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CONGRESSIONAL TESTIMONY

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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.

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]

[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.

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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.