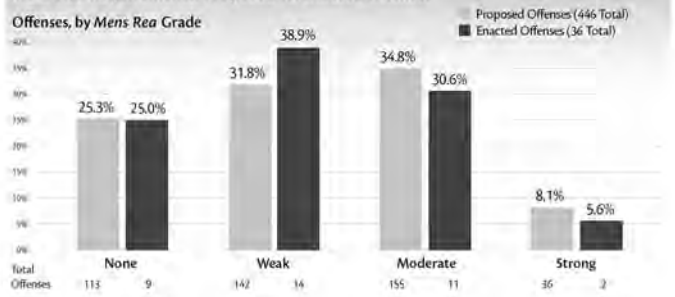
Chart 3 illustrates the substantial consistency of the strength of *mens rea* requirements through the legislative process, from initial proposal to enactment into law. This answers in the affirmative two of the study's questions: (1) an analysis of the *mens rea* requirements in all non-violent offenses introduced in a single Congress is a sound basis for studying the entire legislative process for such offenses; and (2) each stage of the congressional process warrants review and re-evaluation

Chart 3

***Mens Rea* Requirements: Proposed vs. Enacted Offenses**



Source: Calculations by The Heritage Foundation and the National Association of Criminal Defense Lawyers.

to ensure that Congress does not continue to create offenses that put innocent actors at risk of criminal punishment.

B. A Study of Each *Mens Rea* Category Through Example Offenses

To provide further insight into the meaning of the data presented above, this section provides examples of offenses typical of each category. While the numbers alone make a powerful statement, they take on even greater significance in the context of typical offenses.

1. Offenses in the None *Mens Rea* Category

The 113 non-violent offenses in the None category, which represent 25 percent of the 446 non-violent offenses introduced in the 109th Congress, do not require a prosecutor, court, or jury to engage in a meaningful consideration of a criminal defendant's mental state. The defendant's knowledge, intent, misperceptions, mistakes, or accidents are essentially irrelevant to his innocence or guilt. In the online appendix to this report, many of these offenses are referred to as "strict liability" offenses because they do not include any *mens rea* terminology or requirements. Although some of the offenses in the None category omit all traditional criminal law *mens rea* terminology and instead rely on tort-law terminology, such as "should have known," "reasonably should have known," or "negligently," for imposing criminal punishment, these terms provide little or no protection to the unwary. Nothing in the language of an offense categorized as None prevents conviction of a defendant who did not intend to violate a law and who did not know that his conduct was unlawful or sufficiently wrongful so as to put him on notice of possible exposure to criminal responsibility.

The 113 non-violent offenses in the None category, which represent 25 percent of the 446 non-violent offenses introduced in the 109th Congress, do not require a prosecutor, court, or jury to engage in a meaningful consideration of a criminal defendant's mental state.

An example of an offense in the None category is found in H.R. 3192, the Paid Family and Medical Leave Act of 2005.[87] Section 107(1) of that bill states that whoever "makes or causes to be made any false statement in support of an application for benefits" under the federal Family Medical Insurance Program is guilty of a felony. On its face, the use of the phrase "false statement" in the offense suggests that the government must prove that the defendant acted with *mens rea* before criminal liability can be imposed. That would indeed be the case if this offense were rewritten to include, for example, a blanket or introductory *mens rea* term—i.e., "whoever *knowingly* makes or causes to be made any false statement in support of an application for benefits." So drafted, the offense would require the government to prove that the defendant knew that the statement was false (and possibly also that it was made in connection with an application for benefits).

The actual offense defined by section 107(1), however, includes no *mens rea* requirement and is, in fact, a strict liability offense. The government need prove only that a defendant made or "caused to be made" a statement, that the statement was made "in support of" a Family Medical Insurance Program application, and that the statement was in fact false. If, for example, a man listed an incorrect date of birth for one of his stepchildren, or a woman entered the wrong year when asked for her date of hire, these "false statements" would put them at risk of conviction. According to the express terms of this offense, the government need not prove that an applicant's false statement was material to eligibility for benefits, that the applicant intended to defraud anyone, or even that the applicant knew the statement to be false. As with all strict liability offenses, the government need not prove that the defendant knew *anything* at all. For these reasons, this offense is categorized as None.

A second example of an offense in the None category is found in section 2(c) of S. 3506, the Data Theft Protection Act.[88] That provision states: "It shall be unlawful for any person to use a means

of identification or individually identifiable health information obtained directly or indirectly from a Federal database in furtherance of a violation of any Federal or State criminal law." It might appear that the final clause, requiring the conduct to be carried out "in furtherance of a violation of" another criminal law, provides the protection of a *mens rea* requirement. However, nothing in the statute requires the defendant to know that the conduct prohibited was in fact "in furtherance of [another] violation" of Federal or State criminal law.

Similarly, while it might appear that the defendant is protected by the offense's requirement that there was in fact another "violation...of Federal or State criminal law," nothing in this offense requires that the other violation of federal or state law be committed by the person who "uses" the personally identifiable health information. Thus, a healthcare provider who uses personally identifiable information obtained indirectly from a federal database to answer questions by a person impersonating an employer or another health-care provider could, under the language of this offense, be subjected to criminal punishment. Though this offense may appear, at first glance, to provide a *mens rea* requirement or at least some protection for those who act without *mens rea*, it in fact provides neither.

2. Offenses in the Weak *Mens Rea* Category

An offense is categorized as Weak if its language is reasonably likely to protect from conviction at least some defendants who did not intend to violate a law and did not have knowledge that their conduct was unlawful or sufficiently wrongful to put them on notice of possible criminal responsibility. The offenses in this category cannot be characterized as strict liability because they include some *mens rea* requirement and, therefore, proof of a defendant's culpable mental state before criminal punishment can be imposed. Unlike those offenses in the None category that have express *mens rea* requirements but use tort-law terminology, the offenses in the Weak category mostly employ traditional criminal-law *mens rea* terminology. This study determined that 142 of the 446 offenses (just under 32 percent) had Weak *mens rea* requirements.

The Stolen Valor Act of 2005 (S. 1998), which was enacted into law in December 2006, includes a typical Weak offense. The act amended existing law such that it is now a federal crime to, among other things, "knowingly" buy, sell, mail, ship, barter, "or exchange[ ] for anything of value" a wide variety of military decorations, badges, and medals.[95] The bill's findings indicate that its purpose is to prevent fraudulent uses of and claims about U.S. military decorations—for example, falsely claiming to be the recipient of the Congressional Medal of Honor or Purple Heart—thereby preserving the "reputation and meaning of such decorations and medals."[96] But the offense is not limited to fraudulent conduct. It is written so broadly and with such weak *mens rea* protections that it would reach many acts by perfectly legitimate historians and collectors who deal in these military decorations.[97] Under its terms, even heirs of a solider who transfer his decorations or medals among themselves in exchange for other property in the soldier's estate would risk imprisonment.

This study determined that 142 of the 446 offenses (just under 32 percent) had Weak mens rea *requirements.*

The Stolen Valor Act's only *mens rea* requirement is that the person charged must have "knowingly" engaged in the prohibited conduct. As the U.S. Supreme Court has recognized, "'[U]nless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense.'"[98] "The term 'knowingly,'" the Court stated in *Bryan v. United States*, "does not necessarily have any reference to a culpable state of mind or to knowledge of the law."[99] Consequently, the offense created by the Stolen Valor Act provides inadequate protection against criminal conviction and punishment for those who buy, sell, exchange, or ship a military decoration, badge, or medal without any intention of making or furthering a fraudulent claim of valor. Although the offense's *mens rea* requirement provides some protection, that protection is inadequate. Accordingly, this offense is categorized as Weak.

Another example of a Weak *mens rea* provision is found in H.R. 3968, the Federal Mineral Development and Land Protection Equity Act of 2005. Section 506(g)(2) of the bill states that whoever "knowingly…violates any other environmental protection requirement set forth in title III [of this Act] or any regulation issued by the Secretaries to implement this Act, any provision of a permit issued under this Act (including any exploration or operations plan on which such permit is based), or any condition or limitation thereof, shall" be criminally punished.[70] The offense's *mens rea* element, "knowingly," requires the government to prove that the conduct constituting the violation was not accidental or inadvertent. However, "knowingly" does not necessarily require "a culpable state of mind or…knowledge of the law,"[71] nor does it require a showing that the violation resulted in any harm. Accordingly, this offense is graded as Weak because it offers little or no protection to those who are unaware of the law or those who, in good faith, attempt to comply with it but are unable to do so.

Offenses in the None category combined with offenses in the Weak category comprise more than half of all the offenses in this study. Such offenses are wholly inadequate to prevent unjust prosecutions and convictions.

Whereas this offense is graded as Weak for the purposes of this study's data and statistical analyses, it is described in the report's online appendix as None-to-Weak. This is because the offense authorizes executive branch officials to engage in regulatory criminalization.[72] Though its text contains a *mens rea* requirement, most of the prohibited conduct would be defined by unelected officials in regulations and even individualized mining permits.[73] Blanket criminalization of all regulatory and permit violations effectively diminishes the protectiveness of the statute's *mens rea* requirement and reduces the likelihood that potential defendants will be on notice of the requirements and prohibitions that they must observe. Therefore, despite the presence of a *mens rea* term, the broad and indeterminate class of conduct that would be criminalized by this offense makes it more like the offenses that are typical of the None category than those of the Weak category.

As illustrated by these examples, the great majority of offenses that fall into the Weak category rely exclusively on the term "knowingly" as a blanket or introductory *mens rea* requirement. In recent years, the Supreme Court has stated that the term "knowingly" requires the government to prove only that the defendant had knowledge of the facts constituting the offense,[74] thus excluding only accidental or inadvertent conduct. This is insufficient, however, to protect those lacking knowledge of wrongdoing and acting without intent to do anything unlawful or even wrongful in part. Weak *mens rea* requirements allow for, and inevitably result in, unjust prosecutions and convictions.

For that reason, it is disturbing that offenses with Weak *mens rea* requirements are the second most common choice of federal legislators proposing non-violent criminal offenses. Even more disconcerting is the fact that the number of offenses in the None category combined with the number of offenses in the Weak category comprise more than half of all the offenses in this study. Offenses in the Weak or None categories are wholly inadequate to prevent unjust prosecutions and convictions.

3. Offenses in the Moderate *Mens Rea* Category

The number of offenses in the Moderate category is slightly greater than the number of Weak offenses. Approximately one-third of the studied offenses, 155 of 446, have *mens rea* requirements that place them in the Moderate category. The language of an offense categorized as Moderate is more likely than not to prevent an individual from being found guilty if he did not intend to violate a law and did not know that his conduct was unlawful or sufficiently wrongful so as to put him on notice of possible criminal responsibility. Nevertheless, such an individual could be convicted under an offense categorized as Moderate because of, for example, inconsistent judicial interpretation and application of the *mens rea* terms it uses.

One example of a Moderate offense is in section 2(a) of H.R. 4148, the Federal Disaster Profiteering Prevention Act of 2005. This section provides criminal penalties for "[w]hoever, in a matter involving a contract with the Federal Government for the provision of goods or services, directly or indirectly, in connection with relief or reconstruction efforts provided in response to a presidentially declared major disaster or emergency, knowingly and willfully…falsifies, conceals, or covers up by any trick, scheme, or device a material fact."[73] Based on Supreme Court precedent, this "willfully" requirement should prevent the conviction of many or most defendants who did not know that their conduct was unlawful or sufficiently wrongful.[74] But as the Court itself has observed, "willful" is a word of many meanings, and its construction is often influenced by its context.[75] Federal courts therefore do not apply a standard meaning to "willfully." It is primarily for this reason that offenses using "willfully" as a blanket or introductory *mens rea* requirement, with nothing more, are categorized as Moderate rather than Strong.

Another example of a Moderate offense is in section 5 of H.R. 4572, the Export Administration Renewal Act of 2005. This offense provides that "[a]ny individual…who willfully violates, conspires to violate, or attempts to violate any provision of this Act or any regulation, license, or order issued under this Act shall be fined up to 10 times the value of the exports involved or $1,000,000, whichever is greater, imprisoned for not more than 10 years, or both, for each violation."[76] This offense is graded Moderate because, as in the preceding example, the blanket or introductory usage of the "willfully" requirement should prevent the conviction of most defendants who did not intend to violate the law and did not know their conduct was unlawful or sufficiently wrongful so as to put them on notice of criminal responsibility. But this *mens rea* requirement cannot be relied upon to provide adequate protection for all such defendants because federal courts do not apply a standard meaning to "willfully."

This offense is not, however, strictly Moderate. Rather, the strength of the *mens rea* requirement in H.R. 4572 falls between Weak and Moderate because it incorporates a large, open-ended set of regulatory violations. Thus, even experts in export law would have a difficult time being aware of all of the regulations under which criminal punishment might be imposed. Yet some courts might conclude that individuals performing actions covered by the Export Administration Act have a duty to know all Export Administration Act regulations and therefore impute constructive knowledge of any unlawfulness to the individual because he knew that the field is heavily regulated. Wholesale incorporation of regulations into criminal offenses thereby undermines the protectiveness of *mens rea* requirements. For this reason, H.R. 4572 is categorized in the online appendix as Weak-to-Moderate, not simply Moderate.

Approximately one-third of the studied offenses, 155 of 446, have mens rea requirements that place them in the Moderate category.

Blanket or introductory uses of the *mens rea* term "willfully" make up the great majority of the offenses categorized as Moderate. The offenses in this category would provide an uncertain amount of protection for defendants charged under them because of the inconsistency with which courts interpret and apply the term "willfully."

4. Offenses in the Strong *Mens Rea* Category

The language of an offense categorized as Strong is highly unlikely, absent substantial misinterpretation, to permit the conviction of a person who did not intend to violate a law and did not have knowledge that his conduct was unlawful or sufficiently wrongful to put him on notice of possible criminal responsibility. Virtually every criminal offense that Congress passes or even considers should include *mens rea* requirements that are this protective. It is therefore of significant concern that only a small percentage of the studied offenses fall into this category.

One example of an offense in the Strong category is in H.R. 5188, Jane's Law, which criminalizes evasion of court-ordered child support payments. The offense in section 2(a) states:

> Whoever knowingly, travels in interstate or foreign commerce, with the intent to evade compliance with a court ordered property distribution as part of a separation or divorce settlement involving more than $5000, with respect to a spouse or former spouse, shall be fined under this title or imprisoned for not more than two years or both.[7]

The introductory *mens rea* term, "knowingly," can be relied upon to provide protection against conviction for inadvertences. But the key to the strength of the overall *mens rea* requirement is the phrase "with the intent to evade compliance with a court ordered property distribution." It is difficult to imagine a scenario in which a person could, without knowledge that such action is unlawful, act with intent to evade an order from the court. The court order referenced in this offense is a directive of law handed down from the court to the defendant, and thus the inclusion of this phrase in this offense requires the person to act with a specific intent to violate the law. For this reason, the offense in H.R. 5188 is categorized as Strong.

Virtually every criminal offense that Congress passes or even considers should include mens rea requirements that would be categorized as Strong, but fewer than one out of every 12 of the offenses in this study was so categorized.

S. 414, the Voter Protection Act of 2005, contains another example of an offense categorized as Strong. Section 303 states that whoever "destroys or damages any property with the intent to prevent or impede an individual from voting in an election for" federal office is guilty of a federal crime.[8] Properly applied, the *mens rea* phrase "with the intent to" should protect from conviction anyone who accidentally damages voting equipment without the intent of preventing or impeding an individual from voting. If an inattentive truck driver, for example, crashes while delivering voting machines and destroys them, he might be charged under state law for reckless driving, depending on the circumstances. But unless evidence shows that the truck driver's actual intent was to prevent voting, it would be a misapplication of the plain language of this offense for him to be convicted under it. This is because the *mens rea* requirement in the offense properly restricts its application to the behavior it is intended to punish: intentionally preventing citizens from voting. Absent that specific intent, criminal punishment is unlikely to be imposed.

A final example illustrating one "best practice" approach to fashioning strong *mens rea* requirements is in section 515(b) of H.R. 1295, the Responsible Lending Act. This offense includes both a blanket or introductory "willfully" *mens rea* term and a specific requirement that, for culpability to attach, an individual must know that he is acting in violation of the law: "It shall be unlawful to willfully disclose to any person any information concerning any person who is a mortgage broker or is applying for licensing as a mortgage broker knowing the disclosure to be in violation of any provision of this title (a) requiring the confidentiality of such information; or (b) establishing a privilege from disclosure...." Because of the proper use of the "willfully" and "knowing" terms, this offense is categorized as Strong.

Despite these salutary examples, fewer than one out of every 12 of the offenses in this study contained *mens rea* requirements protective enough to be categorized as Strong. This may be due to the difficulty and occasional linguistic awkwardness involved in drafting a protective *mens rea* requirement. It might also be caused by Members of Congress (and the public) overlooking the possible injustices resulting from criminal laws that are vague and overbroad, that fall short of providing fair notice, and that fail to require a level of culpability sufficient to justify criminal punishment. Nevertheless, fundamental principles of justice mandate that nearly all of the non-violent criminal offenses

in this study should have included a Strong *mens rea* requirement.

In summary, the study's categorization analysis found that:

- Almost three-fifths of all non-violent offenses proposed had inadequate (Weak or None) *mens rea* protections;
- Fewer than one out of every 12 offenses contained protections that are fully adequate to protect against unjust conviction (Strong); and
- One out of every three offenses had *mens rea* requirements inhabiting a middle ground (Moderate), leaving open the possibility of conviction of those whose level of culpability does not warrant criminal punishment.

C. The Reliance on Judiciary Committee Oversight

Despite the special expertise and jurisdiction of the House and Senate Judiciary Committees over matters of criminal law and criminal justice, Chart 4 demonstrates that more than half of the studied offenses were not referred to either committee for oversight.

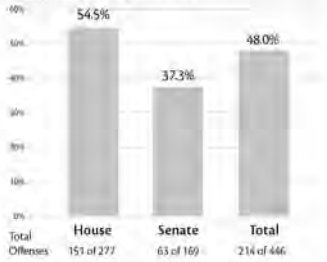
As Chart 4 shows, only 214 (48.0 percent) of the 446 offenses studied were in bills that were referred to the respective judiciary committee. While nearly 55 percent of the 277 House offenses were referred to the House Judiciary Committee, only 37 percent of the 169 Senate offenses were referred to the Senate Judiciary Committee. This is despite these committees' special expertise in crafting criminal offenses, knowledge of the priorities and resources of federal law enforcement, and express jurisdiction over federal criminal law.

For example, since its creation in 1816, the Senate Judiciary Committee has had jurisdiction over

Chart 4

Less than Half of Offenses Were Referred to Judiciary Committees

Percentage of Offenses in Study Referred to Respective Judiciary Committee



Source: Calculations by The Heritage Foundation and the National Association of Criminal Defense Lawyers

"legislation related to criminal justice."[81] Further, the Rules of the Senate provide that to the Senate Judiciary Committee "shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to…[j]udicial proceedings, civil and criminal, generally."[82] The rules grant express authority over criminal justice matters to no other Senate committee. Nevertheless, over 62 percent of the studied offenses that were introduced in the Senate received little or no oversight from the Senate Judiciary Committee and did not benefit from its special expertise.

As discussed above, this study sought to determine whether oversight by the judiciary committees correlated with stronger *mens rea* requirements in the studied offenses.[83] Thus, in addition to passage and enactment, five different congressional actions (judiciary committee referrals, hearings, markups, amendments, and reports) were tested to determine whether such correlations existed. These calculations and their results are discussed further below.

D. Identifying the Effect of Congressional Actions on *Mens Rea* Requirements

The Heritage Foundation's CDA analyzed the study's data to determine whether a statistically significant correlation existed between the strength of *mens rea* requirements in offenses and congressional actions taken on the bills containing those offenses. If a statistically significant correlation exists between the strength of *mens rea* requirements and a congressional action, it could be positive or negative. If, for example, there were a negative correlation between the strength of *mens rea* requirements and enactment into law, that would suggest that a criminal offense's *mens rea* requirement is likely to be weaker if the bill of which it is a part is passed by both chambers and signed into law by the president. Conversely, a positive correlation between the strength of *mens rea* requirements and some congressional action might suggest that that action serves to strengthen *mens rea* protections or that bills containing stronger *mens rea* protections are more likely to be subject to that action.

The CDA conducted several types of statistical calculations to look for such correlations. The first two variables it tested for possible correlations were whether a bill was (1) passed by its respective congressional chamber and (2) enacted into law. The data on these two actions are presented in Table 1.

Table 1

Studied Offenses Passed and Enacted

Originating Chamber	Offenses Passed by Originating Chamber	Offenses Enacted into Law
House	49	28
Senate	21	8
Total	70	36
% of All Studied Offenses	15.7%	8.1%

Source: Calculations by The Heritage Foundation and the National Association of Criminal Defense Lawyers.

If a bill was marked up by the House Judiciary Committee or one of its subcommittees, reported by the House Judiciary Committee for consideration by the full House of Representatives, or both, the bill's non-violent criminal offenses tended to have stronger, more protective mens rea *requirements.*

The CDA found no statistically significant correlation between whether a bill was passed by its originating chamber or enacted into law and the strength of the *mens rea* requirements in the bill's offenses. In other words, this study's data provide no statistical evidence that the *mens rea* provisions in non-violent offenses passed by one chamber or enacted in the 109th Congress were weaker or stronger than the *mens rea* provisions in all proposed non-violent offenses.

Other tests did, however, reveal statistically significant correlations. The CDA found that the strength of the *mens rea* requirements in a bill introduced in the House has a weak, positive correlation with that bill's being (a) marked up by the House Judiciary Committee or one of its subcommittees and (b) reported out of the House Judiciary Committee for consideration by the full House of Representatives. Put differently, if a bill was marked up by the House Judiciary Committee or one of its subcommittees, reported by the House Judiciary Committee for consideration by the full House of Representatives, or both, the bill's non-violent criminal offenses tended to have stronger, more protective *mens rea* requirements.

On the Senate side, however, no statistically significant correlations were found between the strength of *mens rea* requirements and any action taken by the Senate Judiciary Committee or its subcommittees.

When the data for the House and Senate bills are aggregated and analyzed together, a weak but statistically significant positive correlation appears between the strength of the studied offenses' *mens rea* requirements and their bills being marked up by or reported out of either the House Judiciary Committee or the Senate Judiciary Committee. In other words, legislation that was marked up or reported out by either judiciary committee tended to contain

stronger *mens rea* requirements than bills not subject to these actions. This finding, however, appears to reflect the correlation identified above involving actions taken by the House Judiciary Committee, and so does not contradict the failure to find any correlations involving actions taken by the Senate Judiciary Committee.

Finally, Heritage's CDA tested whether each of the other three judiciary committee actions recorded (referral to a judiciary committee, hearing, and amendment) was correlated with the strength of *mens rea* requirements. It found no statistically significant relationships.[84]

E. The Regulatory Criminalization Problem

As part of the individual assessment of the studied offenses, the authors determined whether Congress itself articulated the *actus reus* and *mens rea* of the offense or if Congress sought, in the statutory language of "the offense,"[85] to delegate that responsibility to an unelected agency, body, or individual acting on behalf of such an agency or body. The authors endeavored to make note of every offense that included regulatory criminalization in order to determine the frequency with which Congress attempts to delegate its criminal lawmaking authority. The resulting data underscore concerns that have been raised about regulatory criminalization.[86]

Table 2 presents this data, broken down by chamber and by three legislative actions (introduction, passage, enactment). Of the 446 studied offenses, 63 (14 percent) authorized regulatory criminalization. The percentage of offenses authorizing regulatory criminalization is even greater among those offenses passed by one chamber (17 percent) or enacted into law (22 percent). Nearly one-quarter of the enacted offenses allow additional criminal offenses to be created, not by Congress, but by unelected and less accountable agency officials.

Table 2

Regulatory Criminalization by Chamber

Of the 36 studied offenses that were enacted into law, eight (22 percent) delegated criminal lawmaking authority to unelected regulators.

	Introduced	Passed	Enacted
House	41 of 277 (14.8%)	9 of 49 (18.4%)	5 of 28 (17.9%)
Senate	22 of 169 (13.0%)	3 of 21 (14.3%)	3 of 8 (37.5%)
Total	63 of 446 (14.1%)	12 of 70 (17.1%)	8 of 36 (22.2%)

Source: Calculations by The Heritage Foundation and the National Association of Criminal Defense Lawyers.

This result has significant ramifications. When Congress enacts a single offense authorizing regulatory criminalization, it effectively attaches criminal penalties to regulations, rules, and orders that may not yet have been contemplated, let alone drafted and made into law. A single criminal offense may serve as the authority for any number of additional, regulatory criminal offenses. Whereas the ABA Task Force in 1998 and Professor John Baker in 2008 reported scholarly estimates of the number of criminal offenses in federal statutes, both acknowledged that, at a minimum, there are tens of thousands of additional criminal offenses in federal regulations.[87] Regulatory criminalization thus has profound implications for the problem of how to ensure individuals and businesses receive fair notice of what conduct can be punished criminally.

Nearly one-quarter of the enacted offenses allow additional criminal offenses to be created, not by Congress, but by unelected and less accountable agency officials.

V. Conclusions on the Legislative Process

The primary conclusion of this report is that non-violent criminal offenses lacking adequate *mens rea* requirements are ubiquitous at every stage of the federal legislative process. Although two steps in the legislative process appear to improve the quality of *mens rea* requirements, a majority of the non-violent offenses Members of Congress introduce have flawed *mens rea* requirements, and this percentage does not improve through the process. Further, the majority of non-violent criminal offenses introduced in the 109th Congress were drafted with language that is ambiguous and has uncertain legal effect, to the greatest detriment of the average layperson with no legal training. In addition, a sizeable percentage of proposed criminal offenses, and a larger percentage of those passed by a chamber or enacted, would have delegated Congress's criminal lawmaking authority to regulators.

The primary conclusion of this report is that non-violent criminal offenses lacking adequate* mens rea *requirements are ubiquitous at every stage of the federal legislative process.

Further, the neglect of the special expertise of the House and Senate Judiciary Committees is profound; less than one-half of the studied offenses were referred to either committee. This study, as well as the experience of its authors, strongly suggests that Members of Congress propose so many new criminal offenses and modifications to existing offenses that only a small percentage of these proposals could possibly receive meaningful oversight by the judiciary committees or benefit from their special expertise. In the past, the judiciary committees performed a vital gate-keeping function in preserving the consistency and integrity of federal criminal law, but today they are overrun. Increasingly, new and modified criminal offenses are proposed, shepherded through Congress by their sponsors, and even enacted without affording deference to the committees, their expertise, or their unique jurisdiction over the federal criminal justice system.

A. *Mens Rea* Requirements Are Inadequate at Every Step of the Legislative Process

As shown in the following tables, 44 of the 70 offenses passed in either chamber and 23 of the 36 offenses enacted into law were categorized as None or Weak. In other words, 63 percent of the offenses passed by a chamber of Congress and 64 percent of the offenses actually enacted into law had wholly inadequate *mens rea* requirements.

As shown in Table 3 and Chart 5 below, the *mens rea* requirements of non-violent offenses in bills that were passed by their originating chamber are, on average, actually weaker than those in all proposed non-violent offenses. Though this difference may not be statistically significant, it does demonstrate that the *mens rea* requirements in bills that pass a chamber are not of higher quality than those in bills that do not.

Chart 5 demonstrates a similar consistency between the percentage of non-violent offenses enacted into law that have inadequate *mens rea* requirements (Weak or None) and the percentage of all proposed non-violent offenses that have inadequate *mens rea* requirements. The percentage of enacted offenses that fall into the Strong category is somewhat lower than the percentage for the total sample. Moreover, a larger percentage of enacted offenses fall into the Weak category. The percentage of offenses that are categorized as None is approximately the same for enacted offenses and all proposed offenses, while the percentage of offenses in the Moderate category is slightly lower for those offenses that were enacted into law than for all the proposed offenses. In sum, the composite profile of the strength or weakness of *mens rea* requirements for all proposed non-violent offenses is consistent with that of those offenses that were enacted into law.

The data show that, at all stages of the legislative process, the majority of offenses lack adequate *mens rea* requirements. This problem is not unique

Table 3

***Mens Rea* Requirements Throughout the Legislative Process**

Offenses, by *Mens Rea* Grade

	Studied (446 Total)				Passed (70 Total)				Enacted (36 Total)			
	None	Weak	Moderate	Strong	None	Weak	Moderate	Strong	None	Weak	Moderate	Strong
House	82	90	83	22	12	18	14	5	7	11	8	2
Senate	31	52	72	14	4	10	6	1	2	3	3	0
Total	113	142	155	36	16	28	20	6	9	14	11	2
%	25.3%	31.8%	34.8%	8.1%	22.9%	40.0%	28.6%	8.6%	25.0%	38.9%	30.6%	5.6%

Source: Calculations by The Heritage Foundation and the National Association of Criminal Defense Lawyers.

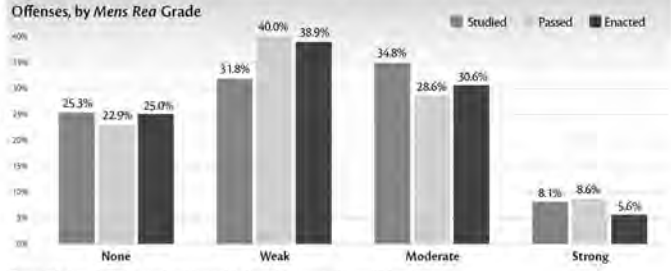
to the 109th Congress. For almost three years, every criminal offense introduced in Congress that fits this study's criteria has been reviewed for The Heritage Foundation's Overcriminalized.com Web site.[88] The percentages of criminal offenses in each of the four *mens rea* categories for non-violent offenses introduced in the 109th Congress appear to be generally consistent with those introduced in the 110th Congress.

Public debate in recent Congresses over *mens rea* requirements has been rare, with few Members objecting to proposed criminal offenses with *mens rea* requirements that this study would characterize as None or Weak.[89] Rather, most Members of Congress appear to be sensitive to the potential political costs of appearing to be "soft on crime" by strengthening *mens rea* requirements to protect those acting without culpable intent. The current system is not working, and Congress will need new structural and procedural devices if it is to thwart this political pressure and return to crafting criminal offenses with adequate *mens rea* requirements.

Chart 5

***Mens Rea* Requirements of Studied, Passed, and Enacted Offenses**

Offenses, by *Mens Rea* Grade



Source: Calculations by The Heritage Foundation and the National Association of Criminal Defense Lawyers.

B. The Judiciary Committees Are Frequently Afforded No or Inadequate Opportunities for Oversight of Criminal Offenses

Congress consistently neglects the special expertise of the two judiciary committees when drafting criminal offenses. Over one-half (52 percent) of the criminal offenses in this study were neither referred to a judiciary committee nor subject to any oversight by either committee. The number of criminal offenses proposed and enacted has grown so sharply that, on the whole, individual Members of Congress and congressional leaders may have concluded that the judiciary committees lack the time and resources to review every criminal offense that is proposed. Thus, for expediency or for strategic purposes, Members may forgo or even evade judiciary committee review.

Without adequate mens rea *requirements, these federal criminal offenses greatly increase the danger that law-abiding individuals will find themselves facing prosecution and even prison time in the federal system.*

Bypassing the judiciary committees may not always be intentional. This study frequently uncovered criminal offenses that were buried in much larger bills entirely unrelated to criminal law and punishment. It may be that these offenses were simply overlooked or were obscure enough, in the context of their legislative vehicles, to fail to alert anyone to the need for judiciary committee review. In some cases, criminal offenses may be added to a bill by amendment after the bill has already been assigned to a non-judiciary committee or once the bill is on the floor of its respective chamber. When this happens, unless the Members of Congress responsible for the amendment containing criminal provisions pause the process, notify their chamber's judiciary committee, and grant that committee sufficient time to review and appropriately revise the criminal provisions, judiciary committee members may not even know that the amendment contains criminal provisions.[50] While the cause of this neglect is not entirely clear, the result is that hundreds of criminal offenses are being proposed in a typical Congress, and many of them are not afforded judiciary committee oversight.

C. The Proliferation of Federal Criminal Law Continues

Much has already been said about the magnitude of new criminalization that was proposed and enacted by the 109th Congress. The numbers speak for themselves:

- 446 non-violent criminal offenses were introduced,
- 70 non-violent criminal offenses were passed by at least one chamber, and
- 36 non-violent criminal offenses were enacted into law.

Given these large numbers, it unsurprising that Congress created 452 entirely new crimes from 2000 through 2007,[51] legislating at a rate of over one new crime each week for every week of every year. Without adequate *mens rea* requirements, these federal criminal offenses greatly increase the danger that law-abiding individuals will find themselves facing prosecution and even prison time in the federal system. These numbers do not, of course, capture the full magnitude of the effect that regulatory criminalization authorized by the 36 newly enacted offenses will have on federal law.

Further, these numbers concern only those types of offenses included in this study, generally non-violent, non-drug, non-firearm, non-pornography, and non-immigration offenses. Many additional offenses that were not a part of this study were proposed during the 109th Congress and ultimately enacted into law.

D. Poor Legislative Draftsmanship Is Commonplace

The lack of clarity in the studied offenses cannot be quantified, though its existence and frequency

are plain. The authors can attest to the many hours, days, and months that went into performing these individual assessments and to the significant proportion of that time spent trying to answer such questions as:

- What conduct is actually covered by this offense and what conduct is not?
- How far into the language of the statute does the *mens rea* terminology extend, and to which elements?
- To which current federal laws and to which regulations (assuming they have already been promulgated) does this statute refer, and which does it incorporate?

Questions of this sort required substantial research, deliberation, and discussion before an offense could be categorized. Some appreciation of this process may be gleaned from the individual assessments in the online appendix, which illustrate much of this reasoning for the benefit of readers and other researchers.

The complexity of this part of the study's analysis is offered as further evidence in support of the criticisms that have been leveled against Congress's criminal lawmaking by academics, practitioners, judges, and others. Congress frequently fails to speak clearly and with the necessary specificity when legislating criminal offenses. Consider, for example, the *Flores-Figueroa* litigation discussed above.[96] It took several years of litigation and the opinions of three different courts, including the United States Supreme Court, to determine the meaning of a single criminal offense, which is all of one sentence long. Another example can be found in the federal honest services fraud statute.[97] More than 20 years after the statute's enactment, the federal circuit courts are hopelessly divided over this exceedingly vague and overbroad statute. The statute is finally being scrutinized by the Supreme Court, and the Justices face the choice of striking the statute down on the ground of vagueness, saving the statute by doing Congress's job of making it more definite and precise, or allowing the chaos and confusion surrounding the statute's meaning to continue.[98]

This complexity has serious consequences. When tort law or other civil law is vague, unclear, or confusing, there can be substantial consequences. But those consequences generally take the form of monetary damages. When the criminal law is vague, unclear, or confusing, the consequences are particularly dire: the misuse of governmental power to unjustly deprive individuals of their physical freedom.

Congress frequently fails to speak clearly and with the necessary specificity when legislating criminal offenses.

E. Congress Regularly and Inappropriately Delegates Criminal Lawmaking Authority

Finally, the amount of regulatory criminalization authorized in the studied offenses demonstrates that congressional delegation of its authority to make criminal law occurs at every stage of the legislative process and, notably, more frequently in those studied offenses that were either passed by a chamber or enacted into law than in the larger sample of proposed offenses. Specifically, 14 percent of all proposed non-violent offenses included some form of regulatory criminalization. That increases to 17 percent among only those offenses passed by one of the chambers of Congress. The figure increases yet again, to 22 percent, among enacted offenses. In raw numbers, eight of the 36 offenses enacted into law delegate Congress's authority to make criminal laws. Those eight offenses were contained in four separate bills, two originating from each chamber.

As previously discussed, these numbers do not reflect the actual number of offenses that will be added to federal criminal law. Almost every time such offenses are enacted into law, countless additional federal regulations also become criminal offenses. In fact, the regulations that become punishable as crimes often do not even exist at the time the statutory offense is enacted. But statutory

offenses authorizing criminalization by administrative agencies typically do not limit criminal exposure just to regulations; in addition, they often create criminal exposure based on violations of any "rules" or "orders" issued by the agency or its officials. For these reasons, the presence of these regulatory criminalization offenses prevents the authors from providing a complete tally of the number of criminal offenses that will result from the bills enacted by the 109th Congress. Rather, this study's data provide only the minimum number of federal criminal offenses enacted into law by this single Congress. The ultimate number is likely to be considerably higher.

The question of whether a matter is important enough to send a person to prison should be decided by the people's elected representatives.

While it might strike some as odd that Congress so readily and frequently abdicates its constitutional authority to create criminal laws, there are several possible explanations. The most obvious is expediency: Some believe that, rather than devoting time and energy to actually defining regulations, Congress should focus on broader policymaking. Other arguments for delegation generally assert that decisions about technical areas of administrative law should be left to those with specific expertise. Whatever merit these arguments may have, they lack persuasiveness with respect to Congress's power and responsibility to define what conduct and mental state justifies depriving an individual of her personal freedom. The question of whether a matter is important enough to send a person to prison should be decided by the people's elected representatives.

Other explanations that have been offered are more cynical. Delegating to administrative agencies the authority to make criminal law might allow Members of Congress the benefit of appearing "tough on crime" without being politically accountable to the individuals most affected by regulatory criminalization. Further, Congress can obtain this benefit without performing the arduous drafting process that the criminal law traditionally requires. A more generous argument is that most Members of Congress simply do not fully realize the many negative ramifications of this type of delegation.

Regardless of the explanation, Congress frequently and consistently delegates its criminal law-making authority. This delegation results in more regulatory criminalization, which, in turn, contributes to the continued proliferation of the federal criminal law.

VI. Ending the Trend: Federal Criminal Law Reforms

Congress should adopt basic, good-government reforms that will slow, stop, or even reverse the dangerous trend of haphazard federal criminalization. This shift should begin with the recognition that the proliferation of criminal offenses lacking meaningful *mens rea* requirements is a threat to civil liberty. In order to be effective, proper reforms must be tailored to:

- Address the root causes of the overcriminalization problem;
- Encourage Congress to legislate more clearly and deliberatively and with greater coherence; and
- Reduce Congress's knee-jerk tendency to criminalize in response to every problem and as a solution to all of society's real and supposed ills.

The authors of this report recommend the following reforms to bring an end to the deterioration

Recommendations

Congress should:

- **Enact Default Rules of Interpretation to Ensure that *Mens Rea* Requirements Are Adequate to Protect Against Unjust Conviction.**
- **Codify the Common-Law Rule of Lenity, which Grants Defendants the Benefit of the Doubt When Congress Fails to Legislate Clearly.**
- **Require Judiciary Committee Oversight of Every Bill that Includes Criminal Offenses or Penalties.**
- **Provide Detailed Written Justification for and Analysis of All New Federal Criminalization.**
- **Draft Every Federal Criminal Offense with Clarity and Precision.**

of *mens rea* requirements and related problems of overcriminalization.

A. Enact Default *Mens Rea* Rules

Of the several reforms that could be implemented to help ensure that innocent individuals are protected from unjust conviction under federal criminal offenses that have inadequate *mens rea* requirements, perhaps the most straightforward and effective reform would be to codify default rules for the interpretation and application of *mens rea* requirements. This reform would add new provisions to the U.S. Code that would specifically direct federal courts to grant a criminal defendant the benefit of the doubt when Congress has failed to adequately and clearly define the *mens rea* requirements for criminal offenses and penalties.

The first statutory enactment would address the unintentional omission of *mens rea* terminology by directing federal courts to read a protective, default *mens rea* requirement into any criminal offense that lacks one.[93] Although it would almost always be unwise to do so, Congress would remain free to enact strict liability offenses even after this reform is implemented, but to do so, it would have to make its purpose clear in the express language of the statute. Adopting this type of reform would help law-abiding individuals know in advance which criminal offenses carry an unavoidable risk of criminal punishment and safeguard against *unintentional* legislative omissions of *mens rea* requirements.

The second statutory enactment, similar to subsection 2.02(4) of the American Law Institute's Model Penal Code, would direct courts to apply any introductory or blanket *mens rea* terms in a criminal offense to each element of the offense.[94] This reform would eliminate much of the uncertainty that exists in federal criminal law over the extent to which an offense's *mens rea* terminology applies to all of the offense's elements. It would also save all parties—defendants, the government, and the courts—from having to exhaust their time and resources litigating this question, as in the *Flores-Figueroa* case. Again, Congress could still limit the application of the *mens rea* terms to certain elements of the offense, but it would have to articulate such limitations clearly in the text of the statute. This reform would greatly reduce the disparities that exist among the federal courts in the interpretation and application of *mens rea* requirements, and thereby result in the fairer, more consistent application of federal criminal laws. Further, it would provide additional protection to

Perhaps the most straightforward and effective reform would be to codify default rules for the interpretation and application of* mens rea *requirements.

defendants who did not intend to violate the law and did not have knowledge that their conduct was unlawful or sufficiently wrongful.

Enacting these two statutory provisions would improve the *mens rea* protections throughout federal criminal law, provide needed clarity, force Congress to give careful consideration to *mens rea* requirements when adding or modifying criminal offenses, and help ensure that fewer individuals are unjustly prosecuted and punished.

B. Codify the Common-Law Rule of Lenity

A related statutory reform that would reduce the risk of injustice stemming from criminal offenses that lack clarity or specificity would be to codify the common-law rule of lenity. The rule of lenity directs a court, when construing an ambiguous criminal law, to resolve the ambiguity in favor of the defendant.[97] In a recent U.S. Supreme Court decision, Justice Scalia explained that this "venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead."[98] Giving the benefit of the doubt to the defendant is consistent with the traditional rules that all defendants are presumed innocent and that the government bears the burden of proving every element of a crime beyond a reasonable doubt.[99]

The rule of lenity directs a court, when construing an ambiguous criminal law, to resolve the ambiguity in favor of the defendant. Adding the rule of lenity to federal law would serve the rights of all defendants at every stage of the criminal process.

Explicitly applying the rule of lenity to federal criminal law would simply codify what the Supreme Court has called a fundamental rule of statutory construction and cited as a wise principle that it has long followed.[100] Despite the Supreme Court's statements, the rule has not been uniformly or consistently applied by the lower federal courts, and adding it to federal law would serve the rights of all defendants at every stage of the criminal process, not just those who have the means and opportunity to successfully appeal their convictions to the Supreme Court. Codifying the rule of lenity would also protect Congress's lawmaking authority because it would restrict the ability of federal courts to legislate from the bench and reduce the frequency with which those courts must speak because Congress has failed to legislate clearly. Further, it would require Members of Congress to legislate more carefully and thoughtfully, with the knowledge that courts would be forbidden from filling in any inadvertent gaps left in criminal offenses. Most importantly, an explicit rule of lenity would protect individuals from unjust criminal punishment under vague, unclear, and confusing offenses by reinforcing the principle of legality, which holds that no conduct should be punished criminally "unless forbidden by law [that] gives advance warning that such conduct is criminal."[101]

C. Require Sequential Referral to the Judiciary Committees

A third recommended reform is to change congressional rules to require every bill that would add or modify criminal offenses or penalties to be subject to automatic sequential referral to the relevant judiciary committee. Sequential referral is the practice of sending a bill to multiple congressional committees. In practice, the first committee has exclusive control over the bill until it reports the bill out or the time limit for its consideration expires, at which point the bill moves to the second committee in the sequence, in the same manner. Whereas every new or modified criminal offense introduced in Congress should be subject to automatic referral to a judiciary committee, more than half of the studied offenses received no such referral.

Judiciary committee referral may not automatically produce stronger, more protective *mens rea*

requirements. However, this study's statistical analysis of the relationship between the strength of *mens rea* requirements and specific actions by the House Judiciary Committee, considered in the context of the special expertise and jurisdiction of both judiciary committees, make it reasonable to conclude that automatic sequential referral would likely:

- Reduce the practice of including new or modified criminal offenses in many bills unrelated to crime and punishment;
- Reduce the frequency of regulatory criminalization; and
- Stem the overall tide of federal criminalization by forcing a measured and prioritized approach to criminal lawmaking.

This assumes, of course, that the committees carefully review, rather than rubber-stamp, proposed criminal offenses. The judiciary committees alone have the special competence and expertise required to properly draft and design criminal laws. Automatic referral should result in clearer, more specific, and higher quality criminal offenses.

More importantly, this rule could stem the tide of criminalization by forcing Congress to adopt a measured and prioritized approach to criminal lawmaking. Members of Congress have grown accustomed to thinking of criminal offenses as an appropriate feature of any piece of legislation. But as this study shows, ensuring that a proposed criminal offense is a necessary addition to federal criminal law—and that it is properly drafted—requires substantial expertise with the intricate details of criminal law as well as its broader operation and objectives. The House and Senate Judiciary Committees are uniquely positioned to evaluate:

- Whether the approximately 4,450 statutory criminal offenses and an estimated tens of thousands of regulatory criminal offenses now in federal law already cover the conduct being criminalized;
- Whether a new offense is consistent with the Constitution, particularly constitutional federalism's reservation of general police power to the 50 states;
- Whether federal law enforcement has the resources to investigate and prosecute a new offense, and whether federal public defenders have the resources to defend indigent defendants charged under it; and
- Whether enforcing a new offense will divert resources from more important law enforcement goals.

These fundamental questions should be answered before Congress considers enacting any new criminal offense. If the judiciary committees carefully considered these and related questions for each proposed criminal offense, Members of Congress might become reluctant to propose new or modified offenses that are ill conceived, poorly drafted, or superfluous.

Requiring sequential referral of all bills with criminal provisions to the judiciary committees would also increase congressional accountability for new criminalization, help prioritize criminal legislation, and reduce overcriminalization.

Further, the special expertise for fashioning *mens rea* requirements that are no broader than necessary to allow conviction of only those who are truly culpable or blameworthy resides in the judiciary committees. Prosecutorial discretion plays an important role in the American criminal justice system, particularly in selecting enforcement priorities, determining whether the evidence is sufficient to support a prosecution, and negotiating plea bargains where the evidence of a defendant's culpability is strong. But a criminal offense should never be so broad, or its *mens rea* requirements so lax, that it allows prosecutors to obtain convictions of persons who are not truly blameworthy and who did not have fair notice of possible criminal responsibility. The judiciary committees are in the best position to ensure that Congress ends its practice of passing these dangerous criminal offenses.

Requiring sequential referral of all bills with criminal provisions to the judiciary committees would also increase congressional accountability

for new criminalization, help prioritize criminal legislation, and reduce overcriminalization. As it now stands, no single committee can take overall responsibility for reducing the proliferation of new (and often unwarranted, ill-conceived, and unconstitutional) criminal offenses or for ensuring that adequate *mens rea* requirements are a feature of all new and modified criminal offenses. Sequential referral would empower the judiciary committees to take responsibility for all new criminal provisions. Further, Members of Congress and the public would know that they should address their interests and concerns about new criminal offenses to the judiciary committees, which could act on them.

Finally, the judiciary committees are well positioned to prioritize new criminal offenses because they have the best information about the level and allocation of federal law enforcement's resources and must operate within their own time and resource limitations. Such prioritization should reduce the proliferation of federal criminal offenses, the erosion of adequate *mens rea* requirements from federal criminal law, the unwarranted and unconstitutional federalization of inherently local crime, and other forms of overcriminalization. Given the current neglect of these concerns in the legislative process, such improvements would be a welcome change.

D. Require Reporting on All New Federal Criminalization

The fourth reform is a reporting requirement for all new federal criminalization, which would work hand-in-hand with the sequential referral reform. Similar to a bill Representative Don Manzullo (R–IL) introduced in 2001, this reform would require the federal government to produce a regular public report that includes much of the information necessary to assess the purported justification, costs, and benefits of all new criminalization.

This reform proposal would require Congress to deliberate over and provide factual and constitutional justification for every expansion of the federal criminal law.

Today, there is no effective check on overcriminalization. Over the past half century, the political pressures to criminalize have been difficult for most Members of Congress, irrespective of party affiliation, to resist. In addition, federal regulators who criminalize conduct should be subject to far more public accountability than they are today. This reform would help to provide such accountability by requiring the federal government to perform basic but thorough reporting on the grounds and justification for all new and modified criminal offenses and penalties. Implementing this reform would require rules changes in both chambers of Congress and statutory reporting requirements governing the federal agencies that create and modify criminal offenses and penalties.

For every new or modified criminal offense or penalty that Congress passes, it must report:

- A description of the problem that the criminal offense or penalty is intended to redress, including an account of the perceived gaps in existing law, the wrongful conduct that is currently unpunished or under-punished, and any specific cases or concerns motivating the legislation;
- A direct statement of the express constitutional authority under which the federal government purports to act;
- An analysis of whether the criminal offenses or penalties are consistent with constitutional and prudential considerations of federalism;
- A discussion of any overlap between the conduct to be criminalized and conduct already criminalized by existing federal and state law;
- A comparison of the new law's penalties with the penalties under existing federal and state laws for comparable conduct;
- A summary of the impact on the federal budget and federal resources, including the judiciary, of enforcing the new

offense and penalties to the degree required to solve the problem that the new criminalization purports to address;

- A review of the resources that federal public defenders have available and need in order to adequately defend indigent defendants charged under the new law; and
- An explanation of how the *mens rea* requirement of each criminal offense should be interpreted and applied to each element of the offense.

Congress should also collect information on criminalization reported by the executive branch of the federal government. This information should be compiled and reported annually and, at minimum, should include:

- All new criminal offenses and penalties that federal agencies have added to federal regulations and an enumeration of the specific statutory authority supporting these regulations; and
- For each referral that a federal agency makes to the Justice Department for possible criminal prosecution, the provision of the United States Code and each federal regulation on which the referral is based, the number of counts alleged or ultimately charged under each statutory and regulatory provision, and the ultimate disposition of each count.

Congress should always be required to determine the true cost of new criminal offenses prior to enactment. The United States is already saddled with in excess of 4,450 federal statutory criminal offenses, tens of thousands of regulatory criminal offenses, an overworked federal judiciary with an ever-growing case load, and a crowded and expensive prison system. The federal government's failure to assess and justify the full costs of any new or modified criminal offenses or penalties is irresponsible.

This reform proposal would require Congress to deliberate over and provide factual and constitutional justification for every expansion of the federal criminal law. In the 109th Congress alone, federal legislators introduced over 200 bills proposing new or expanded non-violent criminal offenses, and that number does not include the bills proposing new or expanded criminalization concerning violence, firearms, drugs, pornography, or immigration violations. Many offenses in these bills would have created new federal crimes, duplicated existing federal criminal statutes, or provided redundant penalties for crimes already punished under state law. As it stands today, there is no comprehensive process for Congress to determine whether these new offenses are necessary and appropriate. A strong reporting requirement reform would compel Congress to address such matters.

E. Focus on Clear and Careful Draftsmanship

One overarching reform recommendation is a slower, more focused, and deliberative approach to the creation and modification of federal criminal offenses. When drafting legislation, Members of Congress should always:

One overarching reform recommendation is a slower, more focused, and deliberative approach to the creation and modification of federal criminal offenses.

- Include an adequate *mens rea* requirement;
- Define both the *actus reus* (guilty act) and the *mens rea* (guilty mind) of the offense in specific and unambiguous terms;
- Provide a clear statement of whether the *mens rea* requirement applies to all the elements of the offense or, if not, of which *mens rea* terms apply to which elements of the offense; and
- Avoid delegating criminal lawmaking authority to regulators.

Criminal offenses frequently fail to define the *actus reus* in a clear and understandable manner and often include an *actus reus* that is broad,

overreaching, or vague. Practically speaking, the magnitude of conduct proscribed by an overbroad *actus reus* can actually have a diminishing effect on the protection afforded by the *mens rea* provision. When a criminal offense does not have clearly defined boundaries, the risk of unjust criminal punishment increases. For this reason, legislative drafters must make every reasonable effort to craft a clear and precise definition of each criminal offense and of the offense's boundaries, regardless of whether Congress is proposing new criminal offenses or simply amending existing ones.

The importance of sound legislative drafting cannot be overstated, for it is the drafting of a criminal offense that frequently determines whether a person acting without intent to violate the law will endure a life-altering prosecution and conviction, and lose his freedom.

Determining the proper *mens rea* requirement for a criminal offense requires great deliberation, precision, and clarity. Any Member of Congress proposing a new or modified federal criminal offense must carefully consider how the *mens rea* requirement will actually operate when applied to the specified *actus reus*. Legislative drafters should almost never rely merely on a standard *mens rea* term in the introductory language of a criminal offense. Instead, the criminal offenses that provide the best protection against unjust conviction are those that include specific intent provisions and provide sufficient clarity and detail to ensure that the precise mental state required for each and every act and circumstance in the criminal offense is readily ascertainable.

The importance of sound legislative drafting cannot be overstated, for it is the drafting of a criminal offense that frequently determines whether a person acting without intent to violate the law and lacking knowledge that his conduct was unlawful or sufficiently wrongful to put him on notice of possible criminal liability will endure a life-altering prosecution and conviction, and lose his freedom. Members of Congress drafting criminal legislation must resist the temptation to bypass this arduous task by handing it off to unelected regulators. The United States Constitution places the power to define criminal responsibility and penalties in the hands of the legislative branch. Therefore, it is the responsibility of that branch to ensure that no one is criminally punished if Congress itself did not devote the time and resources necessary to clearly and precisely articulate the law giving rise to that punishment.

These five reforms would help ensure that every proposed criminal offense receives the attention due when Congress is determining how to focus the greatest power government routinely uses against its own citizens.[116] Coupled with increased public awareness and scrutiny of the criminal offenses Congress enacts, these reforms would strengthen the protections against unjust conviction and prevent the dangerous proliferation of federal criminal law. With their most basic liberties at stake, Americans are entitled to expect no less.

Methodological Appendix

I. The *Mens Rea* Analysis

A. The Studied Offenses Defined

The best way to define the offenses included in this study is by listing the types of offenses that were *not* included. The offenses in this study are not primarily directed at conduct involving firearms, illicit drugs or other controlled substances, pornography, immigration violations, or what is typically referred to as violent or street crime (murder, rape, robbery, arson, larceny, assault, battery, vandalism, carjacking, etc.). The relatively few included offenses that actually involve physical damage to property, bodily injury, or death are not intentional crimes of the sort that have historically been charged as a crime. They are more akin to the injuries for which a person or organization could be sued because their negligence caused personal injuries or damage to property, the remedy for which would be a monetary award in a civil suit. In the cases of a few offenses that are included in this study that involve intentional injury or damage, the definition of the prohibited conduct requires the intent or objective of the property damage or bodily injury to be something other than the damage or injury itself.[109] Similarly, while this study generally does not include immigration offenses, it does include some offenses that are often associated with immigration violations, such as identity theft, false statements, and certain employment practices.

The authors and their research teams used reasonable efforts to review every bill introduced in the 109th Congress that created or modified any criminal offense and then excluded those offenses that did not fit the study's selection criteria. Omissions and oversights are possible, but with very few exceptions,[110] no offenses that fit this study's parameters were intentionally excluded. In all instances, the authors and their researchers attempted to use the latest publicly available version of the bill, regardless of whether it was enacted into law or at what stage of the legislative process it came to rest in its originating chamber when the 109th Congress ended on January 3, 2007.

B. Counting the Studied Offenses

The term "offense," as used in this study, is defined in a specific manner that requires some elaboration. Unlike other studies that identify and count "crimes" or "offenses" based solely on the covered conduct and the statute's structure, this study also accounts for the *mens rea* requirements in the statutory language when determining what constitutes an "offense" for counting purposes. This method is consistent with the study's main purpose, which is to examine the independent protectiveness of each offense's *mens rea* requirement.

A criminal provision that includes only one mental state requirement applied to only one course of conduct is counted as one "offense." However, where a criminal provision includes more than one course of conduct, the number of offenses within that provision is determined by analyzing the application of the mental state requirement to each course of conduct. Thus, where the application of the mental state requirement to two different courses of conduct is analytically distinct, each course of conduct counts as

a separate offense. Similarly, multiple subsections of the same criminal provision are counted as separate offenses if the application of the mental state requirement to the conduct proscribed by the subsections is analytically distinct. As the term "offense" is used throughout this report, it takes on the definition specific to this method of counting offenses.[104] Comparisons with any other study's results should take into consideration the differences in counting methods and the definition of the term "offense."

C. Offense Interpretation

This study's primary focus is the independent protectiveness of each offense's *mens rea* requirement. In other words, the focus of the analysis was on the likelihood that the government could charge, prosecute, and convict individuals who acted without intent to violate a law and lacked the knowledge that their conduct was unlawful or sufficiently wrongful to put them on notice of possible criminal responsibility. When assessing each offense, the study does not rely on the ideal use of prosecutorial discretion, the existence of which some rely on to defend laws that are vague or overbroad or lack meaningful *mens rea* requirements. The idea that prosecutors will protect innocent individuals from unjust prosecution and punishment under such laws has not always proven true, and even if it were true in 99 percent of cases, few would take comfort in knowing that laws sanction the conviction, in some cases, of those who are not culpable. Therefore, this analysis does not take into account how an ideal prosecutor would, or would not, charge an offense and does not assume that prosecutorial discretion will protect potential defendants from unjust conviction. This is consistent with the purpose of the study, which is to assess the protections provided by the *mens rea* requirements themselves.

In addition to plain language analysis, this study is guided by relatively recent Supreme Court decisions that define or interpret common *mens rea* terms used in federal statutes. Federal law does not include standard, well-defined *mens rea* terms, such as those included in state criminal codes based on the American Law Institute's Model Penal Code (MPC). The use of *mens rea* terms in federal criminal law is haphazard, and almost all of the terms have been subjected to a wide variety of (sometimes inconsistent) judicial interpretations.[105] Recent Supreme Court opinions have provided guidance on the interpretation of the terms "willfully" and "knowingly" when used as a blanket or introductory *mens rea* term.[107]

To the extent possible, this study is also guided by the Supreme Court's *Flores-Figueroa* decision, as amplified upon and qualified by Justice Alito's concurring opinion, on the scope of the introductory *mens rea* term ("knowingly") in the federal aggravated identity theft statute.[108] Specifically, where an offense includes a blanket or introductory *mens rea* term (usually "knowingly," "willfully," or both) and the operative language of the offense follows directly and immediately after this term, this study's analysis generally applies the *mens rea* term to each non-jurisdictional element[109] of the offense unless the statute's grammar, context, or structure raises significant uncertainty about this approach. With regard to those offenses where the application of the *mens rea* requirement is not entirely clear, or where the courts are likely to reach differing conclusions, the authors have chosen not to apply the *mens rea* requirement to those elements. Again, this is consistent with the purpose of the study: to determine the actual protection afforded by the *mens rea* requirement standing alone, and not to rely on the additional protections that might be afforded to defendants through an exemplary exercise of prosecutorial discretion or through a particular court's interpretation of a debatable provision of law. Further, this is consistent with the principle that the protectiveness of the *mens rea* requirement in each offense should be analyzed individually according to its unique terminology, grammar, and structure.

Finally, this study does not consider how an ideal court would rule on a motion to dismiss or whether the court would, for example, apply the common-law rule of lenity, or some other doctrine, to aid a

particular defendant.[10] Again, consistent with the purpose of this study, the focus is not on whether a court *might* or *could* protect potential defendants from unjust conviction, but on the protections afforded by the *mens rea* requirements themselves, independent of such considerations.

D. Categorizing the Offenses

1. The Four *Mens Rea* Categories

Each of the offenses included in this study was assigned one of four grades describing the protection provided by the offense's *mens rea* requirement.

a. Inadequate *Mens Rea* Requirements: "None" and "Weak"

- **None:** Nothing in the language of the offense prevents conviction of an individual who
  - Did not intend to violate a law, and
  - Did not have knowledge that his conduct was unlawful or sufficiently wrongful to put him on notice of possible exposure to criminal responsibility.

  The None category includes offenses that omit any *mens rea* requirement, which are usually strict liability offenses, and those offenses that rely on tort-law terminology, such as "should have known," "reasonably should have known," or "negligently," rather than the criminal law's traditional *mens rea* terminology.

- **Weak:** The language of the offense is reasonably likely to prevent the conviction of at least some individuals who
  - Did not intend to violate a law, and
  - Did not have knowledge that their conduct was unlawful or sufficiently wrongful to put them on notice of possible exposure to criminal responsibility.

  At the same time, the language of an offense characterized as Weak could, without being misinterpreted, allow the conviction of a sizable number of these individuals.

  The Weak category includes most offenses that use the terms "knowingly" or "intentionally" in a blanket manner or as part of the introductory language of the offense, without any additional *mens rea* terminology.

  In light of these definitions of None and Weak, this study considers the *mens rea* requirements of offenses falling into either of these two categories to be inadequate.

b. Adequate *Mens Rea* Requirements: "Moderate" and "Strong"

- **Moderate:** The language of the offense is more likely than not to prevent the conviction of an individual who
  - Did not intend to violate a law, and
  - Did not have knowledge that his conduct was unlawful or sufficiently wrongful to put him on notice of possible exposure to criminal responsibility.

Nonetheless, some of these individuals could be convicted of an offense graded as Moderate without engaging in substantial misinterpretation of its language because of inconsistent judicial interpretation and application of the *mens rea* terms it uses.

The Moderate category includes most offenses that use the terms "willfully" or "knowingly and willfully" (or "willfully and knowingly") in a blanket manner as part of their introductory language, without any additional *mens rea* terminology. It also includes some offenses that apply a variation of the phrase "with knowledge" to conduct involving making or using false statements or writings.

- **Strong:** The language of the offense, absent substantial misinterpretation, is highly unlikely to permit the conviction of an individual who
  - Did not intend to violate a law, and
  - Did not have knowledge that his conduct was unlawful or sufficiently wrongful to put him on notice of possible exposure to criminal responsibility.

This category includes, for example, offenses that use some combination of the *mens rea* terms "knowingly" and "willfully" with a specific intent to violate the law or to act in a manner that the average person knows to be inherently wrongful or in violation of the law.

Although the *mens rea* requirements of offenses categorized as Moderate (and especially those categorized as Weak-to-Moderate yet tallied as Moderate) are not ideal and would allow for criminal conviction and punishment of some inculpable persons, this study considers the *mens rea* requirements of offenses falling into both the Strong and Moderate categories to be adequate.

The preceding definitions state the basic guidelines for grading the studied offenses, but this study analyzed each offense's *mens rea* requirement individually and within the context of the rest of the offense's structure and language. As part of the analysis and in addition to being assigned a grade, important parts of the individual assessment were recorded in the tables included in this report's online appendix. These tables include a basic explanation of the strengths and weaknesses of each offense's *mens rea* requirement and a discussion of any offense-specific or other unusual considerations that affected an offense's grade.

2. Tabulating Intermediate *Mens Rea* Grades

In some instances, an offense could not be placed squarely into one of the four *mens rea* categories. Where the authors agreed that the protectiveness of an offense's *mens rea* requirement fell between two categories, it was given an intermediate grade, such as None-to-Weak. Offenses receiving one of these intermediate grades are indicated as such in the online appendix to this report. However, in order to give the benefit of the doubt to congressional drafting, these offenses were assigned the higher, more protective grade for this report's other analyses. For example, an offense graded as Weak-to-Moderate in the online appendix is tabulated simply as Moderate for the purposes of this study's data reporting and statistical analyses.

E. Congressional Actions

In addition to grading each offense's *mens rea* requirement, the study also determined whether any of seven major congressional actions were taken on each bill that contained a studied offense. Of these

seven actions, three concern chamber-wide activities: (1) whether a bill was referred to the House or Senate Judiciary Committee; (2) whether a bill was passed by either the House or Senate; and (3) whether a bill was ultimately enacted into law. If the bill was referred to a House or Senate Judiciary Committee, the study tracked whether the committee (or one of its subcommittees, as possible) held a hearing on the bill, amended the bill, marked up the bill, or reported the bill for consideration by the full chamber.

F. Statistical Analysis of Possible Correlations Between Congressional Actions and Protectiveness of *Mens Rea* Requirements

The Heritage Foundation's Center for Data Analysis conducted several types of statistical calculations to identify where the legislative process might be improving or undermining the *mens rea* requirements of non-violent criminal offenses. The statistical calculations looked for correlations between the protectiveness of *mens rea* requirements and the cataloged actions—specifically, whether the bill was enacted, passed by a chamber, referred to a judiciary committee, or subjected to other major actions by a judiciary committee. The results of CDA's calculations are included in the online appendix.

WITHOUT INTENT

Endnotes

1. This report and the underlying study on which it is based use the terms *mens rea* and "guilty mind." Neither finds its perfect synonym in the term "criminal intent," which is employed in the report's title solely for its wider usage in the media and public discourse.

2. This report uses the term "non-violent offenses" as a shorthand for these offenses. Whereas all the offenses included in this study are non-violent, many other offenses proposed by the 109th Congress could also be described as non-violent. Specifically, this study did not include offenses that involve firearms, drugs and drug trafficking, pornography, and immigration violations. This report's use of the term "non-violent offenses" is merely a shorthand description and is not intended as a statement that the excluded offenses are necessarily violent in nature.

3. As explained more fully later in the report, this study considered a criminal offense's *mens rea* requirement to be adequate if the language of the offense itself provides sufficient protection from criminal punishment to individuals who act without intent to violate a law and without knowledge that their conduct was unlawful or sufficiently wrongful to put them on notice of possible criminal liability. *See* Methodological Appendix, *infra*.

4. Sequential referral is the practice of sending a bill to multiple congressional committees in an ordered sequence. The first committee in the ordered sequence has exclusive control over the bill until it either reports the bill out or its time for consideration expires, at which point the bill moves on to the second committee in the same manner.

5. *See, e.g.*, John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, 1 HERITAGE FOUNDATION L. MEMO. No. 26, June 16, 2008, at 1 (finding that from 2000 through 2007 Congress enacted an average of 56.5 crimes a year).

6. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

7. Bouie v. City of Columbia, 378 U.S. 347, 351 (1964) (internal quotation marks omitted) (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)).

8. *Id.* at 350.

9. Morissette v. United States, 342 U.S. 246, 251–52 (1952).

10. *See* Rollin M. Perkins, *A Rationale of* Mens Rea, 52 HARV. L. REV. 905, 908 (1939).

11. *See* Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 821–46 (1980) (discussing, *inter alia*, the development in the 13th century English courts of the legal doctrine that a criminal defendant could be convicted only upon proof that he acted with a guilty mind).

12. Dennis v. United States, 341 U.S. 494, 500 (1951).

13. *Morissette*, 342 U.S. at 251.

14. As described later in the report, the President of the United States and others in the executive branch play a substantial role in the proliferation of criminal offenses with inadequate *mens rea* requirements.

15. Where the prohibition of certain conduct is justified, civil rather than criminal enforcement is often the most effective method for regulating and punishing that conduct. Civil enforcement does not inflict the stigma of criminal punishment on inadvertent violators and those who are insufficiently blameworthy, and it still effectuates deterrence, retribution, and rehabilitation through the use of fines and other penalties. *See* Marie Gryphon, *It's a Crime!: Flaws in Federal Statutes That Punish Standard Business Practice*, MANHATTAN INST. CIVIL JUSTICE REPORT No. 12, at 10 (Nov. 2009).

16. 1 J. AUSTIN, LECTURES ON JURISPRUDENCE, 497 (Robert Campbell ed., Gaunt, Inc. 4th ed. 1976) (1879); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES 27 (William S. Hein & Co. 1992) (1769) ("[E]very person of discretion…is bound and presumed to know (the law).").

17. Joshua Dressler, Understanding Criminal Law 166 (3d ed. 2001) (emphasis added, internal citation omitted).

18. *See generally* Baker, *supra* note 5; Criminal Justice Section, American Bar Association, The Federalization of Criminal Law (1998) [hereinafter *Federalization of Criminal Law*].

19. Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 713–14 (2005).

20. 18 U.S.C. § 1112 (2008).

21. *See* Black's Law Dictionary 957 (6th ed. 1991) (defining "malice aforethought" as an "intent, at the time of a killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life").

22. 18 U.S.C. § 1111(a) (2008).

23. *Id.*

24. In his dissent from denial of certiorari in *Sorich v. United States*, Justice Antonin Scalia noted that one federal court of appeals "confidently proclaimed" that the vague, overbroad federal honest services fraud statute, 18 U.S.C. § 1346, is "'not violated by every breach of contract, breach of duty, conflict of interest, or misstatement made in the course of dealing.'" 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari) (quoting United States v. Welch, 327 F.3d 1081, 1107 (10th Cir. 2003)). In expressing his skepticism about the appeals court's proclamation, Justice Scalia argued that such an overbroad law could be unjustly applied to make virtually any unseemly conduct a crime:

> Without some coherent limiting principle to define what "the intangible right of honest services" is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.

Id.; *see also* 2 St. Thomas Aquinas, Summa Theologica pt. I-II, q. 96, art. 2, at 1018 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1948) ("[H]uman laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and such like.").

25. Lanzetta v. New Jersey, 306 U.S. 457, 453 (1939).

26. *See generally* Baker, *supra* note 5; *Federalization of Criminal Law*, *supra* note 18.

27. *See* Rachel Brand, *Making It a Federal Case: An Inside View of the Pressures to Federalize Crime*, 1 Heritage Found. L. Memo. No. 30, Aug. 29, 2008, at 2–4 (describing political, media, and public pressure to fashion new federal criminal laws or increase federal law enforcement authority in response to problems that garner nationwide attention).

28. *See Federalization of Criminal Law*, *supra* note 18, at 2.

29. *See generally* Baker, *supra* note 5; *Federalization of Criminal Law*, *supra* note 18; Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 Buff. Crim. L. Rev. 46 (1998); Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 Crim. L. Forum 99 (1989).

30. "While a figure of 'approximately 3,000 federal crimes' is frequently cited, that helpful estimate is now surely outdated by the large number of new federal crimes enacted in the 16…or so years intervening since its estimation. The present number of federal crimes is unquestionably larger." *Federalization of Criminal Law*, *supra* note 18, at 94.

31. *Id.* at 7–8.

32. *Id.* at 93.

33. *Id.* at 10.

34. *Id.* at 10 n.13.

35. The Baker study used a methodology based closely on that used by the Justice Department, which was the basis of the ABA Report's 3,000 federal crimes estimate. Baker, *supra* note 5, at 5.

36. *Id.* at 1–2.

37. *Id.* at 2.

38. *See id.* (finding that from 2000 through 2007 Congress created an average of 56.3 entirely new crimes a year).

39. Morissette v. United States, 342 U.S. 246, 251 (1952).

40. *See, e.g.*, 18 U.S.C. § 707 (providing a criminal penalty of up to six months imprisonment for making unauthorized use of the logo of the 4-H Clubs).

41. 18 U.S.C. §§ 1341, 1343 (2008).

42. *See* Black v. United States, 530 F.3d 596 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2379 (U.S. 2009); Weyhrauch v. United States, 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (U.S. 2009); Skilling v. United States, 554 F.3d 529 (5th Cir. 2009), *cert. granted*, 130 S. Ct. 393 (U.S. 2009); *see also* Brief of the National Association of Criminal Defense Lawyers as *Amici Curiae* in Support of Petitioner, Skilling v. United States, No. 08-1394 (U.S. Dec. 18, 2009); Brief of the National Association of Criminal Defense Lawyers as *Amici Curiae* in Support of Petitioner, Weyhrauch v. United States, No. 08-1196 (U.S. Sept. 21, 2009); Brief of the National Association of Criminal Defense Lawyers and New York Council of Defense Lawyers as *Amici Curiae* in Support of Petitioners, Black v. United States, No. 08-876 (U.S. Aug. 6, 2009).

43. S. 2509, 109th Cong. § 1713(b) (2006).

44. *Id.*

45. *See* 18 U.S.C. § 1033(f)(1) ("[T]he term 'business of insurance' means (A) the writing of insurance, or (B) the reinsuring of risks, by an insurer, including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons[.]").

46. Flores-Figueroa v. United States, 129 S. Ct. 1886 (2009).

47. 18 U.S.C. § 1028A(a)(1).

48. *Flores-Figueroa*, 129 S. Ct. at 1888.

49. *Id.* at 1894.

50. *Id.* at 1890.

51. *Id.* at 1891.

52. *Id.* at 1895 (Alito, J., concurring).

53. *Id.* at 1895–96. As Justice Alito explained:

> For example, 18 U.S.C. § 2423(a) makes it unlawful to "knowingly transpor[t] an individual who has not attained the age of 18 years in interstate or foreign commerce...with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." The Courts of Appeals have uniformly held that a defendant need not know the victim's age to be guilty under this statute.... Similarly, 8 U.S.C. § 1327 makes it unlawful to "knowingly a[d] or assis[t] any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony)...to enter the United States." The Courts of Appeals have held that the term "knowingly" in this context does not require the defendant to know that the alien had been convicted of an aggravated felony.

Flores-Figueroa, 129 S. Ct. at 1895–96 (alterations in original, internal citations omitted).

54. *Id.* at 1896.

55. *Id.* at 1891 (majority opinion).

56. For example, one provision in the federal Lacey Act states that any person who "knowingly imports or exports any fish or wildlife or plants in violation of any provision of this chapter" shall be criminally punished. *See* 16 U.S.C. § 3373(d)(1)(A). Another provision of the Lacey Act incorporates every wildlife rule or offense present in "any law, treaty, or regulation of the United States or...any Indian tribal law." 16 U.S.C. § 3372(a)(1).

57. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991); *see also* Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, Competitive Enter. Inst. 13 (2007), *available at* http://cei.org/pdf/6018.pdf ("Since 1980, the CFR [Code of Federal Regulations] has grown from 102,195 pages to 144,040. By contrast, in 1960, there were only 22,877 pages.").

58. H.R. 3968, 109th Cong. § 306(g)(2) (2005).

59. 16 U.S.C. § 3371 *et seq.*

60. *See, e.g.*, Marie Gryphon, *It's a Crime!: Flaws in Federal Statutes That Punish Standard Business Practice*, MANHATTAN INSTITUTE CIVIL JUSTICE REPORT NO. 12, at 2–6 (NOV. 2009) (explaining how missing or inadequate *mens rea* requirements in federal criminal law undermine the principle that to be punished criminally a person must be truly blameworthy); Harvey A. Silverglate, *Federal Criminal Law: Punishing Benign Intentions—A Betrayal of Professor Hart's Admonition to Prosecute Only the Blameworthy*, in IN THE NAME OF JUSTICE 65 (Timothy Lynch ed., 2009). Silverglate's essay in response to Professor Henry Hart's classic article on *The Aims of the Criminal Law*, 410 LAW & CONTEMP. PROBS. 25 (1958), briefly reviews the path that federal criminal law has followed since a few U.S. Supreme Court precedents undermined common-law protections requiring criminal punishment to be based on actual blameworthiness. *Id.* at 66–73. Silverglate's essay also reviews several federal criminal prosecutions that were based on vague, overbroad criminal offenses lacking adequate *mens rea* requirements and similar protections necessary to protect defendants who are not truly blameworthy. *Id.* at 73–94. The development of criminal law in the 50 states has generally followed a different path. Silverglate points out that "efforts to codify state criminal codes in the 1950s and 1960s were intended to modernize and organize—not to reject—ancient common law concepts, firmly establishing their place in the statute books." *Id.* at 67. When considering *mens rea* and related concepts, "the crafters of the new state criminal statutes were attuned to the need to keep the law linked to the moral notions of blameworthiness that underpinned the common law of crimes." *Id.*

61. The rule of lenity is a judicial doctrine used to construe ambiguous criminal laws. *See* United States v. Santos, 128 S. Ct. 2020, 2025 (2008). In such cases, the rule requires the court to resolve the ambiguity in the defendant's favor. *See id.*

62. These numbers include only bills, not resolutions.

63. H.R. 3192, 109th Cong. § 107(1) (2005).

64. S. 3506, 109th Cong. § 2(c) (2006).

65. As amended by the Stolen Valor Act of 2005, Pub. L. No. 109-437, § 3, 120 Stat. 3266 (2006) (hereinafter *Stolen Valor Act*) (S. 1998, 109th Cong.), 18 U.S.C. § 704(a) now reads: "Whoever knowingly wears, purchases, attempts to purchase, solicits for purchase, mails, ships, imports, exports, produces blank certificates of receipt for, manufactures, sells, attempts to sell, advertises for sale, trades, barters, or exchanges for anything of value any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration or medal, or any colorable imitation thereof, except when authorized under regulations made pursuant to law, shall be fined under this title or imprisoned not more than six months, or both."

66. *Stolen Valor Act*, *supra* note 65 § 1.

67. *See* Orders and Medals Society of America, *OMSA President's Message, March-April 2007*, http://www.omsa.org/forums/president.php ("Although the intent of the [l]aw was to restrict and provide severe consequences to those individuals who fraudulently claimed that they were recipients of the Medal of Honor, Distinguished Service Cross, Navy Cross, Air Force Cross, Silver Star and Purple Heart, the actual wording left much to be desired. In fact the law appears to restrict all commerce in the above decorations and[,] depending on how it is interpreted[,] possibly all U.S. Federal awards.").

68. Dixon v. United States, 126 S. Ct. 2437, 2441 (2006) (quoting Bryan v. United States, 524 U.S. 184, 193 (1998)).

69. 524 U.S. at 192. In some federal circuits, any *mens rea* requirement based on knowledge (e.g., "knowingly," "knowing," or "knew") is likely to draw a government request for a jury instruction on willful blindness. *See, e.g.*, United States v. Jewell, 532 F.2d 697, 700–04 (9th Cir. 1976) (en banc) (holding that a jury may convict under a "knowingly" standard if it finds the evidence satisfies a liberal formulation of the "willful blindness" or "deliberate ignorance" doctrine). Any "willful blindness" instruction that follows, for instance, the *Jewell* line of cases is likely to be inferior to and less protective than the formulation of the doctrine in the American Law Institute's Model Penal Code. *See* Model Penal Code § 2.02(7) (2009) ("Requirement of Knowledge Satisfied by Knowledge of High Probability.").

70. H.R. 3968, 109th Cong. § 506(g)(2) (2005).

71. *Bryan*, 524 U.S. at 192.

72. H.R. 3968, 109th Cong. § 506(g)(2).

73. *Id.*

74. *See* Dixon v. United States, 548 U.S. 1, 6–7 (2006) ("[U]nless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." (internal quotation marks omitted)); Bryan v. United States, 524 U.S. 184, 192 (1998) ("[T]he term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law. As Justice Jackson correctly observed, 'the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.'" (quoting Boyce Motor Lines v. United States, 342 U.S. 337, 343 (1952) (Jackson, J., dissenting))).

75. H.R. 4148, 109th Cong. § 2(a) (2005).

76. Although this report's analysis focuses on the *mens rea* requirement of the criminal provision, and not the *actus reus*, it should be taken into consideration when assessing the strength of the offense's *mens rea* provision that the conduct constituting this particular offense is quite broad, vague, and far-reaching. When considering the practical application of such an offense, the conduct proscribed by an overbroad *actus reus* can undermine the protection afforded by the *mens rea* provision.

77. As the U.S. Supreme Court noted in *Bryan v. United States*, the "word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears. Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. As we [have] explained..., a variety of phrases have been used to describe that concept." 524 U.S. 184, 191 (1998) (internal citations omitted). Further, "[t]he word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by careless disregard whether or not one has the right so to act." *Id.* at 191 n.12 (internal citations omitted); *see also id.* at 191–92 ("As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.'"). However, the Court has held that in "certain cases involving willful violations of the tax laws...the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating." *Id.* at 194 (citing Cheek v. United States, 498 U.S. 192, 201 (1991)). In *Ratzlaf v. United States*, 510 U.S. 135 (1994), for example, the Court concluded that "in order to satisfy a willful violation...the jury had to find that the defendant knew that his structuring of cash transactions to avoid a reporting requirement was unlawful." *Bryan*, 524 U.S. at 194. The Court reasoned that "[b]oth the tax cases and *Ratzlaf* involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct." *Id.* at 194 (citing *Ratzlaf*, 510 U.S. at 149). For purposes of analysis, this report relies on the Supreme Court's discussion of the term "willfully" in *Bryan*, in particular, the Court's statements defining "willfully" to require a "culpable state of mind," an act "undertaken with a 'bad purpose,'" or both. Unless the context dictates otherwise, the analysis does not interpret "willfully" as requiring a defendant's specific knowledge of the law or his intent to violate a specific provision of law. This approach steers a course somewhere near the middle of the way through the varied definitions and usages of "willfully" in a significant body of Supreme Court case law.

78. H.R. 4572, 109th Cong. § 5 (2005).

79. H.R. 5188, 109th Cong. § 2(a) (2006).

80. S. 414, 109th Cong. § 303 (2005).

81. U.S. Senate Committee on the Judiciary, http://judiciary.senate.gov/about/ (last visited Feb. 4, 2010). For similar information about the House Judiciary Committee, see http://judiciary.house.gov.

82. U.S. Senate Rule XXV, *available at* http://rules.senate.gov/public/index.cfm?FuseAction=HowCongressWorks.RulesOfSenate.

83. The authors did not overlook the possibility that greater judiciary committee oversight might correlate with *less* protective *mens rea* requirements. Federal law enforcement agencies, including the U.S. Department of Justice, routinely provide some of their employees the opportunity to serve "on detail" as staff to Members of Congress and congressional committees. Anecdotal reports indicate that a substantial percentage of these detailees work for the House and Senate Judiciary Committees and for Members of Congress who serve on those committees and that detailees not infrequently become permanent members of congressional staff. While they serve as congressional staff, law enforcement detailees remain employees of their respective law enforcement agencies. The possibility has been recognized that detailees could exert an institutional bias on the legislative process in favor of broader, harsher criminal offenses under which it is easier to secure a conviction.

84. Future studies might consider whether any of the following factors correlates with the strength of *mens rea* requirements in non-violent offenses: the identity of each bill's primary sponsor or sponsors, the length of sponsors' tenure in Congress, and the length of sponsors' tenure (if any) as a member of a judiciary committee.

85. The term "the offense" is in quotation marks in the text because statutes directing regulatory criminalization are not proper criminal offenses. Such statutes do not define the entire *actus reus*, and they usually do not define the entire *mens rea* requirement or provide the specificity and definiteness of language needed to direct how any *mens rea* requirement should be applied to the elements of the offense as ultimately defined by regulatory action.

86. *Over-Criminalization of Conduct / Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. (2009) [hereinafter *House Hearing*] (written statement of former U.S. Att'y Gen. Dick Thornburgh, July 22, 2009, at 9), *available at* http://judiciary.house.gov/hearings/pdf/Thornburgh090722.pdf, 2009 WL 2186682 ("Congress needs to rein in the continuing proliferation of criminal regulatory offenses. Regulatory agencies routinely promulgate rules that impose criminal penalties that are not enacted by Congress.... Congress should not delegate such an important function to agencies."); *see also id.* (recommending reform similar to that proposed by the Congressional Responsibility Act, H.R. 931, 109th Cong. (2005), which "sought to ensure that Federal regulations would not take effect unless passed by a majority of the members of the Senate and House and signed by the President").

87. Columbia law professor John Coffee has reported estimates that up to 300,000 federal regulations can be punished criminally. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991).

88. Since the beginning of 2007, the Heritage Foundation has been using the Legislative Update system that it developed in conjunction with the National Association of Criminal Defense Lawyers to monitor and perform basic analysis of every criminal offense introduced in Congress that meets the same criteria as the offenses that are the subject of this study. The Legislative Update is publicly available on Heritage's Overcriminalized.com Web site. *See* Overcriminalized.com, http://overcriminalized.com/Legislation.aspx. When Congress is in session, Heritage's weekly Legislative Update Alert provides email subscribers status updates and a brief summary of newly introduced and pending bills that would add non-violent criminal offenses to federal law or modify those already in law. The analysis conducted for the Legislative Update Alert strongly suggests that the data in this report on the number, type, and *mens rea* requirements of criminal offenses introduced and passed in the 109th Congress are generally consistent with the number, type, and *mens rea* requirements of criminal offenses introduced and passed in the 110th Congress.

89. *But see House Hearing*, *supra* note 86 (statement of Chairman Robert "Bobby" Scott), video *available at* http://judiciary.edgeboss.net/real/judiciary/crime/crime072309.smil (noting widespread concern over the deterioration in the standards for what constitutes a criminal offense, including "the disappearance of the common-law requirement of *mens rea*," and emphasizing that "*mens rea* has long played an important role in protecting those who do not intend to commit wrongful acts from prosecution and conviction"); *id.* (statement of Ranking Member Louie Gohmert) (noting that, in the "labyrinth" of criminal laws scattered throughout the U.S. Code and federal regulations, there is "a significant element missing from many of the criminal provisions: criminal intent" and explaining that the *mens rea* requirement is "a cornerstone of criminal law, and it is eroding as regulatory crimes are being prosecuted under reduced, or even non-existent, mental states").

90. Similarly, the Legislative Update system attempts to identify every amendment that contains relevant criminal provisions and to include such amendments in the weekly Legislative Update Alert emails. It is not unusual for this process to identify amendments with criminal provisions being added to bills approximately a week before the bill is passed, leaving too little time for adequate review of the criminal provision by Members and almost no time for the public to be apprised of the new criminalization before it is passed.

91. Baker, *supra* note 5, at 1, 5.

92. *See supra* notes 46–55 and accompanying text.

93. 18 U.S.C. § 1346 (2000).

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

95. In doing so, some consideration should be given to the key provisions in the American Law Institute's Model Penal Code (MPC) that standardize how courts interpret criminal statutes that have no or unclear *mens rea* requirements.

See MODEL PENAL CODE § 2.02(1) (2009) ("Minimum Requirements of Culpability"); *id.* § 2.02(3) ("Culpability Required Unless Otherwise Provided"); *id.* § 2.02(4) ("Prescribed Culpability Requirement Applies to All Material Elements"). Although the general rule articulated in MPC subsection 2.02(3) is salutary insofar as it provides an express remedy for an omission of *mens rea* terminology, "recklessly" should not be used as a default term because it is insufficient to protect those actors who are not truly culpable or blameworthy. *See id.* § 2.02(3) ("When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly, or recklessly with respect thereto."). In order to avoid unjust convictions, it is strongly recommended that any default *mens rea* provision enacted into federal law rely on the *mens rea* terms that are most protective of persons who are not truly blameworthy.

96. *Id.* § 2.02(4) ("When the law defining an offense 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.").

97. *See, e.g.*, United States v. Santos, 128 S. Ct. 2020, 2025 (2008).

98. *Id.*

99. *See* Taylor v. Kentucky, 436 U.S. 478, 483–87 (1978) (explaining the presumption of innocence and the government's burden of demonstrating the defendant's guilt beyond a reasonable doubt); Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence...is a basic component of a fair trial under our system of criminal justice.").

100. In *United States v. Bass*, the Supreme Court referred to the rule of lenity as a "wise principle[ ] this court has long followed." 404 U.S. 336, 347 (1971). Quoting Justice Oliver Wendell Holmes, Jr., and Judge Henry Friendly, respectively, the Court further explained:

> This principle is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." ... Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."

Id. at 348 (internal citations omitted); *see also* Bell v. United States, 349 U.S. 81, 83 (1955) ("When Congress leaves to the judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this is not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.").

101. Wayne R. LaFave, CRIMINAL LAW 11 (4th ed. 2003).

102. It would be of great benefit to the nation, and little would be lost, if Congress were to place a non-partisan, across-the-board moratorium on enacting new criminal offenses for at least one year and invest the legislative time and resources that are now being squandered on creating new criminal offenses into studying existing federal criminal offenses and rewriting the currently monstrous, disorganized, and incomprehensible body of federal criminal law. *Cf.* Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 643 (2006) (characterizing federal criminal law as "an 'incomprehensible,' random and incoherent, 'duplicative, ambiguous, incomplete, and organizationally nonsensical' mass of federal legislation that carries criminal penalties" (internal citations omitted)).

103. One example of such an offense is found in section 303 of the Voter Protection Act, S. 414, 109th Cong. (2005), which criminalizes damage to property if the offender intended thereby to prevent a person from voting in an election for national office. *See supra* note 80 and accompanying text.

104. The only known exceptions that fit this study's criteria are the bills in the 109th Congress criminalizing cloning and conduct related to cloning, which were removed because the authors were unable to reach agreement on the nature of these offenses' *mens rea* provisions.

105. The reader is referred to the online appendix to this report, available at http://report.heritage.org/sr0077 and www.nacdl.org/withoutintent. Each individual offense defined in this study has its own table in the Offenses Appendix in the Online Appendix.

106. *See, e.g.*, Dixon v. United States, 548 U.S. 1 (2006); Bryan v. United States, 524 U.S. 184 (1998); Ratzlaf v. United States, 510 U.S. 135 (1994).

107. *See, e.g.*, *Dixon*, 548 U.S. at 6–7; *Bryan*, 524 U.S. at 193; *Ratzlaf*, 510 U.S. at 141.

108. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1888 (2009) (holding that the *mens rea* term "knowingly" in the introductory language of the federal aggravated identity theft statute (18 U.S.C. § 1028A(a)(1)) applies to the phrase "of another person" located at the end of the offense's definition). For a more complete discussion of the Supreme Court's decision in *Flores-Figueroa*, see *supra* notes 46–55 and accompanying text.

109. Because the federal government is a body of limited, enumerated powers, a high percentage of the non-violent offenses in this study require (or purport to require) a nexus between the violative conduct and interstate commerce. The purpose of language requiring this nexus is to bring the conduct under the power granted to Congress under the Commerce Clause of the U.S. Constitution. Some offenses, for example, require the conduct to be "in or affecting interstate commerce," an extremely broad jurisdictional "hook," which ostensibly makes the prohibited conduct a matter of federal jurisdiction. Where a single *mens rea* term (usually "knowingly" or "willfully") is used as a blanket or introductory requirement at the beginning of the language defining the offense, this study generally does not assume that the federal courts will require the government to prove that the defendant knew that his conduct was, for example, "in or affecting interstate commerce" in order to secure a conviction.

110. The rule of lenity is a judicial doctrine used to construe ambiguous criminal laws. *See* United States v. Santos, 128 S. Ct. 2020, 2025 (2008). In such cases, the rule requires the court to resolve the ambiguity in the defendant's favor. For a discussion of the rule of lenity, see *supra* notes 97–101 and accompanying text.

Online Appendix available at:

http://report.heritage.org/sr0077

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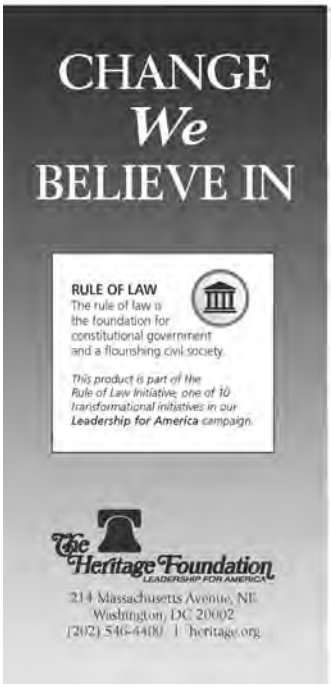
A series of memos to President-elect Obama identifying policy areas where his words line up with our vision.

No. 17
January 9, 2009

Enacting Principled, Nonpartisan Criminal-Law Reform

A Memo to President-elect Obama

Brian W. Walsh



As President, I will…work every day to ensure that this country has a criminal justice system that inspires trust and confidence in every American, regardless of age, or race, or background.

—Barack Obama, Howard University, September 28, 2007[1]

PRESIDENT-ELECT OBAMA, during your campaign, you promised to improve the administration of criminal justice for all Americans without limitation. This promise is vital because criminal punishment is the greatest power that government routinely uses against its own people.[2] Every expansion of the federal criminal law beyond its proper bounds, and every unjust federal criminal offense, is an exercise of raw governmental power that undermines Americans' trust and confidence in the justice system.

For centuries, citizens faced only a few dozen criminal offenses, but in recent decades the number of federal criminal offenses has proliferated beyond almost all constitutional and prudential bounds. Worse, many of these criminal offenses are improper and unjust exercises of federal power. The Supreme Court has frequently stated that the federal government lacks a plenary or general police power, yet hundreds of federal criminal offenses cover subjects that the Constitution reserves to the authority of state and local jurisdictions. Hundreds more lack meaningful criminal-intent requirements to protect from unjust criminal punishment those Americans who may violate a law or regulation only accidentally or inadvertently, without any criminal intent.

Compounding the problem, federal policies and practices for investigating and prosecuting crime have become increasingly aggressive

at the expense of fundamental protections against unjust criminal process. For the past decade, both the attorney–client relationship and the attorney–client privilege on which it is founded have been under attack by the Justice Department and other federal law enforcement agencies. In addition, unlike the grand jury systems in some reform-minded states, the federal grand jury system provides fewer protections against unwarranted prosecution and serves primarily as a vehicle that prosecutors can use to secure an indictment.

When it comes to federal criminal-justice reform, advocates and media commentators have typically directed the public's attention to proposed changes in sentencing and incarceration policy that would primarily benefit isolated classes of offenders. Some of these reforms may indeed be needed, but—in accordance with your campaign promise—you should focus your Administration's efforts on principled, nonpartisan reforms that benefit *all* Americans.

To inspire the widest possible trust and confidence in the federal criminal justice system, you and your Administration should:

- **Add basic protections against unjust punishment.** For centuries, the Anglo–American legal system has defined a crime to require both a guilty act (*actus reus*) and a guilty mind (*mens rea*). The latter is commonly referred to as a criminal-intent requirement: To win a conviction, the government must prove beyond a reasonable doubt that the accused acted with criminal intent. Today, however, Congress increasingly fails to include a meaningful criminal-intent requirement in new criminal offenses that it enacts.[3] Without a meaningful criminal-intent requirement, Americans who never intended to commit a crime—even those who violated a prohibition literally by accident—may nonetheless be convicted and punished as criminals.

  To protect innocent Americans, new provisions should be added to federal law specifically directing federal courts to grant a criminal defendant the benefit of the doubt when Congress fails to speak clearly in its definition of criminal offenses and penalties. The American Law Institute's Model Penal Code includes key provisions standardizing how courts interpret criminal statutes that have unclear or nonexistent criminal-intent requirements.[4] Federal law should include similar provisions. One such provision would apply a default criminal-intent requirement to criminal statutes that lack any such requirement. A second would mandate that any introductory or blanket criminal-intent requirement be applied to all material elements of the offense.[5]

  Although it would be unwise to do so, Congress would remain free to enact criminal offenses without meaningful criminal-intent requirements. But Congress would have to make this purpose clear in the text of the statute. This reform would thus enable law-abiding Americans to know which conduct carries an unavoidable risk of criminal punishment (i.e., is act-at-your-peril conduct) and which conduct they may safely engage in as long as they have every intention of following the law.

---

1. "Remarks of Senator Barack Obama: Howard University Convocation," Washington, D.C., September 28, 2007, at *http://www.barackobama.com/2007/09/28/remarks_of_senator_barack_obam_26.php* (January 2, 2009).

2. *See* Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952) ("Whatever view one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals.").

3. To cite just one recent benchmark, Louisiana State University law professor John Baker, Jr., recently completed a Heritage Foundation study to number the criminal offenses in the United States Code and assess federal offenses' criminal-intent requirements. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Criminal Law*, Heritage Foundation Legal Memorandum No. 26, June 16, 2008. Baker's research showed that 17 of the 91 entirely new criminal offenses that Congress added to the United States Code from 2000 through 2007 included no criminal-intent requirement whatsoever. *Id.* at 7.

4. *See* Model Penal Code § 2.02(1), (3), (4).

5. *Cf.* United States v. Flores-Figueroa, No. 08-108, 2008 WL 2855747 (Jul. 22, 2008) (petition for writ of certiorari) (asking the Supreme Court to determine whether the "knowingly" criminal-intent term in 18 U.S.C. § 1028A(a)(1) protects Flores-Figueroa, who pleaded guilty to two immigration-related offenses, from a two-year sentencing increase for "aggravated identity theft" in the absence of evidence that he knew the Social Security number he was using actually belonged to someone else).

The common-law rule of lenity operates in a similar fashion to protect defendants from conviction under expansive interpretations of criminal provisions. It generally provides that ambiguities in a criminal statute (i.e., when it can reasonably be interpreted to define either a broader or a narrower offense) are to be resolved in favor of the defendant. The rule is based on the commonsense notion of justice that no one "should…languish[] in prison unless the lawmaker has clearly said they should."[6] It applies when the "metes and bounds" of a criminal offense, the language defining the severity of the offense, or both are ambiguous.[7]

Codifying the rule of lenity would reduce uncertainty in federal criminal law; narrow the scope of legal issues that the parties must litigate, both at trial and in the federal appellate courts; and require that Congress be clear when it defines a criminal offense. Americans are entitled to no less protection of their liberty.

- **Protect Americans' relationship with their attorneys.** Individuals and organizations across the political spectrum have long decried federal policies and practices that have been eroding the protections granted by the attorney–client privilege and the attorney–client relationship. These policies originated with the 1999 memorandum issued by your Attorney General nominee, then-Deputy Attorney General Eric Holder.[8] The text and subsequent implementation of the Holder memorandum coerced organizations to waive the venerable attorney–client privilege in order to reduce their chances of being indicted for the allegedly criminal conduct of any employee. The memorandum also pressured organizations either to violate any commitment they had made to pay employees' legal fees or to face a greater likelihood of indictment.[9]

  Such policies, though perhaps well-intentioned, resulted in a federal law enforcement culture in which it is expected (even when not demanded) that a company under investigation waive privileges, cut off legal fees, and take similar steps to limit their employees' ability to defend themselves. Since 1999, employees have been pressured into giving potentially incriminating statements to government agents without having their attorneys present.[10]

  A wide range of organizations, from the American Bar Association to the American Civil Liberties Union to the U.S. Chamber of Commerce, have worked together for several years to change these policies. As a result, and to forestall legislation, current Deputy Attorney General Mark Filip announced changes in the U.S. Attorneys' Manual last August that instruct federal prosecutors that they may no longer use coercive tactics to persuade companies to waive their rights to their attorney–client privilege and related protections.[11] Nor may prosecutors coerce companies to violate employees' constitutional rights or to pressure employees to waive such rights on their own. If actually and fully implemented by all federal prosecutors, the new guidelines should substantially reduce violations of the rights of companies and their employees.[12]

6. United States v. Bass, 404 U.S. 336, 348 (1971) (quoting Judge Henry Friendly).

7. *See* United States v. Rodriguez, 128 S. Ct. 1783, 1800 (U.S. 2008) (Souter, J., dissenting).

8. U.S. Dep't of Justice, *Federal Prosecution of Corporations*, Memorandum from Deputy Attorney General Eric Holder to All Component Heads and United States Attorneys §§ II, VI.B. (June 16, 1999) (on file with the Department of Justice) (authorizing prosecutors to request waivers of attorney–client privilege and encouraging them to factor companies' compliance with such "requests" into indictment decisions).

9. *Id.* (directing prosecutors to make an apparently independent pre-indictment determination of employees' criminal culpability and to consider a management decision to provide legal counsel to such "culpable" employees to be additional grounds for indicting the entire company).

10. *See, e.g.*, United States v. Stein, 541 F.3d 130, 155–57 (2d Cir. 2008).

11. U.S. Department of Justice, U.S. Attorneys' Manual §§ 9-28.710 (stating that "prosecutors should not ask for such waivers and are instructed not to do so"), 9-28.720 ("Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection.").

12. The Securities and Exchange Commission issued a new Enforcement Manual in October 2008 with language placing some limits on the ability of SEC staff to engage in practices similar to those formerly authorized by the Holder memorandum and its successors. *See* SEC Enforcement Div., Enforcement Manual § 4.3 (Oct. 6, 2008), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf. But important loopholes undermine the effectiveness of this limiting language.

While the new policy is a substantial improvement over the Justice Department's previous policies, by its terms it applies only to federal prosecutors in U.S. Attorneys' Offices, includes exceptions that are likely to undermine its effectiveness, and has no effect on similar harmful policies that have been adopted by several other federal agencies since the Holder memorandum was issued. The Department's policy, standing alone, thus does not fully solve the problem of government-coerced waivers and violations of employee rights. What is needed is a permanent solution with the force of law that applies to all federal agencies—i.e., comprehensive legislation with provisions like those in the bipartisan Attorney–Client Privilege Protection Act that passed the House last year by unanimous voice vote.[13]

- **Reform the federal criminal code.** As Georgetown law professor Julie O'Sullivan has concluded, the federal criminal law does not even qualify to be called a criminal code. It is instead "an 'incomprehensible,' random and incoherent, 'duplicative, ambiguous, incomplete, and organizationally nonsensical' mass of federal legislation that carries criminal penalties."[14] Criminalization has become extremely popular. As you have previously noted, many candidates run campaigns based on greater criminal penalties and more criminal offenses.[15] This is true even of candidates for national office, despite the fact that, as the Supreme Court has frequently noted, the Constitution does not grant the federal government a plenary police power.[16]

  In its final report, the American Bar Association Task Force on the Federalization of Crime, chaired by former Attorney General Edwin Meese III, reported that it had been "told explicitly by more than one source that many…new federal laws are passed not because federal prosecution of these crimes is necessary but because federal crime legislation in general is thought to be politically popular."[17] Many Members of Congress apparently will not vote against crime legislation "even if it is misguided, unnecessary, and even harmful."[18]

  Federal criminal law thus has proliferated without rhyme or reason, and often with little evidence that the fundamental nature and proper boundaries of criminal law have been taken into account. Today, there are at least 4,450 criminal offenses in the federal code,[19] and Columbia law professor John Coffee has noted that criminal charges may be brought for the violation of an estimated 300,000 federal regulations.[20] As discussed above, many federal criminal offenses include no meaningful criminal-intent requirement at all.

  To give Americans a reasonable opportunity to understand what the criminal law requires of them before they act and later discover that the federal government deems them to be criminals, your Administration should support the bipartisan efforts already underway to make the federal criminal code smaller and more understandable. The first step is to eliminate provisions that have not been charged (or that have been charged only rarely) during the past 10 years as well as those held to be unconstitutional. This recodification should also:

  1. Collect all similar criminal offenses (such as all offenses covering conduct resulting in a victim's death) in a single chapter of the United States Code;

13. *See* Floor Statement of Robert C. "Bobby" Scott, Chairman, Subcommittee on Crime, Terrorism, and Homeland Security, House Judiciary Committee, in Support of H.R. 3013, the "Attorney–Client Privilege Protection Act," Sep. 27, 2008.
14. Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643, 643 (2006) (citations omitted).
15. *See* Chris Sullentrop, "The Right Has a Jailhouse Conversion," N.Y. Times, Dec. 24, 2006 (quoting then-U.S. Senator Barack Obama describing how some members of the Illinois state legislature factored election-year politics into their decisions about whether to increase criminal penalties).
16. *See* United States v. Morrison, 529 U.S. 598, 618 (2000).
17. Crim. Law Div., Am. Bar Ass'n, *The Federalization of Criminal Law* 2 (1998). The ABA Task Force was composed of 17 academics, former prosecutors, Justice Department officials who served in Democrat and Republican Administrations, and Members of Congress of both major parties. Its final report was unanimous.
18. *Id.*
19. Baker, *supra* note 3, at 1, 5.
20. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991).

2. **Consolidate** criminal provisions that overlap in whole or in part; and
3. **Eliminate** provisions that are blatant exercises of federal power in areas that the Constitution has reserved to the states.

A primary goal of this reform would be to impose structure and coherence on the federal criminal law, making it more like a real criminal code. This proposed reform, if conducted under your leadership with appropriate bipartisan involvement and support, would lay the groundwork for more substantive reforms that are of interest to and acceptable to both Democrats and Republicans, liberals and conservatives.

- **Pursue federal grand jury reform.** The Fifth Amendment protects Americans' right to indictment by a grand jury because the grand jury is supposed to serve as a "protector of citizens against arbitrary and oppressive governmental action."[21] Even if an individual is cleared of all charges and found not guilty, federal indictment by itself often works severe and irreparable damage to his career and reputation.[22] Entire business organizations can be destroyed by a federal indictment even if the U.S. Supreme Court later determines that the legal theory on which federal prosecutors based their charges was erroneous.[23] And defending against an unjust indictment can easily wipe out all of a defendant's financial resources.

  Today, however, the federal system lacks important rights for grand jury targets and suspects, and it no longer serves as the bulwark against unjust prosecution that it did when the Fifth Amendment was adopted.[24] Proposals for federal grand jury reform should be examined in a careful and deliberate manner and should focus initially on two important protections:

  1. Without allowing defense attorneys to object or otherwise participate in the proceedings, your Administration should work with Congress to experiment with allowing subjects and targets of federal grand jury investigations to have their attorneys present in the grand jury room.
  2. Absent exceptional circumstances, federal criminal defendants should be provided with transcripts of the entire grand jury proceedings, including all evidence and all statements made by prosecutors in the grand jury's presence.

  Others may be studied,[25] but reforms such as these enjoy broad support, including support from high-ranking Justice Department officials who served in past Administrations and such professional organizations as the American Bar Association.[26]

Conclusion

Because they respect and restore basic principles on which all criminal law should rest, proposals for criminal-law reform such as those outlined above have broad support across the political and ideological spectrum. Nonpartisan coalitions are already in place to pursue and promote these reforms, and your Administration should work with these Left–Right coalitions to implement them.

21. United States v. Calandra, 414 U.S. 338, 343 (1974).

22. Former Secretary of Labor Raymond J. Donovan famously captured the destructive effect of mere indictment when, after a jury acquitted him and each of his co-defendants of charges based on the government's tenuous theory of criminal culpability, he asked, "Which office do I go to, to get my reputation back?" Selwyn Raab, "Donovan Cleared of Fraud Charges by Jury in Bronx," N.Y. TIMES, May 26, 1987, at A1.

23. *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 698, 706–08 (2005). Despite the U.S. Supreme Court's reversal of the firm's conviction, the 28,000 partners and employees of international accounting giant Arthur Andersen lost their careers and everything they had invested in the firm when federal prosecutors destroyed it by indicting the firm on a hyper-aggressive and fallacious legal theory of the entire firm's criminal culpability for the allegedly wrongful conduct of a handful of its employees.

24. Prosecutors and legal scholars alike have acknowledged that the saying in essence is correct that if a prosecutor were to ask nicely, a grand jury would indict a ham sandwich. *See* "The Supreme Court, 1991 Term: Independence of the Grand Jury," 106 Harv. L. Rev. 191, 199–200 (Nov. 1992) (unsigned article); Martin S. Himeles, Jr., Op-Ed., "How to Indict a Ham Sandwich," WASH. TIMES, Aug. 18, 1999.

25. *See* Paul Rosenzweig, "Time Is Now for Federal Grand Jury Reform," The Heritage Foundation, Feb. 21, 2003.

26. *See* Nat'l Ass'n of Crim. Defense Lawyers, Report of Commission to Reform the Federal Grand Jury (undated), *available at* http://www.nacdl.org/public.nsf/freeform/grandjuryreform?opendocument (citing support of former Deputy Attorney General Larry S. Thompson and other former Justice Department officials and federal prosecutors).

Further, these principle-based reforms benefit all Americans suspected of or charged with a crime. They are thus not as susceptible to the politicization that has infected most criminal justice policy. Implementing them will inspire Americans' trust and confidence in the federal criminal justice system and fulfill your campaign promise to do so.

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WebMemo

Published by The Heritage Foundation

No. 2933
June 9, 2010

The Criminal Intent Report: Congress Must Justify New Criminalization

Brian W. Walsh

The political pressure to criminalize innocent conduct has proved difficult for most Members of Congress, irrespective of party affiliation, to resist. As a result of these pressures, Congress often crafts criminal legislation that is "misguided, unnecessary, and even harmful."[1] It is far too easy for a Member of Congress to score political points by casting himself as "tough on crime," even when the conduct being criminalized and penalized is not inherently wrongful and poses no clear danger to anyone.

Counteracting this pressure is a non-partisan issue. Together, The Heritage Foundation and the National Association of Criminal Defense Lawyers (NACDL) released a major study last month with several concrete proposals for reform.[2] One reform would require Members of Congress to provide written analysis and justification for all new and modified federal criminal offenses and penalties. Additionally, this reform would require the two political branches of the federal government to produce a regular public report that includes information necessary to assess the purported justification, costs, and benefits of all new criminalization.

Criminalization Run Amok. Currently, there is no effective check on overcriminalization. With over 4,450 criminal offenses in the United States Code and up to 300,000 federal regulations that may be enforced with criminal penalties, it is a safe bet that Congress has already criminalized all inherently wrongful conduct (e.g., murder, rape, robbery, theft, arson, assault, and battery), often more than once. Yet Congress continues to create an average of over 56 new crimes each year, that is, one new crime a week, every week of the year, even when Members are not in session.

Most people would agree with former Attorney General Dick Thornburgh that "[o]nly when conduct is sufficiently wrongful and severe, and the parameters or unlawful conduct are easily understood, should the government resort to the stigma, public condemnation, and potential deprivation of liberty that go along with the criminal sanction."[3] Americans are therefore generally surprised to learn that Congress regularly enacts offenses lacking a guilty-mind ("criminal-intent") requirement that is adequate to protect the innocent from criminal punishment. *Without Intent*, the new report from The Heritage Foundation and NACDL, found that approximately 60 percent of the non-violent criminal offenses[4] enacted in a single Congress (the 109th Congress) lacked such a guilty-mind requirement. Even worse, over 20 percent of the federal offenses enacted in 2005 and 2006 delegated away Congress's authority to create criminal offenses and impose penalties, handing this power to unelected bureaucrats in the federal agencies. As another sign of its cavalier attitude toward criminalization, Congress regularly enacts new criminal

This paper, in its entirety, can be found at:
http://report.heritage.org/wm2933

Produced by the Center for Legal and Judicial Studies

Published by The Heritage Foundation
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No. 2933 WebMemo June 9, 2010

offenses punishing conduct that is identical, or nearly so, to conduct that is already criminalized under federal law.

Requiring Justification, Increasing Accountability. To counter this trend, Congress should require reporting on criminalization in the two political branches. Similar to a bill Representative Don Manzullo (R–IL) introduced in 2001, this reform would help to provide much-needed accountability by requiring the federal government to perform basic but thorough reporting on the grounds and justification for all new and modified criminal offenses and penalties. Implementing this reform would require rule changes in both chambers of Congress and statutory reporting requirements governing the federal agencies that create and modify criminal offenses and penalties.

For every new or modified criminal offense or penalty that Congress passes, it should report:

- A description of the problem that the criminal offense or penalty is intended to redress, including an account of the perceived gaps in existing law, the wrongful conduct that is currently unpunished or under-punished, and any specific cases or concerns motivating the legislation;
- A direct statement of the express constitutional authority under which the federal government purports to act;
- An analysis of whether the criminal offenses or penalties are consistent with constitutional and prudential considerations of federalism;
- A discussion of any overlap between the conduct to be criminalized and conduct already criminalized by existing federal and state law;
- A comparison of the new law's penalties with the penalties under existing federal and state laws for comparable conduct;
- A summary of the impact on the federal budget and federal resources, including the judiciary, of enforcing the new offense and penalties to the degree required to solve the problem that the new criminalization purports to address;
- A review of the resources that federal public defenders have available and need in order to adequately defend indigent defendants charged under the new law; and
- An explanation of how the *mens rea* (i.e. criminal-intent or guilty-mind) requirement of each criminal offense should be interpreted and applied to each element of the offense.

Criminalization in the Executive Branch. Congress should also require the federal departments and agencies to collect and report similar information on criminalization in the executive branch. This information should be compiled and reported annually and, at minimum, should include:

- All new criminal offenses and penalties that federal agencies have added to federal regulations and an enumeration of the specific statutory authority supporting these regulations; and
- For each referral that a federal agency makes to the Justice Department for possible criminal prosecution, the provision of the United States Code and each federal regulation on which the referral is based, the number of counts alleged or ultimately charged under each statutory and regulatory provision, and the ultimate disposition of each count.

1. Criminal Justice Section, American Bar Association, "The Federalization of Criminal Law," 1998, at 2.
2. Brian W. Walsh & Tiffany M. Joslyn, "Without Intent: How Congress Is Undermining the Criminal Intent Requirement in Federal Law," The Heritage Foundation and the National Association of Criminal Defense Lawyers, April 2010, at *http://www.heritage.org/Research/Reports/2010/05/Without-Intent*.
3. Dick Thornburgh, "Federal Erosion of Business Civil Liberties," Introduction, 2nd ed.,Washington Legal Foundation, 2010, at *http://wlf.org/upload/competition/WLF_Spcl_Rprt_2010_Ed.pdf* (June 9, 2010).
4. The report uses the term "non-violent offenses" as a shorthand for the offenses studied. Whereas all the offenses included in the study are non-violent, many other offenses proposed by the 109th Congress could also be described as non-violent. Specifically, the study did not include offenses criminalizing conduct involving firearms, drugs and drug trafficking, pornography, and immigration violations.

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No. 2933 WebMemo June 9, 2010

Congress should always be required to determine the true cost of new criminal offenses prior to enactment. The United States is already saddled with more than 4,400 federal statutory criminal offenses, tens of thousands of regulatory criminal offenses, an overworked federal judiciary with an ever-growing case load, and a crowded and expensive prison system. The federal government's failure to assess and justify the full costs of any new or modified criminal offenses or penalties is irresponsible.

Factual and Constitutional Justification Needed. This reform proposal would require Congress to deliberate over and provide factual and constitutional justification for every expansion of the federal criminal law. In the 109th Congress alone, federal legislators introduced over 200 bills proposing new or expanded non-violent criminal offenses, a number that does not include the bills proposing new or expanded criminalization concerning violence, firearms, drugs, pornography, or immigration violations. Many offenses in these bills would have duplicated existing federal criminal statutes or provided redundant penalties for crimes already punishable under state law.

As it stands today, there is no comprehensive process for Congress to determine whether these new offenses are necessary and appropriate. A strong reporting requirement reform would compel Congress to address such matters.

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12/15/00 Wash. Times (D.C.) A1
2000 WLNR 351065

December 15, 2000

Section: A

Metro's board rips arrest of girl, 12

Daniel F. Drummond - THE WASHINGTON TIMES

Metro's board of directors grilled General Manager Richard A. White and the transit agency's police chief yesterday about a "zero-tolerance" policy that led to a 12-year-old girl being carted off in handcuffs for eating french fries in a Metro station.

"A war was declared and the board did not know anything about it," Decatur W. Trotter, a Maryland board member, said of Metro Transit Police's stepped-up efforts to crack down on people eating food inside the Red Line Tenleytown-American University station.

Adult violators usually get a citation, but 12-year-old **Ansche Hedgepeth** and about a dozen other juveniles had metal handcuffs slapped on their wrists and were fingerprinted during the week-long undercover operation in the last full week of October.

"This isn't the case of someone doing something really criminal," said Christopher E. Zimmerman, a Democrat and member of both the Metro and Arlington County boards. "We don't go around all the time arresting people who had french fries at the platform."

Metro spokesman Ray Feldmann said officers had no choice but to detain the children because, under a 1982 D.C. law, police cannot just issue a citation to a law-breaking juvenile.

Leigh Slaughter, D.C. Corporation Council special deputy, said there is no mechanism in place for juveniles to be released after being issued a citation.

Adults can receive a fine of up to $300 for eating on the train or in the station.

Ansche was sentenced to community-service work at a Boys and Girls Club in the District for her violation of the eating rules. The seventh-grader at Deal Junior High School also has had to undergo counseling services.

Mr. Zimmerman thinks Metro is using a D.C. law as a scapegoat for its officers' bad judgment.

"I don't think it's appropriate for them to blame the District of Columbia," Mr. Zimmerman said after the board meeting.

In reaction to the police actions, Metro is crafting a new policy to allow officers to put juveniles who commit "quality of life" crimes - such as eating and drinking - into a diversion program.

"We'll try to work an arrangement out with the District," Mr. White said after the board meeting. "That provides us with an alternative mechanism short of actually needing to arrest juveniles for offenses."

Another Maryland board member, Carlton R. Sickles, said he wants to hold a hearing on police policy before the safety committee he heads.

Some Metro Transit Police officers, speaking anonymously, said the handcuffing of a 12-year-old should have been avoided.

"There's nothing to say we can't use discretion," said a veteran Transit Police officer. "This was just an overzealous captain trying to look good in the chief's eyes."

The officer said emphasis has been placed on citing people with eating and drinking on Metro property since Chief Barry J. McDevitt in 1997 implemented a quota system on citations given to passengers caught snacking.

Chief McDevitt was actually notified of the crackdown after captains and other officers ordered the stepped-up efforts at the station, Mr. Feldmann said.

Mr. Zimmerman and other board members were upset the police went forward with such an aggressive crackdown without letting the board know.

"I think you have gone beyond operational . . . and it's a question of policy," Mr. Zimmerman said.

While the police policies are open for discussion, Mr. White said the board shouldn't have been surprised by its actions.

"Our police department operates under a operating policy that the board is aware of, quite aware of, that goes back 15 years," Mr. White said. "It's a zero-tolerance policy."

Metro has come under criticism in the past for its strict anti-food policies. In 1980, a 25-year-old woman filed a lawsuit against the transit agency after she was arrested, strip-searched and jailed for more than a day for taking a bite out of a sandwich.

In other business, the board approved roughly $500 million in contracts, including a $361 million award to Alstom Transportation Inc. of Hornell, N.Y., to overhaul 364 rail cars.

* Jim Keary contributed to this report.

J0094879-121500

---- INDEX REFERENCES ---

NEWS SUBJECT: (Judicial (1JU36); Legal (1LE33); Police (1PO98))

REGION: (Maryland (1MA47); USA (1US73); Americas (1AM92); North America (1NO39))

Language: EN

OTHER INDEXING: (ALSTOM TRANSPORTATION INC; C CORPORATION COUNCIL; GIRLS CLUB; MARYLAND BOARD; METRO TRANSIT POLICE; RED LINE TENLEYTOWN AMERICAN UNIVERSITY; TRANSIT POLICE) (Adult; Adults; Ansche; Ansche Hedgepeth; Barry J. McDevitt; Carlton R. Sickles; Christopher E. Zimmerman; Decatur W. Trotter; Feldmann; Jim Keary; Leigh Slaughter; Metro; Ray Feldmann; Richard A. White; White; Zimmerman)

EDITION: Final

Word Count: 832
12/15/00 WATIMES A1
END OF DOCUMENT

12/1/00 Ark. Times 46
2000 WLNR 7507894

Arkansas Times

December 1, 2000

Volume 27; Issue 14

Zero tolerance for french fries, children

Anonymous

Zero tolerance for french fries, children

DEBORAH MATHIS

Remember 12? I do. And in such vivid detail that I'm having a hard time believing it was 35 years ago.

As I recall it, 12 was big. Full of firsts. First year of junior high school, meaning the first year that I was in a school with its own sports teams and regular Friday night dances. First time I had a different teacher for every subject. First year I got to wear stockings and dress shoes with a hint of height in the heel (though only on very special occasions). First year that I even considered that I might one day want to cut my hair and that those puffy-sleeved dresses were looking kinda childish.

Overall, I remember that 12 had me in a quandary. I had one foot in childhood but the other was straining toward womanhood, so it should have been no wonder that one minute I seemed very mature and responsible and the next like a babbling tot.

Such a wonder, such a fix is 12.

Flush with these memories, I can relate to a young Washington girl named **Ansche Hedgepeth**. Ansche is a good student and, by all accounts, a good kid. Her life is pretty routine. Goes to school each weekday. Joins a crowd of kids heading home in the afternoon. Stops by a fast food joint and orders a small bag of french fries. Hops the subway home.

Recently, Ansche was following this routine when trouble came visiting. Seems the subway police had spotted the girl eating her daily snack in the station or on the train or both. That's against the law in the nation's capital. You're not supposed to eat, drink, smoke or even chew gum on the Metro. The Transit Police chief very proudly explains that there is zero tolerance policy in force and it is no paper tiger.

But the Metro cops did not merely pull Ansche aside, scold her, write a citation, or get her folks on the phone. No,

they clamped handcuffs on the girl and ran her in. Turns out that D.C. has an ordinance requiring that juveniles charged with criminal offenses be taken into custody. So they took Ansche to a detention hall, where she was fingerprinted. Her parents were called.

As you might imagine, this has sparked some discussion in the Washington area.

One area denizen wrote to the Washington Post that if anyone smart enough to have won a science trophy, as Ansche has done, "is bright enough" to read and follow the no-no signs in the subway station. Another Post reader argued that the transit cops were protecting public safety. "What if she dropped her fries and someone had slipped in the grease?" the reader asked.

Perhaps there are circumstances that justify a zero tolerance policy. Zero tolerance for deadly weapons in schools. Zero tolerance for violent behavior or serious threats of violence in any public setting.

Even zero tolerance about eating on the Metro will do, I suppose. For sure, the system is a quarter of a century old and I must say that it looks and smells a whole lot better than most big-city, high-use subway systems.

But must that come at the expense of a single passenger's sense of safety? Are clean seats so crucial that they're worth accosting, intimidating, humiliating and handcuffing **Ansche Hedgepeth** when adult offenders are given citations and fines, then allowed to go?

Ansche's penance is community service. And she has been ordered to counseling.

The first sentence is entirely fair. There were rules, after all, however preposterously enforced.

As for the counseling, I hope she will find assurance that all cops aren't aggressive; some actually have hearts and enough sense and confidence to exercise discretion, particularly with children. I hope she will get her sense of ordinariness back.

I trust she will not be worked over in counseling about the evils of eating on board.

She's not stupid, after all. Or wicked. Or wanton. She's 12.

---- INDEX REFERENCES ---

NEWS SUBJECT: (Parents & Parenting (1PA25); Children (1CH89); Health & Family (1HE30))

INDUSTRY: (Food & Beverage Production (1FO79); Agriculture, Food & Beverage (1AG53))

REGION: (USA (1US73); Americas (1AM92); North America (1NO39))

Language: EN

OTHER INDEXING: (METRO; TRANSIT POLICE) (Ansche; Ansche Hedgepeth; Flush; Full; Hops; Joins; Turns)

Word Count: 757
12/1/00 ARKTIMES 46
END OF DOCUMENT

Rough justice in America

Too many laws, too many prisoners

Never in the civilised world have so many been locked up for so little

Jul 22nd 2010 | *Spring, Texas*

THREE pickup trucks pulled up outside George Norris's home in Spring, Texas. Six armed police in flak jackets jumped out. Thinking they must have come to the wrong place, Mr Norris opened his front door, and was startled to be shoved against a wall and frisked for weapons. He was forced into a chair for four hours while officers ransacked his house. They pulled out drawers, rifled through papers, dumped things on the floor and eventually loaded 37 boxes of Mr Norris's possessions onto their pickups. They refused to tell him what he had done wrong. "It wasn't fun, I can tell you that," he recalls.

Mr Norris was 65 years old at the time, and a collector of orchids. He eventually discovered that he was suspected of smuggling the flowers into America, an offence under the Convention on International Trade in Endangered Species. This came as a shock. He did indeed import flowers and sell them to other orchid-lovers. And it was true that his suppliers in Latin America were sometimes sloppy about their paperwork. In a shipment of many similar-looking plants, it was rare for each permit to match each orchid precisely.

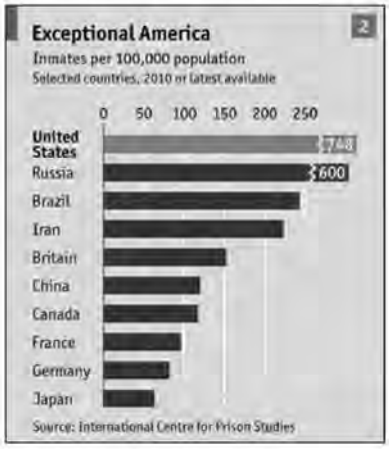
In March 2004, five months after the raid, Mr Norris was indicted, handcuffed and thrown into a cell with a suspected murderer and two suspected drug-dealers. When told why he was there, "they thought it hilarious." One asked: "What do you do with these things? Smoke 'em?"

Prosecutors described Mr Norris as the "kingpin" of an international smuggling ring. He was dumbfounded: his annual profits were never more than about $20,000. When prosecutors suggested that he should inform on other smugglers in return for a lighter sentence, he refused, insisting he knew nothing beyond hearsay.

He pleaded innocent. But an undercover federal agent had ordered some orchids from him, a few of which arrived without the correct papers. For this, he was charged with making a false statement to a government official, a federal crime punishable by up to five years in prison. Since he had communicated with his suppliers, he was charged with conspiracy, which also carries a potential five-year term.

As his legal bills exploded, Mr Norris reluctantly changed his plea to guilty, though he still protests his innocence. He was sentenced to 17 months in prison. After some time, he was released while his appeal was heard, but then put back inside. His health suffered: he has Parkinson's disease, which was not helped by the strain of imprisonment. For bringing some prescription sleeping pills into prison, he was put in solitary confinement for 71 days. The prison was so crowded, however, that even in solitary he had two room-mates.

A long love affair with lock and key

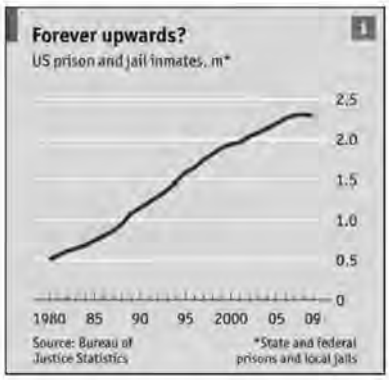


Justice is harsher in America than in any other rich country. Between 2.3m and 2.4m Americans are behind bars, roughly one in every 100 adults. If those on parole or probation are included,

one adult in 31 is under "correctional" supervision. As a proportion of its total population, America incarcerates five times more people than Britain, nine times more than Germany and 12 times more than Japan. Overcrowding is the norm. Federal prisons house 60% more inmates than they were designed for. State lock-ups are only slightly less stuffed.

The system has three big flaws, say criminologists. First, it puts too many people away for too long. Second, it criminalises acts that need not be criminalised. Third, it is unpredictable. Many laws, especially federal ones, are so vaguely written that people cannot easily tell whether they have broken them.

In 1970 the proportion of Americans behind bars was below one in 400, compared with today's one in 100. Since then, the voters, alarmed at a surge in violent crime, have demanded fiercer sentences. Politicians have obliged. New laws have removed from judges much of their discretion to set a sentence that takes full account of the circumstances of the offence. Since no politician wants to be tarred as soft on crime, such laws, mandating minimum sentences, are seldom softened. On the contrary, they tend to get harder.



Some criminals belong behind bars. When a habitual rapist is locked up, the streets are safer. But the same is not necessarily true of petty drug-dealers, whose incarceration creates a vacancy for someone else to fill, argues Alfred Blumstein of Carnegie Mellon University. The number of drug offenders in federal and state lock-ups has increased 13-fold since 1980. Some are scary thugs; many are not.

Michelle Collette of Hanover, Massachusetts, sold Percocet, a prescription painkiller. "I was planning to do it just once," she says, "but the money was so easy. And I thought: it's not heroin." Then she became addicted to her own wares. She was unhappy with her boyfriend, she explains, but did not want to split up with him, because she did not want their child to grow up fatherless, as she had. So she popped pills to numb the misery. Before long, she was taking 20-30 a day.

When Ms Collette and her boyfriend, who also sold drugs, were arrested in a dawn raid, the police found 607 pills and $901 in cash. The boyfriend fought the charges and got 15 years in prison. In a plea bargain Ms Collette was sentenced to seven years, of which she served six.

"I don't think this is fair," said the judge. "I don't think this is what our laws are meant to do. It's going to cost upwards of $50,000 a year to have you in state prison. Had I the authority, I would send you to jail for no more than one year…and a [treatment] programme after that." But mandatory sentencing laws gave him no choice.

Massachusetts is a liberal state, but its drug laws are anything but. It treats opium-derived painkillers such as Percocet like hard drugs, if illicitly sold. Possession of a tiny amount (14-28 grams, or ½-1 ounce) yields a minimum sentence of three years. For 200 grams, it is 15 years, more than the minimum for armed rape. And the weight of the other substances with which a dealer mixes his drugs is included in the total, so 10 grams of opiates mixed with 190 grams of flour gets you 15 years.

Ms Collette underwent drug treatment before being locked up, and is now clean. But in prison she found she was pregnant. After going through labour shackled to a hospital bed, she was allowed only 48 hours to bond with her newborn son. She was released in March, found a job in a shop, and is hoping that her son will get used to having her around.

Rigid sentencing laws shift power from judges to prosecutors, complains Barbara Dougan of Families Against Mandatory Minimums, a pressure-group. Even the smallest dealer often has enough to trigger a colossal sentence. Prosecutors may charge him with selling a smaller amount if he agrees to "reel some other poor slob in", as Ms Dougan puts it. He is told to persuade another dealer to sell him just enough drugs to trigger a 15-year sentence, and perhaps to do the deal near a school, which adds another two years.

Severe drug laws have unintended consequences. Less than half of American cancer patients receive adequate painkillers, according to the American Pain Foundation, another pressure-group. One reason is that doctors are terrified of being accused of drug-trafficking if they over-prescribe. In 2004 William Hurwitz, a doctor specialising in the control of pain, was sentenced to 25 years in prison for prescribing pills that a few patients then resold on the black market. Virginia's board of medicine ruled that he had acted in good faith, but he still served nearly four years.

Half the states have laws that lock up habitual offenders for life. In some states this applies only to violent criminals, but in others it applies even to petty ones. Some 3,700 people who committed neither violent nor serious crimes are serving life sentences under California's "three strikes and you're out" law. In Alabama a petty thief called Jerald Sanders was given a life term for pinching a bicycle. Alabama's judges are elected, as are those in 32 other states. This makes them mindful of public opinion: some appear in campaign advertisements waving guns and bragging about how tough they are.

Watching hairs go white, and lifetimes ebb away

Many Americans assume that white-collar criminals get off lightly, but many do not. Granted, they may be hard to catch and can often afford good lawyers. But federal prosecutors can file many charges for what is essentially one offence. For example, they can count each e-mail sent by a white-collar criminal in the course of his criminal activity as a separate case of wire fraud, each of which carries a maximum sentence of 20 years. The decades soon add up. Sentences depend partly on the size of the loss and the number of people affected, so if you work for a big, publicly traded company, you break a rule and the share-price drops, watch out.

Eternal punishment

Jim Felman, a defence lawyer in Tampa, Florida, says America is conducting "an experiment in imprisoning first-time non-violent offenders for periods of time previously reserved only for those who had killed someone". One of Mr Felman's clients, a fraudster called Sholam Weiss, was sentenced to 845 years. "I got it reduced to 835," sighs Mr Felman. Faced with such penalties, he says, the incentive to co-operate, which means to say things that are helpful to the prosecution, is overwhelming. And this, he believes, "warps the truth-seeking function" of justice.

Innocent defendants may plead guilty in return for a shorter sentence to avoid the risk of a much longer one. A prosecutor can credibly threaten a middle-aged man that he will die in a cell unless he gives evidence against his boss. This is unfair, complains Harvey Silverglate, the author of "Three Felonies a Day: How the Feds Target the Innocent". If a defence lawyer offers a witness money to testify that his client is innocent, that is bribery. But a prosecutor can legally offer something of far greater value—his freedom—to a witness who says the opposite. The potential for wrongful convictions is obvious.

Badly drafted laws create traps for the unwary. In 2006 Georgia Thompson, a civil servant in Wisconsin, was sentenced to 18 months in prison for depriving the public of "the intangible right of honest services". Her crime was to award a contract (for travel services) to the best bidder. A firm called Adelman Travel scored the most points (on an official scale) for price and quality, so Ms Thompson picked it. She ignored a rule that required her to penalise Adelman for a slapdash presentation when bidding. For this act of common sense, she served four months. (An appeals court freed her.)

The "honest services" statute, if taken seriously, "would seemingly cover a salaried employee's phoning in sick to go to a ball game," fumes Antonin Scalia, a Supreme Court justice. The Supreme Court ruled recently that the statute was so vague as to be unconstitutional. It did not strike it down completely, but said it should be applied only in cases involving bribery or kickbacks. The challenge was brought by Enron's former boss, Jeff Skilling, who will not go free despite his victory, and Conrad Black, a media magnate released this week on bail pending an appeal, who may.

There are over 4,000 federal crimes, and many times that number of regulations that carry criminal penalties. When analysts at the Congressional Research Service tried to count the number of separate offences on the books, they were forced to give up, exhausted. Rules concerning corporate governance or the environment are often impossible to understand, yet breaking them can land you in prison. In many criminal cases, the common-law requirement that a defendant must have a *mens rea* (ie, he must or should know that he is doing wrong) has been weakened or erased.

"The founders viewed the criminal sanction as a last resort, reserved for serious offences, clearly defined, so ordinary citizens would know whether they were violating the law. Yet over the last 40 years, an unholy alliance of big-business-hating liberals and tough-on-crime conservatives has made criminalisation the first line of attack—a way to demonstrate seriousness about the social problem of the month, whether it's corporate scandals or e-mail spam," writes Gene Healy, a libertarian scholar. "You can serve federal time for interstate transport of water hyacinths, trafficking in unlicensed dentures, or misappropriating the likeness of Woodsy Owl."

"You're (probably) a federal criminal," declares Alex Kozinski, an appeals-court judge, in a provocative essay of that title. Making a false statement to a federal official is an offence. So is lying to someone who then repeats your lie to a federal official. Failing to prevent your employees from breaking regulations you have never heard of can be a crime. A boss got six months in prison because one of his workers accidentally broke a pipe, causing oil to spill into a river. "It didn't matter that he had no reason to learn about the [Clean Water Act's] labyrinth of regulations, since he was merely a railroad-construction supervisor," laments Judge Kozinski.

Society wants retribution

Such cases account for only a tiny share of the Americans behind bars, but they still matter. When so many people are technically breaking the law, it is up to prosecutors to decide whom to pursue. No doubt most prosecutors choose wisely. But members of unpopular groups may not find that reassuring. Ms Thompson, for example, was prosecuted just before an election, at a time when allegations of public corruption in Wisconsin were in the news. Some prosecutors, such as Eliot Spitzer, the disgraced ex-governor of New York, have built political careers by nailing people whom voters don't like, such as financiers.

Prison deters? Not much, not the worst

Some people argue that the system works: that crime has fallen in the past two decades because the bad guys are either in prison or scared of being sent there. Caged thugs cannot break into your home. Bernie Madoff's 150-year sentence for running a Ponzi scam should deter imitators. And indeed the crime rate continues to drop, despite the recession, as Michael Rushford of the Criminal Justice Legal Foundation, an advocacy group, points out. This, he says, is because habitual criminals face serious consequences. Some research supports him: after raking through decades of historical data, John Donohue of Yale Law School estimates that a 10% increase in imprisonment brings a 2% reduction in crime.

Others disagree. Using more recent data, Bert Useem of Purdue University and Anne Piehl of Rutgers University estimate that a 10% increase in the number of people behind bars would reduce crime by only 0.5%. In the states that currently lock up the most people, imprisoning more would actually increase crime, they believe. Some inmates emerge from prison as more accomplished criminals. And raising the incarceration rate means locking up people who are, on average, less dangerous than the ones already behind bars. A recent study found that, over the

past 13 years, the proportion of new prisoners in Florida who had committed violent crimes fell by 28%, whereas those inside for "other" crimes shot up by 189%. These "other" crimes were non-violent ones involving neither drugs nor theft, such as driving with a suspended licence.

And now the reckoning, in dollars

Crime is a young man's game. Muggers over 30 are rare. Ex-cons who go straight for a few years generally stay that way: a study of 88,000 criminals by Mr Blumstein found that if someone was arrested for aggravated assault at the age of 18 but then managed to stay out of trouble until the age of 22, the risk of his offending was no greater than that for the general population. Yet America's prisons are crammed with old folk. Nearly 200,000 prisoners are over 50. Most would pose little threat if released. And since people age faster in prison than outside, their medical costs are vast. Human Rights Watch, a lobby-group, talks of "nursing homes with razor wire".

Jail is expensive. Spending per prisoner ranges from $18,000 a year in Mississippi to about $50,000 in California, where the cost per pupil is but a seventh of that. "[W]e are well past the point of diminishing returns," says a report by the Pew Center on the States. In Washington state, for example, each dollar invested in new prison places in 1980 averted more than nine dollars of criminal harm (using a somewhat arbitrary scale to assign a value to not being beaten up). By 2001, as the emphasis shifted from violent criminals to drug-dealers and thieves, the cost-benefit ratio reversed. Each new dollar spent on prisons averted only 37 cents' worth of harm.

Since the recession threw their budgets into turmoil, many states have decided to imprison fewer people, largely to save money. Mississippi has reduced the proportion of their sentences that non-violent offenders are required to serve from 85% to 25%. Texas is making greater use of non-custodial penalties. New York has repealed most mandatory minimum terms for drug offences. In all, the number of prisoners in state lock-ups fell by 0.3% in 2009, the first fall since 1972. But the total number of Americans behind bars still rose slightly, because the number of federal prisoners climbed by 3.4%.

A less punitive system could work better, argues Mark Kleiman of the University of California, Los Angeles. Swift and certain penalties deter more than harsh ones. Money spent on prisons cannot be spent on more cost-effective methods of crime-prevention, such as better policing, drug treatment or probation. The pain that punishment inflicts on criminals themselves, on their families and on their communities should also be taken into account.

"Just by making effective use of things we already know how to do, we could reasonably expect to have half as much crime and half as many people behind bars ten years from now," says Mr Kleiman. "There are a thousand excuses for failing to make that effort, but not one good reason."

THE WALL STREET JOURNAL.
WSJ.com

SEPTEMBER 27, 2009, 11:09 P.M. ET

You Commit Three Felonies a Day

Laws have become too vague and the concept of intent has disappeared.

By L. GORDON CROVITZ

When we think about the pace of change in technology, it's usually to marvel at how computing power has become cheaper and faster or how many new digital ways we have to communicate. Unfortunately, this pace of change is increasingly clashing with some of the slower-moving parts of our culture.

Technology moves so quickly we can barely keep up, and our legal system moves so slowly it can't keep up with itself. By design, the law is built up over time by court decisions, statutes and regulations. Sometimes even criminal laws are left vague, to be defined case by case. Technology exacerbates the problem of laws so open and vague that they are hard to abide by, to the point that we have all become potential criminals.

Boston civil-liberties lawyer Harvey Silverglate calls his new book "Three Felonies a Day," referring to the number of crimes he estimates the average American now unwittingly commits because of vague laws. New technology adds its own complexity, making innocent activity potentially criminal.

Mr. Silverglate describes several cases in which prosecutors didn't understand or didn't want to understand technology. This problem is compounded by a trend that has accelerated since the 1980s for prosecutors to abandon the principle that there can't be a crime without criminal intent.

In 2001, a man named Bradford Councilman was charged in Massachusetts with violating the wiretap laws. He worked at a company that offered an online book-listing service and also acted as an Internet service provider to book dealers. As an ISP, the company routinely intercepted and copied emails as part of the process of shuttling them through the Web to recipients.

The federal wiretap laws, Mr. Silverglate writes, were "written before the dawn of the Internet, often amended, not always clear, and frequently lagging behind the whipcrack speed of technological change." Prosecutors chose to interpret the ISP role of momentarily copying messages as they made their way through the system as akin to impermissibly listening in on communications. The case went through several rounds of litigation, with no judge making the obvious point that this is how ISPs operate. After six years, a jury found Mr. Councilman not guilty.

Other misunderstandings of the Web criminalize the exercise of First Amendment rights. A Saudi student in Idaho was charged in 2003 with offering "material support" to terrorists. He had operated Web sites for a Muslim charity that focused on normal religious training, but was prosecuted on the theory that if a user followed enough links off his site, he would find violent, anti-American comments on other sites. The Internet is a series of links, so if there's liability for anything in an online chain, it would be hard to avoid prosecution.

Mr. Silverglate, a liberal who wrote a previous book taking the conservative position against political correctness on campuses, is a persistent, principled critic of overbroad statutes. This is a common problem in securities laws, which Congress leaves intentionally vague, encouraging regulators and prosecutors to try people even when the law is unclear. He reminds us of the long prosecution of Silicon Valley investment banker Frank Quattrone, which after five years resulted in a reversal of his criminal conviction on vague charges of obstruction of justice.

These miscarriages are avoidable. Under the English common law we inherited, a crime requires intent. This protection is disappearing in the U.S. As Mr. Silverglate writes, "Since the New Deal era, Congress has delegated to various administrative agencies the task of writing the regulations," even as "Congress has demonstrated a growing dysfunction in crafting legislation that can in fact be understood." Prosecutors identify defendants to go after instead of finding a law that was broken and figuring out who did it. Expect more such prosecutions as Washington adds regulations.

Sometimes legislators know when they make false distinctions based on technology. An "anti-cyberbullying" proposal is making its way through Congress, prompted by the tragic case of a 13-year-old girl driven to suicide by the mother of a neighbor posing as a teenage boy and posting abusive messages on MySpace. The law would prohibit using the Internet to "coerce, intimidate, harass, or cause substantial emotional distress to a person." Imagine a law that tried to apply this control of speech to letters, editorials or lobbying.

Mr. Silverglate, who will testify against the bill later this week, tells me he figures that "being emotionally distressed is just part of living in a free society." New technologies like the Web, he concludes, "scare legislators because they don't understand them and want to control them, even as they become a normal part of life."

In a complex world of new technologies, there is more need than ever for clear rules of the road. Americans should expect that a crime requires bad intent and also that Congress and prosecutors will try to create clarity, not uncertainty. Our legal system has a lot of catching up to do to work smoothly with the rest of our lives.

The Economist

Crime and punishment in America

Rough justice

America locks up too many people, some for acts that should not even be criminal

Jul 22nd 2010

IN 2000 four Americans were charged with importing lobster tails in plastic bags rather than cardboard boxes, in violation of a Honduran regulation that Honduras no longer enforces. They had fallen foul of the Lacey Act, which bars Americans from breaking foreign rules when hunting or fishing. The original intent was to prevent Americans from, say, poaching elephants in Kenya. But it has been interpreted to mean that they must abide by every footling wildlife regulation on Earth. The lobstermen had no idea they were breaking the law. Yet three of them got eight years apiece. Two are still in jail.

America is different from the rest of the world in lots of ways, many of them good. One of the bad ones is its willingness to lock up its citizens (see our briefing). One American adult in 100 festers behind bars (with the rate rising to one in nine for young black men). Its imprisoned population, at 2.3m, exceeds that of 15 of its states. No other rich country is nearly as punitive as the Land of the Free. The rate of incarceration is a fifth of America's level in Britain, a ninth in Germany and a twelfth in Japan.

Tougher than thou

Some parts of America have long taken a tough, frontier attitude to justice. That tendency sharpened around four decades ago as rising crime became an emotive political issue and voters took to backing politicians who promised to stamp on it. This created a ratchet effect: lawmakers who wish to sound tough must propose laws tougher than the ones that the last chap who wanted to sound tough proposed. When the crime rate falls, tough sentences are hailed as the cause, even when demography or other factors may matter more; when the rate rises tough sentences are demanded to solve the problem. As a result, America's incarceration rate has quadrupled since 1970.

Similar things have happened elsewhere. The incarceration rate in Britain has more than doubled, and that in Japan increased by half, over the period. But the trend has been sharper in America than in most of the rich world, and the disparity has grown. It is explained neither by a difference in criminality (the English are slightly more criminal than Americans, though less murderous), nor by the success of the policy: America's violent-crime rate is higher than it was 40 years ago.

Conservatives and liberals will always feud about the right level of punishment. Most Americans think that dangerous criminals, which statistically usually means young men, should go to prison for long periods of time, especially for violent offences. Even by that standard, the extreme toughness of American laws, especially the ever broader classes of "criminals" affected by them, seems increasingly counterproductive.

Many states have mandatory minimum sentences, which remove judges' discretion to show mercy, even when the circumstances of a case cry out for it. "Three strikes" laws, which were at first used to put away persistently violent criminals for life, have in several states been applied to lesser offenders. The war on drugs has led to harsh sentences not just for dealing illegal drugs, but also for selling prescription drugs illegally. Peddling a handful can lead to a 15-year sentence.

Muddle plays a large role. America imprisons people for technical violations of immigration laws, environmental standards and arcane business rules. So many federal rules carry criminal penalties that experts struggle to count them. Many are incomprehensible. Few are ever repealed, though the Supreme Court recently pared back a law against depriving the public of "the intangible right of honest services", which prosecutors loved because they could use it against almost anyone. Still, they have plenty of other weapons. By counting each e-mail sent by a white-collar wrongdoer as a separate case of wire frand, prosecutors can threaten him with a gargantuan sentence unless he confesses, or informs on his boss. The potential for injustice is obvious.

As a result American prisons are now packed not only with thugs and rapists but also with petty thieves, small-time drug dealers and criminals who, though scary when they were young and strong, are now too grey and arthritic to pose a threat. Some 200,000 inmates are over 50—roughly as many as there were prisoners of all ages in 1970. Prison is an excellent way to keep dangerous criminals off the streets, but the more people you lock up, the less dangerous each extra prisoner is likely to be. And since prison is expensive—$50,000 per inmate per year in California—the cost of imprisoning criminals often far exceeds the benefits, in terms of crimes averted.

Less punishment, less crime

It does not have to be this way. In the Netherlands, where the use of non-custodial sentences has grown, the prison population and the crime rate have both been falling (see article). Britain's new government is proposing to replace jail for lesser offenders with community work. Some parts of America are bucking the national trend. New York cut its incarceration rate by 15% between 1997 and 2007, while reducing violent crime by 40%. This is welcome, but deeper reforms are required.

America needs fewer and clearer laws, so that citizens do not need a law degree to stay out of jail. Acts that can be regulated should not be criminalised. Prosecutors' powers should be clipped: most white-collar suspects are not Al Capone, and should not be treated as if they were. Mandatory minimum sentencing laws should be repealed, or replaced with guidelines. The most dangerous criminals must be locked up, but states could try harder to reintegrate the softer cases into society, by encouraging them to study or work and by ending the pointlessly vindictive gesture of not letting them vote.

It seems odd that a country that rejoices in limiting the power of the state should give so many draconian powers to its government, yet for the past 40 years American lawmakers have generally regarded selling to voters the idea of locking up fewer people as political suicide. An era of budgetary constraint, however, is as good a time as any to try. Sooner or later American voters will realise that their incarceration policies are unjust and inefficient; politicians who point that out to them now may, in the end, get some credit.

The New York Times

November 24, 2009

Right and Left Join Forces on Criminal Justice

By ADAM LIPTAK

WASHINGTON — In the next several months, the Supreme Court will decide at least a half-dozen cases about the rights of people accused of crimes involving drugs, sex and corruption. Civil liberties groups and associations of defense lawyers have lined up on the side of the accused.

But so have conservative, libertarian and business groups. Their briefs and public statements are signs of an emerging consensus on the right that the criminal justice system is an aspect of big government that must be contained.

The development represents a sharp break with tough-on-crime policies associated with the Republican Party since the Nixon administration.

"It's a remarkable phenomenon," said Norman L. Reimer, executive director of the National Association of Criminal Defense Lawyers. "The left and the right have bent to the point where they are now in agreement on many issues. In the area of criminal justice, the whole idea of less government, less intrusion, less regulation has taken hold."

Edwin Meese III, who was known as a fervent supporter of law and order as attorney general in the Reagan administration, now spends much of his time criticizing what he calls the astounding number and vagueness of federal criminal laws.

Mr. Meese once referred to the American Civil Liberties Union as part of the "criminals' lobby." These days, he said, "in terms of working with the A.C.L.U., if they want to join us, we're happy to have them."

Dick Thornburgh, who succeeded Mr. Meese as attorney general under President Ronald Reagan and stayed on under President George Bush, echoed that sentiment in Congressional testimony in July.

"The problem of overcriminalization is truly one of those issues upon which a wide variety of constituencies can agree," Mr. Thornburgh said. "Witness the broad and strong support from such varied groups as the Heritage Foundation, the Washington Legal Foundation, the National Association of Criminal Defense Lawyers, the A.B.A., the Cato Institute, the Federalist Society and the A.C.L.U."

In an interview at the Heritage Foundation, a conservative research group where he is a fellow, Mr. Meese said the "liberal ideas of extending the power of the state" were to blame for an out-of-control criminal justice system. "Our tradition has always been," he said, "to construe criminal laws narrowly to protect people from the power of the state."

There are, the foundation says, more than 4,400 criminal offenses in the federal code, many of them lacking a requirement that prosecutors prove traditional kinds of criminal intent.

"It's a violation of federal law to give a false weather report," Mr. Meese said. "People get put in jail for importing lobsters."

Such so-called overcriminalization is at the heart of the conservative critique of crime policy. The U.S. Chamber of Commerce made the point in a recent friend-of-the-court brief about a federal law often used to prosecute corporate executives and politicians. The law, which makes it a crime for officials to defraud their employers of "honest services," is, the brief said, both "unintelligible" and "used to target a staggeringly broad swath of behavior."

The Supreme Court will hear three cases concerning the honest-services law this term, indicating an exceptional interest in the topic.

Harvey A. Silverglate, a left-wing civil liberties lawyer in Boston, says he has been surprised and delighted by the reception that his new book, "Three Felonies a Day: How the Feds Target the Innocent," has gotten in conservative circles. (A Heritage Foundation official offered this reporter a copy.)

The book argues that federal criminal law is so comprehensive and vague that all Americans violate it every day, meaning prosecutors can indict anyone at all.

"Libertarians and the civil liberties left have always had some common ground on these issues," said Radley Balko, a senior editor at Reason, a libertarian magazine. "The more vocal presence of conservatives on overcriminalization issues is really what's new."

Several strands of conservatism have merged in objecting to aspects of the criminal justice system. Some conservatives are suspicious of all government power, while others insist that the federal government has been intruding into matters the Constitution reserves to the states.

In January, for instance, the Supreme Court will hear arguments in United States v. Comstock, about whether Congress has the constitutional power to authorize the continued confinement of people convicted of sex crimes after they have completed their criminal sentences.

Then there are conservatives who worry about government seizure of private property said to have been used to facilitate crimes, an issue raised in Alvarez v. Smith, which was argued in October.

"A joint on a yacht, and the whole thing is forfeited," said Paul Cassell, a law professor at the University of Utah and a former federal judge appointed by President George W. Bush.

Some religious groups object to prison policies that appear to ignore the possibility of rehabilitation and redemption, and fiscal conservatives are concerned about the cost of maintaining the world's largest prison population.

"Conservatives now recognize the economic consequences of a criminal justice leviathan," said Erik Luna, a law professor at Washington and Lee University.

The roots of the conservative re-examination of crime policy might also be found in the jurisprudence of Justices Antonin Scalia and Clarence Thomas. The two justices, joined by liberal colleagues, have said the original meaning of the Constitution required them to rule against the government in, among other areas, the rights of criminal defendants to confront witnesses.

"Scalia and Thomas are vanguards of an understanding by the modern right that its distrust of government extends all the way to the criminal justice system," said Douglas A. Berman, a law professor at Ohio State University.

The court will hear another confrontation clause case, Briscoe v. Virginia, in January. It is a sequel to a decision in June that prosecutors may not use crime lab reports without live testimony from the analysts who prepared them.

The conservative re-evaluation of crime policy is not universal, of course. Two notable exceptions to the trend, said Timothy Lynch, director of the Cato Institute's criminal justice project, are Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr.

"Roberts and Alito are coming down consistently on the side of the government in these criminal justice cases," Mr. Lynch said.

Some scholars are skeptical about conservatives' timing and motives, noting that their voices are rising during a Democratic administration and amid demands for accountability for the economic crisis.

"The Justice Department now acts as a kind of counterweight to corporate power," said Frank O. Bowman, a law professor at the University of Missouri. "On the other side is an alliance between two strands of conservative thinking, the libertarian point of view and the corporate wing of the Republican Party."

Mr. Meese acknowledged that the current climate was not the ideal one for his point of view. "We picked by accident a time," he said, "when it was not a very popular topic in light of corporate frauds."

Girl Arrested For Eating in Subway

Seventh Grader Gets Arrested for Eating in Subway

Nov. 16

A 12-year-old girl found out the hard way that there□s no snacking allowed in the Washington, D.C. subway.

Seventh-grader Ansche Hedgepeth was handcuffed, booked and fingerprinted for eating French fries in a northwest Washington subway station.

Ansche told police she knew she wasn□t supposed to eat in the station but didn□t think she would get arrested. Ansche□s mother Tracey Hedgepeth, who has written a complaint letter to the Metro Transit Police Department, said police went too far.

□I can□t believe there isn□t a better way to teach kids a lesson,□ she said. □The police treated her like a criminal.□

But Metro Transit Police Chief Barry J. McDevitt is unapologetic about the girl□s arrest last month and others like it.

□We really do believe in zero tolerance,□ he said.

Commuter complaints about unlawful eating on Metro cars and in stations led McDevitt to mount an undercover crackdown on violators. A dozen plainclothes officers cited or arrested 35 people, 13 of them juveniles. Only one adult was arrested.

A Place Where Kids Go

Ansche said the station in northwest Washington where she was nabbed is □just a place where a lot of kids go. There□s a hot dog stand and Cafe Med, where I bought my fries.□

She said she took the elevator to the station with a friend. As the pair passed the station kiosk, a man stepped in front of Ansche.

□He said: □Put down your fries. Put down your book bag,□ □ Ansche said. □They searched my book bag and searched me. They asked me if I have any drugs or alcohol.□

Ansche said she has never been asked those questions or searched like that before. □I was embarrassed. I told my friend to call my mom, but I didn□t tell anybody else,□ she said.

She said she never talked to the officer, although Metro police insist that she was asked whether she knew eating was against the law and that she said she did. They said anyone who doesn⊥t know about the law usually is given a warning first.

Signs warning that it is illegal to eat or drink on the cars and in the stations are posted in the Metro system.

She was taken to the detention center, where she was checked in, fingerprinted and held for her parents to pick her up.

If Ansche had been an adult, she simply would have received citations for fines up to $300. But juveniles who commit criminal offenses in the District of Columbia must be taken into custody, McDevitt said.

It is department policy to handcuff anyone who is arrested, no matter the age, he said.

In 1987, Iran-contra figure Fawn Hall was given a $10 fine for eating a banana in the Metro Center subway station. She was not arrested.

ABCNEWS Radio and the Associated Press contributed to this report.

OVERCRIMINALIZATION IN THE PUBLIC EYE

By Ivan Dominguez, NACDL Asst. Dir. Public Affairs & Communication

Overview

Federal overcriminalization of conduct in the United States is not just a problem for those caught up in its net. It has become something of a spectacle--on display across the country and around the world. Indeed, just two weeks ago, July 22, 2010, the cover of one of the world's most respected news magazines, *The Economist*, was "**Why America Locks Up Too Many People.**" Inside, there were two stories--the first featured the story of George Norris who, as described below, was one of two overcriminalization victims who testified before the House Crime Subcommittee's Overcriminalization hearing in July 2009 ("**Too many laws, too many prisoners: Never in the civilised world have so many been locked up for so little**" and "**Rough justice: America locks up too many people, some for acts that should not even be criminal**") (copies attached as "Economist Article 1.pdf" and "Economist Article 2.pdf").

July 2009 Overcriminalization Hearing Before House Crime Subcommittee

Together with Subcommittee staff, NACDL and The Heritage Foundation played a key role in a diverse coalition of organizations that worked together to bring about the July 2009 hearing on "Over-criminalization of Conduct and Over-Federalization of Criminal Law" before the U.S. House of Representatives Crime, Terrorism, and Homeland Security Subcommittee (Chairman Scott, D-Va.). The coalition included the American Bar Association, American Civil Liberties Union, Cato Institute, Constitution Project, Federalist Society, and Washington Legal Foundation.

Among the witnesses who testified during the July 2009 hearing were two victims of overcriminalization. Krister Evertson is an entrepreneur and inventor who was acquitted for failing to add the correct sticker to his otherwise properly shipped UPS package containing raw sodium. (While he had checked the UPS ground option on the shipping form, apparently UPS "ground" in fact ships from Alaska by air, and unbeknownst to him the package therefore required a special sticker.) Immediately after having survived that prosecution, Evertson was charged and ultimately convicted, under the Resource Conservation and Recovery Act (RCRA), of illegally transporting and disposing of potentially hazardous fuel-cell materials, when all he actually did was move the material just one-half mile from his home in sealed steel drums to a safe storage facility for future use. Kathy Norris also testified at the July 2009 hearing. She is the wife of George Norris, a retiree who pled

guilty to paperwork-related charges in connection with the importation of legal orchids to the United States. Both Evertson and Norris served significant time in federal prison for their "crimes."

Not only was this hearing before a standing-room only crowd, but it brought public and media attention to this critical issue. Indeed, both of the victims who were brought before the subcommittee to testify have had their stories told, and retold, in media throughout the country, and beyond (*see Economist* cover story featuring Mr. Norris's story--coincidentally issued on the one year anniversary of the Crime Subcommittee's Overcriminalization hearing at which he testified). Attached is a list of more than 30 sources that have published stories concerning one or both of the overcriminalization victims who testified before the Crime Subcommittee (list attached as "source list – overcrim victims.pdf"). Attached please also find representative stories/editorials/opinion pieces about overcriminalization and one or both of the victims who testified in July 2009 from *The Economist*, *Examiner*, *Houston Chronicle*, *New Haven Register*, *New York Times*, *Roll Call*, and *Washington Times* (copies attached as "Representative Stories_Overcriminalization and Witnesses.pdf").

Politically Diverse Coalition Combating Overcriminalization

As detailed above, important and influential groups from across the political spectrum have coalesced around this issue, and not just for stand-alone events like the July 2009 hearing before the House Crime Subcommittee. We are working together every day, researching and reporting on the problem, educating our constituencies and the public, and answering the questions of an increasingly interested media. Indeed, just last fall, on November 24, 2009, the *New York Times* ran a front page story "**Right and Left Join Forces on Criminal Justice**," by Adam Liptak (copy attached as "New York Times Front Page.pdf"). The article quotes former attorneys general Thornburgh and Meese on the problems of overcriminalization. NACDL Executive Director Norman Reimer captured the significance of the broad and growing coalition, "It's a remarkable phenomenon…. The left and the right have bent to the point where they are now in agreement on many issues. In the area of criminal justice, the whole idea of less government, less intrusion, less regulation has taken hold." And former Attorney General Richard Thornburgh was quoted in this story making the point as well: "The problem of overcriminalization is truly one of those issues upon which a wide variety of constituencies can agree…. Witness the broad and strong support from such varied groups as the Heritage Foundation, the Washington Legal Foundation, the National Association of Criminal Defense Lawyers, the A.B.A., the Cato Institute, the Federalist Society and the A.C.L.U." Adam Liptak's piece was reprinted in multiple newspapers across the country.

Significant Scholarship on Overcriminalization

2009 saw the release of NACDL member and civil rights attorney Harvey Silverglate's book Three Felonies a Day: How the Feds Target the Innocent, to wide acclaim. Appearing on numerous panels around the country, including testimony before Congress, to public radio and the pages of the *Wall Street Journal*, Silverglate's in-depth research brought further attention to the problem of federal overcriminalization. L. Gordon Crovitz's piece in the *Wall Street Journal*, "**You Commit Three Felonies a Day: Laws have become too vague and the concept of intent has disappeared**," (copy attached as "Wall Street Journal Op-ed.pdf") brought the problem to the attention of millions of *Journal* readers and opinion makers. Discussing Silverglate's work, Crovitz points out that "Under the English common law we inherited, a crime requires intent. This protection is disappearing in the U.S." Several months later, NACDL and the Heritage foundation released their groundbreaking report on exactly that subject in a joint press conference on Capitol Hill with Rep. Bobby Scott (D-VA) and Rep. Louie Gohmert (R-TX), commemorating Law Day 2010.

In just the month following the release of the NACDL/Heritage groundbreaking report, Meltwater News showed approximately **300** stories in the media discussing this important project. From the moment the story hit the wires and the report was released, news outlets around the nation took note. From the *San Diego Union Tribune* to the *Cleveland Plain Dealer* and from the *Seattle Post-Intelligencer* to the *Boston Globe*, people across the land learned about how Congress is eroding the criminal intent requirement in the federal law. The news made its way across the political spectrum in the blogosphere, reaching from *Salon.com* and the *Huffington Post* through to *FreeRepublic.com*. Both *Forbes* and the *National Review* covered it. It was also reported by dozens of television and radio stations. It prompted a supportive editorial about Congress's "dangerous path" in the *Las Vegas Review-Journal*, and Marcia Coyle wrote about it for the *National Law Journal*. In sum, the media clearly recognized both the import of this report and the newsworthiness of the coalition that made it possible, as both observations were repeatedly reflected in the reporting. Attached is a list of hundreds of news organizations, blogs and the like that covered this report for their readers (list attached as "Story Sources_Without Intent Report.pdf"), as well as the text of some representative stories/editorials/opinion pieces from the Associated Press (reprinted coast-to-coast), Fredrickburg.com, *Las Vegas Review Journal*, Sentencing Law and Policy Blog, *The Bulletin* (PA), and the White Collar Crime Prof Blog (copies attached as "Representative Stories_Without Intent Report.pdf")

In addition to wide and favorable coverage of this report and the unexpected coalition that produced it, copies of the report have been distributed throughout Congress and are being sent to federal judges, federal public defenders, Sentencing Commissioners, interested organizations, corporate offices, and lobbyists throughout the nation.

In addition to Silverglate's book and the NACDL/Heritage *mens rea* report, you are also surely aware of the recently released Heritage Book, One Nation Under Arrest, edited by Paul Rosenzweig and Brian Walsh. (I suspect Brian can provide information about media coverage of that book's release and the interest it has garnered across the political spectrum.) Smaller pieces from all of the overcriminalization coalition groups regarding all manner of overcriminalization topics have appeared in places too numerous to mention in this report.

Conclusion

Even with the highest incarceration rate in the entire world, the United States cannot claim to have anywhere near the safest society on earth. Indeed, the facts are to the contrary. And on one important source of this problem--Congress's overcriminalization of conduct and over-federalization of crime--diverse and influential organizations around the nation are working together and bringing ever greater public and media attention to a problem that Congress is fully empowered to solve. With a groundswell of bipartisan organizational and grassroots support, this area is ripe for Congressional attention and decisive action.

abcNEWS

Report: Congress Makes Too Many Vague Laws

Unlikely partners on crime say Congress fails to give fair notice of criminal conduct

By MARK SHERMAN

The Associated Press

WASHINGTON

A conservative think tank and criminal defense lawyers are forming an unusual alliance to try to get Congress to quit writing criminal laws so loosely that they subject innocent people to unjust prosecution and prison.

A new study by the Heritage Foundation and the National Association of Criminal Defense Lawyers finds that nearly two dozen federal laws enacted in 2005 and 2006 to combat nonviolent crime lack an adequate provision that someone accused of violating the laws must have had a "guilty mind," or criminal intent.

"It is a fundamental principle of criminal law that, before criminal punishment can be imposed, the government must prove both a guilty act and a guilty mind," the groups said in the report.

Even when Congress includes a "guilty mind" provision in a law, "it is often so weak that it does not protect defendants from punishment for making honest mistakes," or committing minor transgressions, the report said.

The Supreme Court is reviewing three cases involving prosecution under a federal fraud statute that Justice Antonin Scalia has described as a potent tool in the hands of "headline-grabbing prosecutors" in pursuit of behavior that may be unappealing or ethically questionable, but not necessarily criminal.

Scalia said the law is so vague it could be employed against a mayor for using political clout to get a good table at a restaurant or a salaried employee who phones in sick to go to a ballgame.

Rep. Bobby Scott, D-Va., chairman of the House Crime, Terrorism and Homeland Security Subcommittee, said too many bills get through Congress without enough study or refinement.

"You can't prosecute somebody for something they didn't know was a crime," Scott said. He and Rep. Louie Gohmert, R-Texas, the senior Republican on the panel, held a hearing on the issue last year.

Among examples of the problem, the Paid Family and Medical Leave Act of 2005 makes it a crime to include false statements in an application for leave and could be applied to simple mistakes, such as a woman entering the wrong year when asked for her hiring date, the report said.

Heritage and the defense lawyers say lawmakers can take a few steps to improve matters, including requiring the House and Senate judiciary committees to review all proposed criminal laws and writing into law that defendants should get the benefit of the doubt when laws are not written clearly.

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

MEDIA KIT

Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary ~ U.S. House of Representatives

Tuesday, September 28, 2010, at 3:00 p.m.
Rayburn House Office Building, Room 2141

Organizations Supporting the Need for Congressional Hearings on Overcriminalization

American Bar Association (ABA)
American Civil Liberties Union (ACLU)
Constitution Project
Families Against Mandatory Minimums (FAMM)
Manhattan Institute
National Federation of Independent Business (NFIB)
National Association of Criminal Defense Lawyers (NACDL)
The Heritage Foundation

For media or other information visit, www.nacdl.org/overcrimhearing, or contact:

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Congressional Hearing on the Problems of Overcriminalization and Reform Proposals

Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
U.S. House of Representatives

September 28, 2010
Rayburn House Office Building, Room 2141
3:00 p.m.

Capitol Hill Media Packet Content List

(All items available online are hyperlinked below)

Tab 2 – Overcriminalization Op-Eds and News Articles

Tab 3 – Selected Case Studies in Overcriminalization

Tab 4 – Additional Scholarship on Overcriminalization

Overcriminalization: Assessing the Problems, Proposing Solutions

WHAT IS OVERCRIMINALIZATION?

In its current state, the federal criminal justice system frequently prosecutes "crimes" and imposes sentences that are not based on sound principles of justice. Many of the approximately 4,450 criminal offenses in the U.S. Code are poorly defined, lack criminal-intent requirements that are sufficient to protect the innocent, and are difficult or impossible to connect to notions of moral wrongdoing. The estimated 300,000 federal regulations (in the Code of Federal Regulations) that may be enforced with criminal penalties include an even greater number of these same flaws.

The result? Innocent people caught in heartbreaking, Kafkaesque tales of conviction, imprisonment for persons who made mistakes but had no criminal intent, sentences that are far out of proportion with the wrongfulness of the "crime," and unnecessary prosecutions that waste judicial resources. The tragedy for some citizens, and specter of tragedy for the rest of us, is that our liberties are at the mercy of the laws of probability and the idiosyncratic charging decisions of prosecutors. Almost anyone can be prosecuted and convicted under one of the tens of thousands of federal criminal offenses, and it is happening to more and more unsuspecting Americans each year. Unbridled lawmaking and enforcement that is not tethered to this nation's founding principles does not well serve its citizens or America's future.

On Tuesday, September 28, 2010, the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee will take the next step toward principled criminal justice reform when it holds a bipartisan hearing entitled "Overcriminalization: Assessing the Problems, Proposing Solutions." Chairman Robert "Bobby" Scott (D-VA) and Ranking Member Louie Gohmert (R-TX) will convene the hearing at 3:00 p.m. in Room 2141 of the Rayburn House Office Building. We encourage you to attend this hearing and support the growing effort to enact sensible federal criminal law reforms.

WHY IS OVERCRIMINALIZATION A MAJOR PROBLEM?

Overcriminalization threatens the civil liberties of respectable, hard-working individuals and burdens America's economic growth and future.

- Creating "crimes" that are overly complex and numerous and that punish conduct that evokes no sense of moral wrong makes every law-abiding American vulnerable to losing his liberty even when he does not know that he has violated a law. Our criminal laws have become a trap for the unwary and unfairly punish innocent mistakes.

- It is a core principle of the American system of justice that no one should be subjected to criminal prosecution unless they intentionally engage in inherently wrongful conduct or conduct that they know to be unlawful. Only in such circumstances is a person truly blameworthy and deserving of the harsh sanctions associated with criminal punishment. Yet in recent decades Congress has enacted scores of fundamentally flawed criminal statutes that lack adequate criminal intent (*mens rea*) protection for innocent actors. The average American is thus left without protection from the unprincipled proliferation of vague and overbroad criminal offenses.

- Needless prosecutions are a drain on our economy and cause people to lose jobs. Even when a target is ultimately found to be innocent (e.g., now defunct international accounting firm Arthur Andersen), the negative economic effects are long lasting.

- Overcriminalization has resulted in unnecessary incarceration in situations where society would be better served by exacting a civil penalty – the legal sanction that was far more common before Congress began its out-of-control creation of new crimes.

- When taxpayer money is sapped by a criminal justice system full of vague and overlapping laws, valuable resources are wasted on unnecessary and repetitive court proceedings.

- An over-expansive criminal justice system damages America by discouraging business investment and job creation both inside and outside the U.S. Business owners of all sizes rightly consider vague and burdensome criminal laws a threat to a company's growth, and as a result, often choose places of business overseas. The current legal framework thus inhibits lawful business risk-taking and stifles creativity and innovation without any marked societal benefit.

HOW WIDELY RECOGNIZED IS THE PROBLEM?

Those caught in the net of overcriminalization of conduct in the United States are no longer the only ones who recognize its dangers. Overcriminalization is becoming a well-known problem – on display in media outlets across the country and around the world.

Late last fall, the *New York Times* ran a front-page story by Adam Liptak entitled "Right and Left Join Forces on Criminal Justice," highlighting the cooperation of a broad coalition of left-leaning and right-leaning organizations on the subject of criminal justice reform. The *New York Times* article specifically noted the work of many members of this coalition, which includes the National Association of Criminal Defense Lawyers (NACDL), The Heritage Foundation, American Bar Association (ABA), American Civil Liberties Union (ACLU), Cato Institute, Families Against Mandatory Minimums (FAMM), Federalist Society, Manhattan Institute, and Washington Legal Foundation. The coalition has built a non-partisan working group dedicated to advancing a reform agenda promoting less government, less criminalization, and less regulation.

In July of this year, the cover of one of the world's most respected news magazines, *The Economist*, analyzed "Why America Locks Up Too Many People." Inside, two articles addressed the issue of overcriminalization. The cover article featured George Norris, who was one of two overcriminalization victims whose stories were featured during the July 2009 hearing on overcriminalization before the House Subcommittee on Crime, Terrorism, and Homeland Security.

The July 2009 hearing (http://judiciary.house.gov/hearings/hear_090722_2.html) was supported by members of the coalition and brought public interest and media attention to the critical issues of overcriminalization and the over-federalization of crime. Details concerning media coverage of the 2009 hearing have been included in this media packet.

Over the last two years, members and allies of this coalition have produced well-researched and well-received publications on overcriminalization. Civil rights attorney and long-time ACLU member Harvey Silverglate published his widely acclaimed book, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT, which resulted in radio coverage and follow-on pieces such as Gordon Crovitz's review in the *Wall Street Journal* proclaiming that criminal law has "become too vague and the concept of [criminal] intent has disappeared."

Both the Washington Legal Foundation (WLF) and Manhattan Institute released major reports. WLF's "Federal Erosion of Business Civil Liberties" is a comprehensive study of the often unnecessary expansion of regulatory crimes and the degradation of various protections against unjust criminal

prosecution and punishment for both employees and employers. Marie Gryphon's report for the Manhattan Institute focuses on the flaws in federal criminal law that have led to the punishment of conduct that many criminal defendants are not likely to have known was prohibited. In addition, the Federalist Society published papers on the erosion of criminal-intent requirements, vicarious criminal liability, and the costs of overcriminalization to individuals and economic opportunity.

In the wake of these publications, Heritage and NACDL released their groundbreaking report, "Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law." In a rare Washington event – a bipartisan press conference in the U.S. Capitol – Reps. Bobby Scott (D-VA) and Louie Gohmert (R-TX) introduced and lauded the report and the unusual collaboration that produced it. The report and its announcements also earned an exclusive story by the *Associated Press*'s Mark Sherman ("Report: Congress Makes Too Many Vague Laws").

As soon as the AP story hit the wires, news outlets around the nation took note of the report and the Left-Right coalition pursuing criminal-law reform. According to the Meltwater News service, in the 30 days following the report's release, approximately 300 stories in the media discussed this important report. From the *San Diego Union-Tribune* and *Seattle Post-Intelligencer* to the *Cleveland Plain-Dealer* and *Boston Globe*, newspapers across the country reported that Congress has been eroding the criminal intent requirement in federal law, as did dozens of local television and radio stations. The report also earned coverage throughout the Internet and political blogosphere, including on popular websites ranging from Salon.com and the Huffington Post to FreeRepublic.com and National Review Online.

(A list of the news organizations, blogs, and other media sites covering the "Without Intent" report has been included in this media packet. The list succinctly illustrates that extent of the national media attention to concerning the overcriminalization problem and the unique Left-Right coalition organized to fight it.)

The Heritage Foundation's March 2010 book, ONE NATION UNDER ARREST, has also garnered widespread reporting by television, radio, and print media. It highlights the case studies of almost two dozen overcriminalization victims. ONE NATION UNDER ARREST was the subject of John Stossel's primetime show on the Fox Business Channel, which aired two dozen times in July, August, and September and is currently being highlighted by nationally syndicated radio host Marc Levin. It has received favorable reviews from *The Washington Times*, *Pittsburgh Tribune-Review*, and other media outlets.

This widespread national media attention is a result of the American public's growing concern over the current state of federal criminal law. Liberals, conservatives, and libertarians alike view the unchecked growth of criminal law and the erosion of criminal-intent protections as a frightening abandonment of essential civil liberties. As such, there is a groundswell of support for principled, bipartisan action to quell the problems of overcriminalization.

WHAT CAN BE DONE TO FIX THE PROBLEMS?

The recently published "Without Intent" report proposes a number of principled ideas for addressing the problem of overcriminalization, preventing the erosion of the criminal intent requirement, and effectively reforming the federal criminal justice system. Based upon the findings of the report, Congress should consider:

- Providing detailed written justification for and analysis of all new federal criminalization.

- Codifying the common law's venerable Rule of Lenity, which grants defendants the benefit of the doubt when Congress fails to legislate in a clear manner.

- Enacting default rules of interpretation ensuring that guilty-mind (*mens rea*) requirements are adequate to protect against unjust conviction.

- Requiring adequate judiciary committee oversight of every bill proposing criminal offenses or penalties.

- Redoubling efforts to draft every federal criminal offense with clarity and precision.

WHAT IS CONGRESS DOING TO ADDRESS THE PROBLEM?

In light of the convoluted state of our criminal justice system and the bipartisan outcry from average voters, opinion leaders, and policy organizations, Congress has begun to hear the call for more responsible criminal lawmaking and adherence to the fundamental American traditions of liberty and justice. Last year's hearing on overcriminalization represented a congressional first step toward acknowledging the overarching problem.

The dangerous, convoluted state of federal criminal law has spurred a concerted outcry among a large and growing contingent of organizations and opinion leaders. These groups and individuals have been calling on Congress to pass laws in a responsible manner that adheres to the fundamental traditions of liberty and justice. **The House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (Chairman Robert "Bobby" Scott (D-VA) and Ranking Member Louie Gohmert (R-TX)) will hold a hearing entitled "Overcriminalization: Assessing the Problems, Proposing Solutions" on Tuesday, September 28th, 2010 at 3:00 p.m. in Room 2141 of the Rayburn House Office Building. We ask that you attend this hearing and support our effort to see federal criminal law sensibly reformed.**

EXPECTED HEARING WITNESSES

- Abner Schoenwetter, *Overcriminalization victim*

- Bobby Unser, *Overcriminalization victim*

- Jim Lavine, *President, National Association of Criminal Defense Lawyers (NACDL)*

- Ellen Podgor, *LeRoy Highbaugh, Sr., Research Chair and Professor of Law, Stetson University College of Law*

- Stephen Smith, *Professor, University of Notre Dame Law School*

- Brian Walsh, *Senior Legal Research Fellow, The Heritage Foundation*

- Andrew Weissmann, *Partner, Jenner & Block, LLP, and former Director, Department of Justice – Enron Task Force*

Abner Schoenwetter – Overcriminalization Victim

Subcommittee on Crime, Terrorism, and Homeland Security – September 28, 2010

At the age of 64, Abner ("Abbie") Schoenwetter is trying to start his life over again. He has been serving an 8-year sentence in federal prison for a seafood sales transaction. According to the U.S. government, a lobster catch Abbie had agreed to purchase violated three Honduran administrative regulations. The Honduran government filed a legal brief stating that the three regulations were invalid and unenforceable against Abbie and the three other persons charged by the U.S. in the case. The Attorney General of Honduras wrote to the U.S. Attorney General certifying that this was correct. How is it then that this hard-working small businessman with no criminal history was convicted of multiple felonies and sentenced to 97 months in federal prison?

- Abbie was a Florida seafood importer and distributer who occasionally bought lobster tails gathered in the waters of the Caribbean near Honduras.

- In February 1999, the National Marine Fisheries Service (NMFS) received a fax about a cargo vessel bound for Alabama. It alleged that the vessel's lobster catch was in violation of Honduran regulations. The anonymous tipster claimed that the lobsters were undersized and in plastic bags, not cardboard boxes, as supposedly required by Honduran regulations.

- The NMFS seized the shipment under the Lacey Act, which makes it a federal crime to violate any fish or wildlife law or regulation of any nation on earth. The lobsters were to be bought and distributed by Abbie and other Americans.

- After the seizure, federal officials spent several months scouring Honduran law to find a basis for criminal charges. The theory they came up with was that the lobster catch violated three obscure Honduran administrative regulations (1) requiring seafood to be exported in cardboard boxes, (2) prohibiting harvesting lobsters with tails shorter than a specified length, and (3) prohibiting the destruction or harvesting of eggs or offspring of aquatic species.

- In November 2000, a federal jury found Abbie and his co-defendants guilty of multiple counts related to violations of the Lacey Act, all premised on violations of the invalid Honduran regulations.

- In June 2002, the Honduran government filed a brief supporting Abbie and his co-defendants' appeal. The brief stated the following about Honduran law: (1) the size regulation at issue was void *ab initio* and had no legal bearing on the case whatsoever, (2) the packaging regulation at issue had been repealed in 1995 and therefore was not in effect during the period of alleged criminal activity, and (3) the egg-harvesting regulation at issue never prohibited the purported activity of the co-defendants and had no legal effect because of its retroactive repeal.

- Despite the protests of the Honduran government, the appeals court affirmed the convictions. An April 2003 letter from the Attorney General of Honduras criticized this decision and reasserted the invalidity of the regulations that served as the basis for Abbie's conviction.

Abbie was released on probation on August 27, 2010. But throughout his incarceration, Abbie's wife and their three children have suffered extensive stress-related illnesses and have lived on the edge of bankruptcy. They never thought such things could happen in America.

Media Kit: Schoenwetter Case Summary

Robert "Bobby" Unser – Overcriminalization Victim

Subcommittee on Crime, Terrorism, and Homeland Security – September 28, 2010

Three-time Indianapolis 500 winner Bobby Unser has been an avid adventurer and outdoorsman all his life. But never did he think that his love for the outdoors would land him on a path to being deemed a federal criminal. Since his retirement from competitive auto racing, Bobby has spent much of his time in and around the mountains of northern New Mexico and southern Colorado. In December 1996, he and a friend got lost in those mountains while snowmobiling and nearly died, but Bobby's resourcefulness and determination saved his friend's life. Bobby suffered dehydration and frostbite and had to be hospitalized. After returning home, Unser soon learned that he faced a possible $5000 fine and up to six months imprisonment. How is it that someone who nearly lost his life in a blizzard suddenly became the target of federal prosecution?

- Just before Christmas, Bobby Unser and his friend got caught in a 50 to 70 mile an hour ground blizzard that came up suddenly while they were lawfully snowmobiling in permitted areas of a mountainous national forest just north of the Colorado-New Mexico border.

- With very little visibility in the blizzard, Bobby and his friend quickly got lost and disoriented. When the snowmobiles got stuck and broke down, the two men were forced to abandon their sleds and dig a snow cave for shelter to survive the first night. They spent the following day and night trekking through deep snow in 20-below temperatures before finally reaching help. Bobby was hospitalized for frostbite, dehydration, and exhaustion.

- Following his recovery in January, Bobby sought the assistance of the National Forest Service to locate his lost snowmobile. He reviewed maps with Forest Service personnel, openly discussed his ordeal, and identified a potential location for pursuing the search. The Forest Service personnel never identified themselves as law enforcement agents or indicated that they had opened a criminal investigation against him.

- At the end of the second day's discussion, federal officials charged Bobby with operating a motorized vehicle inside a National Wilderness area, a federal crime which carries a maximum sentence of up to six months in jail or prison. Given the nature of his ordeal and the absurdity of the criminal charge, Bobby opted for a trial.

- 16 U.S.C. § 551 and 36 C.F.R. § 261.18(a) fail to state clearly whether the government is required to prove that a person accused of these offenses acted with criminal intent. At trial, the government argued that they did not have to prove that Bobby acted with criminal intent. According to prosecutors, the offenses are strict liability and Unser could be convicted even though he had no intention of entering a wilderness area and had not knowledge that he had done so. The federal trial judge agreed with the government and found Bobby guilty.

- No one knows for certain whether Bobby's snowmobile had entered the wilderness area after he and his friend got lost. Yet the judge deemed conclusive on this hotly disputed question the testimony of a rescue worker who twice described his own estimate of where the snowmobile was ultimately found as "a guess." The federal court of appeals called this witness's testimony "far from precise," but affirmed Bobby's conviction nonetheless.

Because of this ordeal, Bobby has become an active supporter of overcriminalization reform and is determined to help see that no one is convicted for actions they took without any intending to violate a law or knowing that what they were doing was illegal or otherwise wrongful.

Media Kit: Unser Case Summary

Krister Evertson – Overcriminalization Victim

(Mr. Evertson Testified Before the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security on July 22, 2009)

Growing up, Krister Evertson, an Eagle Scout, was a National Honor Society member who spent two years after high school serving the deaf and hearing impaired in California and Indiana. A science whiz, Krister graduated high school one year early with a 4.0 GPA and a passion for invention and helping to make the world a better place. As an adult, Krister invested both financially and personally in his love for science by turning his interest in alternative energy into a small technology business. Up until May 27, 2004, Krister's only experience with law enforcement had been a couple of parking tickets. On that day, everything changed as he became a victim of overcriminalization and his life turned into a nightmare.

- In 2000, Krister began work to turn his dreams into reality. Borrowing some money from his family, Krister purchased equipment and materials to launch a business. Unfortunately, before he could reach success, the money ran short and he had to put the business on hold.

- He carefully stored all his research materials and equipment in 3/8-inch-thick stainless steel tanks, sealed them shut to prevent any accidents, and stored them in a company lot under the supervision of a friend until he could return to his business.

- While in Alaska caring for his 80-year-old mother, Krister generated some income by selling some of his supplies. Selling and shipping raw sodium is perfectly legal but, because it can be hazardous, it usually has to be shipped by ground, not air. Krister carefully packaged it, checked "ground transportation" on the shipping bill, and sent it to the buyer.

- On May 27, 2004, a black SUV full of armed federal agents, forced Krister's car off the road. The agents spilled out and arrested him at gun point. They interrogated him and, after he truthfully answered all their questions, they threw him in jail.

- The government charged Krister with failure to put a federally mandated sticker on his sodium shipment. Unbeknownst to Krister, in Alaska, UPS actually ships its "ground" packages by air. Thus, despite his clear intention to ship the package by ground—as evidenced by his selections of "ground" on the shipment bill and payment for "ground" shipping—the government declared the mistakenly omitted sticker a federal criminal offense.

- While on trial in Alaska, the Environmental Protection Agency raided Krister's storage facility in Idaho—based on the truthful information he provided when questioned—and declared his valuable materials "abandoned" toxic waste to be destroyed. In all, the EPA spent $430,000 destroying Krister's life work.

- When the jury in the Alaska sticker case found Krister innocent, the government turned around and charged him again, this time under the federal Resource Conservation and Recovery Act (RCRA) for his alleged abandonment of toxic materials. The provision of RCRA under which Krister was charged is so broad and requires so little evidence of criminal intent that he was found guilty and sentenced to 21 months in prison.

Krister spent nearly two years in prison and completed his sentence in August 2009. After his experience, Krister decided to speak out about his unfair and unjust treatment. Believing that this is not how criminal justice is supposed to work in the land of the free, he is using his experience to promote overcriminalization reform efforts.

Media Kit: Evertson Case Summary

George Norris – Overcriminalization Victim

(Mr. Norris's Wife, Kathy, Testified Before the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security on July 22, 2009)

George Norris once had a passion for life. A father, grandfather, and elderly retiree, he turned his orchid hobby into a part-time business, importing orchids from all over the world and reselling them to local flower enthusiasts at plant shows and other events. He never made more than a few thousand dollars a year from orchid sales, but it kept him engaged and provided his family with a little extra money as his wife Kathy neared retirement. Both their lives took a sickening turn for the worse on October 2003, when federal agents stormed their property and set in motion a chain of events that eventually resulted in George's spending 17 months in federal prison.

- On October 28, 2003, three pickup trucks full of federal agents from the U.S. Fish and Wildlife Service appeared outside George's home. Clad in protective Kevlar and bearing semi-automatic weapons, the government agents raided the property and forced George to remain seated in his kitchen under supervision while they spent half a day ransacking his home and seizing his belongings. The agents refused to tell George what they were searching for or what he had done to prompt such a show of force.

- The agents left the property, and for months after the raid George remained unaware as to its cause. After five months of silence from the government, George wrote a letter to the federal prosecutor's office to inquire about the matter. In a mute response, the government returned his personal computer, which was now inoperable.

- Although the federal investigation confirmed that George had never imparted or sold any prohibited orchids, he was nevertheless indicted in Miami for "smuggling." His crime, at its core, was a paperwork violation – the orchids George had imported were legal, but a small percentage of the documentation for the orchids purchased was inaccurate. Despite every effort to comply with the law, this simple mistake resulted in a federal criminal conviction.

- George requested a venue transfer to bring the case from Miami to his home state of Texas, which the court denied. Knowing he was innocent, George fought the complicated paperwork charges to the best of his ability given his limited financial resources.

- When George and Kathy's savings were wiped out, George very reluctantly gave up the fight and pled guilty to the baseless charges. Although his attorney indicated he might avoid a criminal sentence, he was sentenced to 17 months in federal prison.

- George, in his late sixties at the time of his conviction, entered prison with a host of medical problems including diabetes, cardiac complications, arthritis, glaucoma, and Parkinson's disease. While incarcerated, George's health declined even further and he has since developed depression, paranoia, and sleep complications.

In her testimony before Congress in July 2009, Kathy described the destructive impact this traumatic experience has had their family. George has become detached from his family and is no longer interested in gardening or spending time outdoors. Often afraid now to even leave his home, George is restricted by his status as a convicted felon from voting or hunting with his grandchildren, a Norris family tradition for generations. George and Kathy have repeatedly expressed their hope that, by sharing their story, they will keep other families from becoming the victims of overcriminalization.

Media Kit: Norris Case Summary

Media Outlets Covering The "Without Intent" Report

13Wham.com

14WFIE.com

2 News

21Wfmj.com – Ohio

77 WABC

8 News Now

9 KTRE.com

970 AM KNNU Radio – Nevada

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The Houston Chronicle

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DailyTimes.com

El Paso Times

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Fresno Bee

Gainesville.com – Florida

GOPUSA

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Grits for Breakfast

Hawaii Reporter

Herald & Review – The Midwest – Illinois

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Houma Today – Louisiana

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IdahoStatesman.com

Independent Mail – The South – South Carolina

JournalGazette.net

K5 The Home Team

Kaaltv.com – Minnesota
KAIT 8

Kansas City Star

KCAU-TV – Iowa

KCBD NewsChannel

KCBS All News 740 AM

KCOY

KFMB – TV

KFVS12

Khq Right Now

KION

KIVI-TV

KJCT8 News

KLBJ News Radio 590 AM – Texas

KLFY TV 10 – Louisiana

KLKN – TV

KLTV 7 News – Texas

Kmir6

KMOV.com – Missouri

KMPH Fox 26

KMTV3 – Omaha

KNDO KNDU Right Now

KOAM-TV

KOB.com

KOIN News 6

KOLD News 13

Kota Territory News

KPLC NBC-7

KPTK

KPVI News 6

Ksl.com

KSLA CBS-12

KSRO 1350

KSTP TV – Minnesota

KSWO

Kten.com

Ktiv.com

KTNV ABC – Nevada

KTTC

KTUU.com

KTVZ – Oregon

KWES News West 9

KWQC-TV6 – Iowa

KWWL

KXnet.com

Lancasteronline.com – Pennsylvania

Las-Vegas Review-Journal

Leagle

Lexington Herald Leader – Kentucky

Lincoln Courier

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Macon.com

MashGet

MND – Mens News Daily

My Earthlink

My San Antonio

My Suncoast

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Napa Valley Register

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NBC 29

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One News Now

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WAFF NBC-48

WALB News 10

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WATE 6 News

Wave3

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WBOC-TV 16 – Delaware

WBTV – North Carolina

WBZ News Radio 1030

WCAX CBS-3

WDAM NBC-7

WDBJ CBS-7

WDT Online –Wisconsin

WECT NBC-6 – North Carolina

WFLX Fox-29 – Florida

WGEM

WHEC-TV

White Collar Crime Prof Blog

WISTV NBC-10

WKBT TV

WKM.com

WKOW 27

WLBT NBC-3

WLNS CBS-6 – Michigan

WLOX ABC-13

WMBF News

WND

WOI ABC-5

WOKV AM 690 and 106.5 FM – Florida

World News

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WQOW TV

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WRIC ABC-8

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  - *When Art Becomes a Crime*
  - *The MySpace Suicide*
  - *The End of the Pocket Knife*
  - *Criminalizing Success: The Political Prosecution of an American Businessman*
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21Wfmj.com – Ohio

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9 KTRE.com

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El Paso Times

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K5 The Home Team

Kaaltv.com – Minnesota

KAIT 8

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KCAU-TV – Iowa

KCBD NewsChannel

KCBS All News 740 AM

KCOY

KFMB – TV

KFVS12

Khq Right Now

KION

KIVI-TV

KJCT8 News

KLBJ News Radio 590 AM - Texas

KLFY TV 10 – Louisiana

KLKN – TV

KLTV 7 News - Texas

Kmir6

KMOV.com – Missouri

KMPH Fox 26

KMTV3 – Omaha

KNDO KNDU Right Now

KOAM-TV

KOB.com

KOIN News 6

KOLD News 13

Kota Territory News

KPLC NBC-7

KPTK

KPVI News 6

Ksl.com

KSLA CBS-12

KSRO 1350

KSTP TV – Minnesota

KSWO

Kten.com

Ktiv.com

KTNV ABC - Nevada

KTTC

KTUU.com

KTVZ - Oregon

KWES News West 9

KWQC-TV6 – Iowa

KWWL

KXnet.com

Lancasteronline.com – Pennsylvania

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Macon.com

MashGet

MND – Mens News Daily

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My San Antonio

My Suncoast

Myfox11.com

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Napa Valley Register

National Center for Policy Analysis

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WAFF NBC-48

WALB News 10

Wandtv.com

WATE 6 News

Wave3

WBAY

WBOC-TV 16 – Delaware

WBTV – North Carolina

WBZ News Radio 1030

WCAX CBS-3

WDAM NBC-7

WDBJ CBS-7

WDT Online –Wisconsin

WECT NBC-6 – North Carolina

WFLX Fox-29 – Florida

WGEM

WHEC-TV

White Collar Crime Prof Blog

WISTV NBC-10

WKBT TV

WKM.com

WKOW 27

WLBT NBC-3

WLNS CBS-6 – Michigan

WLOX ABC-13

WMBF News

WND

WOI ABC-5

WOKV AM 690 and 106.5 FM – Florida

World News

WorldMag.com

WQOW TV

WRAL.com

WRCBtv.com – Tennessee

WRIC ABC-8

WSBradio.com – Georgia

WTEN

WTHR NBC-13

WTOC 11

WTVM 9 – Georgia

WVVA-TV –Virginia

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National Review Online
New Haven Register
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News With Views.com
Now Public News Coverage
Outside the Beltway
Point of Law.com
Press of Atlantic City
Real Clear Politics
Reason.com Blog
RedState
Running 'Cause I Can't Fly Blog
The Agonist
The Boston Herald
The Dallas Morning News
The Economist
The Examiner
The Hawk Eye
The Houston Chronicle
The San Francisco Examiner
The Trinity Tripod
The Washington Times

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