MENS REA: THE NEED FOR A MEANINGFUL INTENT REQUIREMENT IN FEDERAL CRIMINAL LAW

HEARING

BEFORE THE

OVER-CRIMINALIZATION TASK FORCE OF 2013

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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MENS REA: THE NEED FOR A MEANINGFUL INTENT REQUIREMENT IN FEDERAL CRIMINAL LAW

FRIDAY, JULY 19, 2013

HOUSE OF REPRESENTATIVES

OVER-CRIMINALIZATION TASK FORCE OF 2013

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 9 a.m., in room 2237, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Task Force) presiding.

Present: Representatives Sensenbrenner, Goodlatte, Bachus, Gohmert, Labrador, Holding, Scott, Conyers, Nadler, and Jeffries.

Staff Present: (Majority) Robert Parmiter, Counsel; Alicia Church, Clerk; and (Minority) Ron LeGrand, Counsel.

Mr. SENSENBRENNER. The Task Force will come to order.

Today I would like to thank our witnesses for agreeing to appear at this hearing, which is the second in a series of hearings on the growing problem of over-criminalization and over-federalization. This Task Force held its introductory hearing on the scope of the over-criminalization problem a month ago, at which time we heard from a panel of excellent witnesses. Today our work continues.

As the title indicates, today's hearing will focus on the need for a meaningful intent requirement in Federal criminal law. A common criticism of the expansion of Federal criminal law is that it has included an erosion of the *mens rea* requirement. *Mens rea,* Latin for guilty mind, is the state of mind the government, to secure a conviction, must prove that a defendant had when committing a crime.

As Justice Jackson explained some 60 years ago, "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is 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."

Historically, most common law criminal offenses were malum in se offenses, meaning inherently immoral, antisocial acts such as murder, arson, or rape. However, the expansion of the Federal Criminal Code has been accompanied by an ever-increasing labyrinth of Federal regulations, many of which are malum

prohibitum offenses; that is offenses that are crimes merely because Congress has decided to pass a law saying so.

Many of these offenses have no guilty mind requirement, which means that American citizens can be convicted of crimes, and sometimes serve jail time, for unwittingly committing crimes such as failing to file paperwork or fishing without a license, vague definition in these mala prohibita laws ensure that those who did not intend to break the law and who believe in good faith that their conduct was lawful. This is an unacceptable state of affairs, and surely not what Congress nor America's common law system intended.

To complicate matters, many of the terms commonly used in the Federal Code to denote intent lack clear definitions. For example, the Supreme Court has opined that, "willfully," is an ambiguous term which can have different meanings in different contexts. Judge Learned Hand excoriated the term willful. "It is an awful word. It is one of the most troublesome words in a statute that I know. If I were to have to have an index purge, willful would lead all the rest in spite of its being at the end of the alphabet." I do not think we are going to do that in this Task Force, but with Google searches and things like that it is easier than it was when Judge Hand wrote that opinion.

In this session of Congress, I have reintroduced legislation to modernize and streamline the Federal Criminal Code. That legislation would bring uniformity to the code by using the term "knowingly" to define the requisite intent for every crime except for those criminal offenses that require some additional and more specific intent.

In 2010, the Heritage Foundation and the National Association of Criminal Defense Lawyers, definitely an odd couple, published a report entitled "Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law." This report was the result of a study of legislation containing criminal offenses introduced in the 109th Congress, which found that over 50 percent of the offenses considered by that Congress contained inadequate *mens rea* requirements. This is a shockingly high number.

The study found that despite the House and Senate Judiciary Committees' expertise and subject matter jurisdiction over Federal criminal law, over half of the offenses noted in the study were not referred to either Committee. However, the study also found that when the bills were considered and marked up by the two Judiciary Committees, the quality of *mens rea* requirements was significantly improved. We thank them for that.

It is clear going forward that congressional leadership could ensure that the Judiciary Committees receive referrals on any legislation containing criminal penalties. Inadequate drafting by other Congressional Committees should not lead to prison time for American citizens. The lack of an adequate intent requirement in the Federal Code is one of the most pressing problems facing this Task Force, and I look forward to engaging in a substantive discussion with our distinguished panel of witnesses today.

It is now my pleasure to recognize for his opening statement the Ranking Member of the Task Force, the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

For centuries the American legal system has defined a crime to require both a guilty act and a guilty mind. The latter is commonly referred to as criminal intent. To win a conviction, the government must prove beyond a reasonable doubt that the accused committed the prohibited act with criminal intent.

For the past several years, a number of groups from diverse political philosophies have come together to express their concern over the lack of specificity in criminal law standard of proof for holding a person accountable for criminal conduct. They have complained of vagueness in the standard, with many defendants not knowing whether or not they are even guilty of a crime because of the absence of the common law requirement of the guilty mind of *mens rea*.

The *mens rea* requirement has long served as an important role in protecting those who did not intend to commit a wrongful act from prosecution or conviction. *Mens rea* elements, such as specific intent, willful intent, or knowledge of the specific facts constituting the offense, were part of nearly all common law crimes. They have served as a means of protecting individuals from state action to deprive them of liberty and rights. Without these protective elements in our criminal laws, honest citizens are at risk of being victimized and criminalized by poorly crafted legislation and overzealous prosecutors.

For centuries, citizens in this country have only faced a few dozen Federal criminal offenses, but in recent years the number of crimes has exploded. Thousands of Federal crimes are now covered not only in Federal jurisdictions, but also are covered by duplicative areas where state and local crimes also cover Federal crimes. It is estimated that there are also, in addition to that, hundreds of thousands of additional crimes imposed by regulatory action.

As we have seen from testimony from the Crime Subcommittee previously, and this Task Force specifically, many provisions lack criminal intent requirements to protect accused persons from unjust criminal punishment, such as those imposed on persons who may violate a regulation that they did not even know was a crime. To inspire the widest possible trust and confidence, we should ensure that all criminal provisions provided for traditional protections against unjust punishment by ensuring each person convicted has the specific *mens rea* requirement.

One of the areas that we need to specifically look at are some of the regulations and whether or not some of those regulations ought to carry criminal penalties at all. There are some that I think need to cover criminal penalties, but we will discuss those as the Committee goes forward. I look forward to listening to the witnesses and hear their views on this issue. And thank you, and yield back the balance of my time.

Mr. SENSENBRENNER. The Chair recognizes the Ranking Member of the full Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I think this is an important Task Force. And I would merely add that a fundamental principle of our criminal justice system is that an individual should not be subjected to prosecution and conviction unless he or she intentionally engages in wrongful conduct or con-

duct that they knew was unlawful. And so for the hearing on *mens rea*, the need for a meaningful intent requirement in Federal criminal law is an important issue before the Over-Criminalization Task Force. Only under these circumstances should an individual be deserving of punishment.

Unfortunately, here in the Congress we have increasingly strayed from the basic principle, as evidenced by the fact that Federal criminal law is no longer limited to crimes that are readily recognizable. So as the Task Force undertakes its analysis of this issue, there are several matters we should address.

To begin with, the lack of *mens rea* standard presents a real risk that truly innocent individuals may be wrongly convicted and punished. The omission of *mens rea* essentially sets citizens up to be, in effect, ambushed. No one should be at risk of prosecution, conviction, and possible imprisonment for engaging in actions that are not inherently blameworthy unless he or she knew that the act involved was illegal. An individual can be found criminally liable for violating certain commercial, regulatory, and environmental laws without any proof that they intended to violate these laws or that their conduct was clearly blameworthy. In fact, without an articulated *mens rea* standard, it may not even be clear that the crime has even been committed.

Now, the Heritage Foundation study conducted by our witness who is testifying today estimated that 17 of the 91 Federal criminal offenses enacted between 2000 and 2007 lacked any *mens rea* requirement at all. A joint report by the National Association of Criminal Defense Lawyers and the Heritage Foundation examined the Federal criminal law process during the 109th Congress. The study revealed that over 57 percent of the offenses introduced, and 64 percent of those enacted into law, contained inadequate criminal intent requirements, putting the innocent at risk of criminal prosecution. As a result, everyone in the criminal justice system, including the defendant, prosecutor, and judge, is left wondering what mental state, if any, applies.

For those inclined to place their trust in prosecutorial responsibility and discretion, I say that the responsibility lies with us, the Congress, to pass legislation that is fair, unambiguous, and protects the rights of all. That is why this Task Force is so important.

I will put the rest of my statement in the record.

Mr. SENSENBRENNER. Without objection.

Mr. CONYERS. Yield back the balance of my time.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

A fundamental principle of our criminal justice system is that an individual should not be subjected to prosecution and conviction unless he or she intentionally engages in wrongful conduct or conduct that they knew was unlawful.

Only under these circumstances should an individual be deserving of punishment.

Unfortunately, Congress has increasingly strayed from this basic principle as evidenced by the fact that federal criminal law is no longer limited to crimes that are readily recognizable.

So as the Task Force undertakes its analysis of this issue, there are several issues that we should address.

To begin with, the lack of a *mens rea* standard presents a real risk that truly innocent individuals may be wrongfully accused, convicted and punished.

The omission of *mens rea* essentially sets citizens up to be ambushed.

No one should be at risk of prosecution, conviction and imprisonment for engaging in actions that are not inherently blameworthy unless he or she knew that the act involved was illegal.

An individual can be found criminally liable for violating certain commercial, regulatory, and environmental laws without any proof that he or she intended to violate these laws or that his or her conduct was clearly blameworthy.

In fact, without an articulated *mens rea* standard, it may not even be clear that a crime has even been committed.

According to a Heritage Foundation study conducted by John Baker who is testifying here today, it is estimated that 17 of the 91 federal criminal offenses enacted between 2000 and 2007 lacked any *mens rea* requirement at all.

A joint report 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",* and released in May 2010, examined the federal criminal law process during the 109th Congress (2005–2006).

That study revealed that over 57 percent of the offenses introduced and 64 percent of those enacted into law contained inadequate criminal intent requirements, putting the innocent at risk of criminal prosecution.

As a result of this failing, everyone in the criminal justice system—including the defendant, prosecutor, and judge—is left wondering what mental state, if any applies.

For those inclined to place their trust in prosecutorial responsibility and discretion, I say that the responsibility lies with us—the Congress—to pass legislation that is fair, unambiguous and protects the rights of all citizens.

That is our duty. Congress must require that a conviction be based on proof that a person purposefully intended to break the law.

To leave it to the prosecutors and courts to determine Congress' intent is a dereliction of our sworn duty.

Another concern that I have pertains to how we define what constitutes "mens rea."

While we all can agree that the knowledge or *mens rea* element of a criminal law statute is critical, there continues to be debate about the difference between the terms "willfully", and "intentionally" or "knowingly."

"Willful" is often used to describe a state of mind where the person consciously and purposefully breaks the law or violates widely known legal duty.

Is it negligence, knowledge, criminal intent, or strict liability?

And, this standard is to be distinguished from the situation where a person violates a criminal law *without any purpose of doing so,* or he makes a good faith mistake when interpreting a complex area of law.

So, as we become more scrupulous about requiring *mens rea* in criminal offenses, we must also ensure that the specific mens rea or "guilty mind" elements of federal offenses capture only blameworthy conduct.

Finally, I want the witnesses to address the issue of whether proof of willfulness should be required for regulatory crimes.

Specifically, if the standard for these offenses is not willfulness, what should the standard be?

Would it be more appropriate to impose civil penalties and administrative sanctions for those who violate a regulation but do not meet the requirements from criminal conviction?

Are there certain types of regulatory crimes that should be exempt from a *mens rea* standard?

What justification exists for imposing criminal liability for regulatory crimes?

I look forward to hearing the responses to these questions from the witnesses and I commend the Task Force for examining the critical issue of *mens rea.*

Mr. SENSENBRENNER. The Chairman of the full Committee, Mr. Goodlatte, is unable to make it today. I ask unanimous consent that his opening statement be placed in the record.

[The prepared statement of Mr. Goodlatte follows:]

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary

Thank you Chairman Sensenbrenner. I am very happy to be here today at the second hearing of the Over-Criminalization Task Force. Today's hearing will afford Task Force members the opportunity to hear from a distinguished panel of outside experts who have studied the issue of criminal intent very closely for a number of years.

At our first hearing last month, the witnesses unanimously agreed that the erosion of the *mens rea* requirement in Federal law is the most pressing issue facing this Task Force.

Anyone who has been to law school knows that, at common law, finding an individual guilty of a crime required the government to show a convergence of harmful conduct (the *actus reus*) with the intent to do something that the law forbids (the *mens rea,* or "guilty mind" requirement). It required, as the Supreme Court has stated, "concurrence of an evil-meaning mind with an evil-doing hand."

However, as my colleagues and many commentators have noted, the expansion of the federal code—to some 4,500 criminal statutes today, as well as tens of thousands of regulations carrying criminal penalties—has resulted in a code that no average American citizen could be expected to read and understand, let alone conform his conduct to. As a result, the news is replete with stories of Americans who have been convicted of crimes—and sometimes, sentenced to lengthy prison terms—when they had no intent to break the law.

A primary cause of this predicament is Congress itself. That is, recent Congresses have crafted scores of new federal criminal laws that lack adequate criminal intent requirements and define the criminalized conduct in unacceptably vague and overbroad terms. As noted in the *Without Intent* study done by the Heritage Foundation and the National Association of Criminal Defense Lawyers, over 57 percent of the offenses introduced in the 109th Congress—and 64 percent of those enacted into law—contained inadequate intent requirements.

The good news coming out of this study is that regular order by the House Judiciary Committee—that is, the marking up and reporting out of a bill—does improve the quality of *mens rea* requirements. As Chairman of the Judiciary Committee, it should come as no surprise to anyone that I strongly agree with that conclusion.

I can assure my colleagues that this Committee will continue working to ensure that federal criminal laws are responsibly drafted and considered.

I look forward to hearing from our witnesses today about the need for a definitive *mens rea* requirement in the Federal code, and what steps this Task Force and the Judiciary Committee can take to address the issue.

As I stated at the beginning of our first hearing, concern for this issue is bipartisan, and requires bipartisan perspectives. I commend all of my colleagues here today for your excellent work on the Task Force, and I yield back the balance of my time.

Mr. SENSENBRENNER. And I also ask unanimous consent that other Members' opening statements may be placed in the record. Without objection, so ordered.

[The prepared statement of Mr. Scott follows:]

Prepared Statement of the Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Ranking Member, Over-Criminalization Task Force of 2013

Good morning,

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 committed a prohibited act with criminal intent.

Over the past several years, a number of groups, from diverse political philosophies have come together to express their concern over the lack of specificity in criminal law standard of proof for holding a person accountable for criminal conduct. They have complained of vagueness in the standard with many defendants not know whether or why they were guilty of a crime, all because of the absence of the com-

mon-law requirement of mens rea, or "guilty mind" as a required standard of proof to be held accountable for a crime.

The mens rea requirement has long served an important role in protecting those who did not intend to commit wrongful or criminal acts from prosecution and conviction. Mens rea elements such as specific intent, willful intent and the knowledge of specific facts constituting the offense were part of nearly all common-law crimes. They have served as a means of protecting individuals from state action to deprive them of liberty and rights. Without these protective elements in our criminal laws, honest citizens are at risk of being victimized and criminalized by poorly crafted legislation and overzealous prosecutors.

For centuries, citizens in this country faced only a few dozen federal criminal offenses. In recent decades, however, the number of federal criminal offenses has grown explosively. Thousands of federal crimes now cover not only uniquely federal jurisdictional subject areas, but also subject areas duplicative of crimes under state and local jurisdiction. And estimates indicate that there are hundreds of thousands of additional criminal provisions imposed through regulatory actions by federal agencies implementing federal criminal statutes.

As we have seen from testimony before the Crime Subcommittee previously, and recently before this Task Force, many of these provisions lack clear criminal-intent requirements to protect accused persons from unjust criminal punishment, such as those imposed upon persons who may violate a law or regulation only accidentally or inadvertently, without any criminal intent. To inspire the widest possible trust and confidence in the federal criminal justice system, we should ensure that all criminal provisions provided for traditional protections against unjust punishment by ensuring that each has a specific mens rea requirement.

I welcome today's witnesses, and look forward to suggestions as to what provisions, if any, should be added to federal law to protect accused persons from an improper risk of criminal punishment.

It is my hope that this Task Force, with the assistance of witnesses such as those appearing before us today, will identify bipartisan efforts to make the federal criminal code smaller and more understandable. It is also my hope that through this process we will give Americans a reasonable opportunity to understand what the criminal law requires of them before they act.

Mr. SENSENBRENNER. Also, without objection the Chair will be authorized to declare recesses during the hearing of the Task Force today.

Let me say in the beginning that we are scheduled to have about an hour-and-a-half's worth of votes between 10:20 and a little bit before noon. I think it would be incumbent on all of us, particularly the witnesses, if we could wrap this up before we have to go across the street to vote, because I do not think it would be very fair for the witnesses to have to sit around and wait to come back.

Having said that, let me introduce the witnesses.

Dr. John S. Baker, Jr., is the visiting professor at Georgetown University Law School, a visiting fellow at Oriel College at the University of Oxford, emeritus professor of law at the LSU Law School. He teaches short courses on separation of powers for the Federalist Society with Supreme Court Justice Antonin Scalia.

Dr. Baker previously worked as a Federal court clerk and assistant district attorney in New Orleans, and has served as consultant to the U.S. Department of Justice, U.S. Senate Judiciary Subcommittee on Separation of Powers, the White House Office of Planning, USIA and USAID. He was a Fulbright scholar in the Philippines and a Fulbright specialist in Chile.

Dr. Baker served as a law clerk in the Federal District Court and as an assistant district attorney in LA before joining LSU in 1975. He served on an ABA task force which issued the report "The Federalization of Crime" in 1998. He received his bachelor of arts degree from the University of Dallas, his J.D. Degree from the Uni-

versity of Michigan Law School, and his Ph.D. degree in political thought from the University of London.

Mr. Norman L. Reimer is the executive director of the National Association of Criminal Defense Lawyers. As executive director, Norman Reimer heads a professional staff based in Washington, D.C., serving the NACDL's district, local, and state and international affiliate organization members. Since joining NACDL, he has overseen a significant expansion of the association's educational programming and policy initiatives. Previously, he practiced law for 28 years, most recently at Gould, Reimer, Walsh, Goffin, Cohn, LLP. Mr. Reimer assumed the presidency of the New York County Lawyers Association in 2004.

In addition to that role, he has served as a delegate to both the American Bar Association's House of Delegates and the New York State Bar House of Delegates. He formerly served as chair of the Central Screening Committee of the Assigned Counsel Plan, Appellate Division, First Department, overseeing the qualification of several hundred attorneys. He served on the Federal Criminal Justice Panels for the Southern District of New York, where he was certified to represent criminal defendants in felony prosecutions, capital prosecutions, and habeas corpus proceedings. He was also certified by the New York State Capital Defender to handle death penalty prosecutions in the New York State courts.

So we ask you to limit your oral testimony to 5 minutes. You are all familiar with the red, yellow, and green lights before you. Without objection, your full statements will appear in the record.

And, Dr. Baker, why don't you go first?

TESTIMONY OF JOHN S. BAKER, JR., Ph.D., VISITING PROFESSOR, GEORGETOWN LAW SCHOOL, VISITING FELLOW, ORIEL COLLEGE, UNIVERSITY OF OXFORD, PROFESSOR EMERITUS, LSU LAW SCHOOL

Mr. BAKER. Mr. Chairman, Mr. Ranking Member, and Members of Congress, thank you for holding this hearing. And I especially thank you——

Mr. SENSENBRENNER. Is your mike on?

Mr. BAKER. It appears to be.

Mr. Chairman, Mr. Ranking Member, and Members of Congress, thank you for holding this hearing, and thank you in particular for the Task Force. The issue of over-federalization is the main issue I have worked on for decades, and so it is very gratifying to be here and have this opportunity to testify.

In your first meeting you heard from Mr. John Malcolm. And I had planned to say that I was going to pick up where he left off with the *Morissette* case and the quote from Justice Jackson. The problem is that Mr. Sensenbrenner covered most of what I was going to say, and then Mr. Scott and Mr. Conyers doubled down on it.

So it is wonderful to start knowing that we all agree apparently on what the problem is. The difficulty is to figure out a solution. And it is not an easy thing to do. And that means understanding how we got in the mess in the first place is critical to crafting the solution.

I think it is important not so much for Members of this Committee, but for other Members of Congress to understand the difference between state criminal law and Federal criminal law. But first of all, we have identified the strict liability problem of no *mens rea*. But the inadequate *mens rea* problem, where you have a knowingly requirement that does not really amount to a *mens rea* issue is also critical.

The important thing, it seems to me, is to understand that *mens rea* is a principle, and that under it come particular rules. And the rules vary with the nature and the type of the crime. And when we look at state criminal law, it is relatively easy, even though states have added many non-common law crimes, it is easy because the meat and potatoes of a local prosecutor, which I was, in murder, rape, robbery, theft, burglary, that is what we dealt with. And most juries do not have difficulty figuring out what those crimes are. Indeed, in most state prosecutions the issue is not whether there was a crime, the issue is whether the defendant is the person who did it.

In Federal law it is just the opposite. The issue is not whether the defendant did something; it is whether what he did was a crime. And we know with 4,500 statutes out there, there are plenty to pick from. And it is easy to pick up one that has, if not a lack of *mens rea* entirely, a confused *mens rea*. And the classic example is the mail fraud statute, which the Justice Department constantly is litigating and pushing the envelope on.

So how is it then that you go about dealing with it? Well, first of all, in understanding the difference between state and Federal criminal law you have to understand, as you do, but other Members of the Congress may not, that we have simple crimes at the state level and we have crimes at the Federal level that look more like the Tax Code. And as a result, people cannot understand what they are.

And how did we get into this situation? Well, it has to do with something called the Constitution. There is no general police power, as you know, in the Federal Government. The Supreme Court keeps trying to remind the Congress of this. And sometimes it gets through and sometimes it does not. But when you have to put a jurisdictional element in the statute, that immediately complicates the statute. The statute becomes more and more complex.

And indeed, when you are dealing, as you are in most cases, with the power under the Commerce Clause, that means you put in an affecting commerce provision, your powers are limited, supposedly limited, and it does not end up looking, in most cases, like a crime. It is in most cases really a regulation that happens to carry a criminal penalty.

So what is the solution? Well, in one sense the solution would appear to be easy: a default rule. The Model Penal Code has a default rule. The difficulty is default rules in the Model Penal Code—which by the way were not adopted necessarily by most of the states that adopted the Model Penal Code—the difficulty is the default rule works and is crafted relatively easily when you have a coherent code.

What we call the Federal Criminal Code is not a coherent code. It is simply a list of statutes. Because these statutes have been

drafted over time by different sessions of Congress, there is no coherence to these crimes. Therefore, when you attempt to come up with a default rule, as the Heritage Foundation has drafted, it is a difficult, intricate thing to put together.

The most important thing I would say in dealing with the default rule especially is to give guidance to a Federal court, which, no matter what you say, is going to have to interpret it. And if Congress comes down, as the three Members who spoke this morning did, very firmly in favor of enforcing a *mens rea*, that message will get across to the Federal courts. With that message, when you adopt the particular underlying rules that follow from it, the court will understand to err on the side of *mens rea* rather than erring on the side of strict liability.

And if you look at default rules as they have been interpreted in the states under the Model Penal Code, the differences turn on whether the particular state supreme court leaned toward *mens rea* or whether it leaned toward strict liability, and that makes all the difference in the world.

You know, at the state level we know that we found many people who are innocent in jail because they were factually not guilty. The problem in Federal criminal law is that we have innocent people being convicted not because we have the wrong person, but because they really did not commit a crime.

Thank you very much.

[The prepared statement of Mr. Baker follows:]

LEGISLATIVE TESTIMONY

MENS REA: THE NEED FOR A MEANINGFUL INTENT REQUIREMENT IN FEDERAL CRIMINAL LAW

Testimony before the Committee on the Judiciary

U.S. House of Representatives

Task Force on Over-criminalization

July 19, 2013

Dr. John S. Baker, Jr.
Visiting Professor, Georgetown Law School;
Professor Emeritus, LSU Law School

Mr. Chairman, Mr. Ranking Member, and other Members of Congress:

Thank you for the opportunity to speak with you regarding the fundamental principle of *mens rea*. I applaud the House Judiciary Committee for studying this issue as part of the work of the Task Force and for convening this hearing.

My name is John Baker. I am a Visiting Professor at Georgetown Law School; a Visiting Fellow at Oriel College, University of Oxford; and Emeritus Professor at LSU Law School. In the past, I have been a consultant to the U.S. Senate Judiciary Committee Subcommittee on Separation of Powers, and to the U.S. Department of Justice. Prior to teaching, I prosecuted criminal cases in New Orleans and have since been involved in the defense of a few federal criminal cases. I have written extensively on state and federal criminal law,[1] including a criminal law casebook.[2] I was a member of the ABA Task Force that issued the report "The Federalization of Crime" (1998).

The two issues in criminal law on which I have primarily focused are the federalization of crime and the requirement of *mens rea*. The first issue concerns the respective responsibilities of the federal and state governments for promulgating and enforcing criminal prohibitions. The second issue concerns the requirement that criminal statutes require prosecutions to prove that a criminal defendant had a *mens rea*.

I. *Mens Rea*: Central to Criminality.

The common law of crime requires a union of *actus reus* and *mens rea*, i.e. an act and a guilty mind.[3] The *mens rea* requirement is the essential protection for the innocent. Those who do not intend to commit wrongful acts should not suffer unwarranted prosecution and conviction.[4]

In the mid-19th century, some states for the first time enacted police regulations that punished certain conduct without proof of a *mens rea*. In a law review article that became a classic, Professor Francis B. Sayre coined the term "public welfare offenses" to describe these strict-liability offenses.[5] The article distinguished these "regulatory offenses" from "true crimes."[6] Although some strict-liability offenses carried possible imprisonment, Sayre reiterated the traditional understanding that it is unjust to punish without proof of criminal intent:

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[1] *See, e.g.*, John S. Baker, Jr., *Mens Rea and State Crimes: 50 Years Post-Promulgation of the Model Penal Code*, 92 CRIM. L. REP. (BNA) 248 (Nov. 28, 2012); *see also* John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, Legal Memorandum No. 26 (June 16, 2008) *available at* http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes.

[2] John S. Baker, Jr., Daniel H. Benson, Robert Force, B.J. George, Jr., HALL'S CRIMINAL LAW: CASES AND MATERIALS (5th ed. 1993).

[3] *Cf.* Oliver Wendell Holmes, THE COMMON LAW 3 (1881) (discussing the deep roots of *mens rea* within Anglo-American law).

[4] *See, e.g.*, 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 20-21 (1769) (distilling the act of criminality to "this single consideration, the want or defect of *will* . . .") (emphasis in original).

[5] Francis B. Saye, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

[6] *Id.* at 68.

> To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure. Crimes punishable with prison sentences, therefore, ordinarily require proof of a guilty intent.[7]

After World War II, the U.S. Supreme Court echoed Sayre's sentiment. In 1952, the Court in *Morissette v. United States*[8] read a *mens rea* into a federal theft statute. The opinion assumed that, unless Congress clearly stated a contrary intent, federal statutes based on common-law crimes should be construed to have a *mens rea*. The Court emphasized that the prosecutor must persuade the fact-finder that the accused not only possessed "an evil-doing hand," but an "evil-meaning mind."[9] Justice Robert H. Jackson's opinion reaffirmed the *mens rea* principle in the strongest of terms:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is 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. . . .
>
> Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle, but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law.[10]

Since *Morissette*, the Court has several times reiterated these principles – applying "the usual presumption that a defendant must know the facts that make his conduct illegal. . . ." to even non-common law offenses.[11] Unfortunately, Congress has

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[7] *Id.* at 72; *see also United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 495 (E.D.N.Y. 1993) (explaining that *mens rea* requirements "flows from our society's commitment to individual choice.").
[8] 342 U.S. 246 (1951).
[9] *Id.* at 251.
[10] *Id.* at 250-52.
[11] *See United States v. Staples*, 511 U.S. 600, 619 (1994); *see also United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) (explaining that *mens rea* requirements support the maxim that ignorance

not been nearly as sensitive about including a *mens rea* in statutes carrying criminal penalties.

The erosion of *mens rea* has been greater in federal criminal law than it has been at the state level for several related reasons. State law largely codifies common law offenses, which by definition had a *mens rea*.[12] Although the states have modified the common law offenses and have added many crimes unknown to the common law, adherence to the principle of a *mens rea* remains strong, in part due to the Model Penal Code.[13] The "meat and potatoes" of state criminal prosecutions remains the common law crimes of murder, rape, robbery, burglary, larceny/theft, etc. Federal crimes have always been statutory due to the Supreme Court's early ruling that there is no federal common law of crimes.[14] Thus, Congress can only enact a crime pursuant to one of its enumerated powers, usually the Commerce Clause. Congress has no general police power like the states.[15] When Congress does enact legislation pursuant to the Commerce Clause, what it actually does is "regulate" commerce among the states in some way that includes a criminal penalty.

The constitutionally-grounded difference between state and federal crimes has an effect on criminal prosecutions. Federal criminal statutes usually make the relationship to commerce (or some other enumerated power, such as the postal power for mail fraud) a jurisdictional requirement for proof of the crime, such as the Hobbs Act's prohibition on robbery and extortion "affect[ing] commerce."[16] As a result, most federal crimes are more complex and unfamiliar than state crimes. Even when a federal statute provides what appears to be a *mens rea*, it may be a very weak one such as "knowing."[17] Presented with a complex federal statute, having a weak *mens rea*, a federal jury may have great difficulty understanding what constitutes guilt. A state jury, on the one hand, may require little or possibly no instruction on the *mens rea* and other elements of murder, rape,

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of the law is no excuse; individuals who know they are committing an "evil" act cannot then claim ignorance of their act's illegality).

[12] *See* Blackstone, *supra* note 4.

[13] *See* Baker, *Mens Rea and State Crimes*, *supra* note 1 (describing both the intended effect of the MPC to preserve culpability in criminal law, as well as the unintended detriment the MPC has on that goal); *see also* MODEL PENAL CODE § 2.02(4) (1985) (directing courts to apply general *mens rea* terms in a criminal offense to each element of the offense – striving for a "default" *mens rea* term in each statute).

[14] *See United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812) (holding that "jurisdiction of crimes against" the United States exist only from congressionally-enacted statutes, and criminal common law "is not among those [implied] powers" of federal courts).

[15] *See, e.g., United States v. Morrison*, 529 U.S. 598, 618 (2000); *United States v. Lopez*, 514 U.S. 549, 566 (1995).

[16] 18 U.S.C. §1951. Congress need not actually state a jurisdictional requirement in the offense itself, however – it must simply be satisfied with the underlying activity's relationship to interstate commerce. *See, e.g., Gonzalez v. Raich*, 545 U.S. 1, 15-19 (2005) (affirming the Controlled Substances Act's prohibition on marijuana production, distribution, and manufacture because Congress possessed sufficient legislative findings of the substantial effect these activites have on interstate commerce). Incidentially, "jurisdictional requirement," though common parlance, is not quite right. *See, e.g., United States v. Martin*, 147 F.3d 529, 531-32 (7th Cir. 1998) ("the nexus of interstate commerce . . . is 'jurisdictional' only in the shorthand sense that without that nexus, there can be no federal crime. . . . It is not jurisdictional in the sense that it affects a court's subject matter jurisdiction.").

[17] *Cf. infra* note 24 (discussing "knowingly" as a mens rea for the Endangered Species Act).

robbery, or theft because they readily recognize those crimes. On the other hand, few jurors – or even lawyers – can provide a common sense explanation of what constitutes a federal offense under the Racketeer Influenced and Corrupt Organizations Act (RICO)[18] or the mail and wire fraud statutes.[19]

Even more threatening to the innocent are the many federal crimes which lack any *mens rea*.[20] In 2011, the *Wall Street Journal* chronicled the story[21] of Wade Martin – a native Alaskan fisherman who sold 10 sea otters to another person he thought was also a native Alaskan. Mr. Martin was thus surprised to find himself arrested for violating the Marine Mammal Protection Act, which criminalizes the sale of certain species to those who are not native Alaskans.[22] Even though Mr. Martin believed the buyer to be a native Alaskan, that important fact did not matter. The federal prosecutor would not have to prove that Mr. Martin knew the buyer to be other than a native Alaskan. So on the advice of his attorney, Mr. Martin pleaded guilty and received two years on probation with a $1,000 fine. He still lives with the stigma of a criminal conviction.

Mr. Martin's misfortune was not attributable to some exceptional federal criminal statute.[23] Statutes with a weak or non-existent *mens rea* requirement range from criminal

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[18] 18 U.S.C. §§ 1961-68.

[19] 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud).

[20] As documented in a report of the Heritage Foundation in 2008:

> For the period 2000 through 2007, the great majority of [federal criminal] sections or subsections [of the U.S. Code] appeared to have a *mens rea* requirement, often employing the term "knowingly" or "willfully." Nevertheless, 55 statutory provisions (some of which contain more than one crime) contained no reference to a *mens rea* requirement. Of these 55, 17 are new and 38 amend existing statutes. That means that 17 out of the total of 91 new criminal statutes did not specify a mental element.

John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, Legal Memorandum No. 26 (June 16, 2008) *available at* http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes.

[21] *See* Gary Fields and John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, WALL ST. J., Sept. 27, 2011, *available at* http://online.wsj.com/article/SB10001424053111904060604576570801651620000.html.

[22] *See* 16 U.S.C. § 1361 *et. seq.*

[23] Even within one criminal section of the U.S. Code, there can be a divergence over the existence or applicability of a *mens rea* term:

> Consider, for example, 18 U.S.C. § 1960, which prohibits "unlicensed money transmitting businesses" and was amended in the wake of 9/11. The statute contains several subsections. The 2001 amendments added a new subsection expanding the definition of "unlicensed money transmitting business." The added section contains a knowledge requirement. In our count, the amendment does not count as adding a crime. While the amendment adds a *mens rea*, it also drops a *mens rea* requirement from an existing provision. If 18 U.S.C. § 1960 is counted as just one crime or if only the newly added subsection is considered, then the crime carries a *mens rea*. That means, however, that the elimination of the one *mens rea* requirement may escape notice. Once again, what counts as a crime dictates conclusions about what Congress

violations of the Endangered Species Act,[24] to the unauthorized use of a 4-H club logo.[25] Federal criminal statutes with weak or non-existent *mens rea* requirements undermine the rationale for criminalizing conduct. This in turn undermines the seriousness society attaches to a criminal conviction.

II. The Growth of Federal Criminal Law Fuels the Erosion of *Mens Rea*

Mens rea requirements are more important today because the federal government creates so many new crimes. Historically, nearly all crimes – because they were common law crimes – concerned acts that were *malum in se*, or wrong in themselves, such as murder, rape, robbery, burglary, and theft. Virtually all new federal crimes and offenses are *malum prohibitum*, or wrong only because they are prohibited – using a 4-H club logo without authorization is an illustrative example of a *malum prohibitum* offense. For *malum prohibitum* crimes and petty offenses, *mens rea* requirements are needed in order to protect individuals who have accidentally or unknowingly violated the law.

The explosive growth of federal criminal law in recent decades was the concern of a Task Force of the American Bar Association, which calculated that, as of 1998, more than 40% of the federal criminal code since the Civil War has been enacted since 1970 alone.[26] Since then, two follow-up studies have shown the post-1970 pace of creating new federal crimes continues unabated.[27]

The increase in the number of federal criminal laws has been accompanied by a decrease in the concern for the *mens rea* requirement. As Justice Scalia noted in *Sykes v. United States*, "It should be no surprise that as the volume increases, so do the number of

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has done in passing a statute-that is, whether it has or has not eliminated a *mens rea* requirement.

See Baker, Heritage Foundation report *supra* note 1.

[24] *See* 16 U.S.C. § 1540(b)(1) (providing that a person is guilty if he "knowingly violates any provision of this Act, of any permit or certificate issued hereunder, or of any regulation issued in order to implement |specific subsections| shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both."). The *mens rea* term "knowingly" is a weak one in that the charged individual need not know he's endangering one of the species covered by the Act. He only need know that he is endangering something, and what that something is could happen to a covered species as learned after the fact. *See United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998) (discussing why Congress amended the *mens rea* of Act from a "willfully" to "knowingly," in an attempt to make it only a general intent crime.). While general intent crimes have a traceable lineage to the common law, the concept only works when the *actus reus* itself, when done intentionally, is deemed to a morally blameworthy, e.g., battery. Here, unless simple hunting for legitimate prey, for example, is considered an action manifesting a morally blameworthy state of mind, the "knowingly" requirement does not work as a culpable *mens rea*.

[25] *See* 18 U.S.C. § 707 (providing a criminal penalty of up to six-months imprisonment for the unauthorized use of a 4-H club's logo. No intent requirement is specified in this separate portion of the statute).

[26] *See generally* AM. BAR ASS'N TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIME (1998).

[27] *See* John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, Legal Memorandum No. 26 (June 16, 2008) *available at* http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes; *see also* John Baker, *Measuring the Explosive Growth of Federal Crime Legislation*, Federalist Society for Law and Public Policy (2004) *available at* http://www.fed-soc.org/publications/detail/measuring-the-explosive-growth-of-federal-crime-legislation.

imprecise laws. . . . Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem" without dealing "with the nitty-gritty."[28]

Federal prosecutors will respond that they use only a very few federal criminal statutes and that, therefore, the concern for all these statutes is overblown. The great increase in the number of federal offenses without a *mens rea* , however, means that the concept of strict liability is no longer exceptional. Moreover, even in the frequent fraud prosecutions – which would appear necessarily to involve a *mens rea* – there can be confusion regarding the mental element. Among federal criminal statutes, the mail fraud statute is arguably the federal prosecutors' "true love."[29] Altogether, however, there are over three hundred federal offenses criminalizing some sort of fraud or misrepresentation – many do not bother to require the misrepresentation to relate to anything important.[30] The plethora of fraud statutes can erode what should be the critical distinction between a good faith mistake and intentionally misrepresenting a fact or opinion.

The Supreme Court has made some general statements concerning the mental element necessary for fraud. The Court has said that fraudulent intent means "wronging one in his property rights by dishonest methods or schemes" or depriving another "of something of value by trick, deceit, chicane or overreaching."[31] The mail fraud statute, as amended to include the "honest services" provision, did not require actual reliance or pecuniary harm. Before the Supreme Court weighed in via *Skilling v. United States*,[32] federal prosecutors routinely used the vague language of "scheme or artifice to defraud" from the mail fraud statute to prosecute a variety of actions characterized as "honest services" crimes – regardless of whether the purported victim was actually harmed, or whether the alleged perpetrator intended any harm.[33]

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[28] 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

[29] Judge Jed Rakoff of the U.S. District Court for the Southern District of New York (and a former prosecutor) poetically put the point:

> To Federal prosecutors of white-collar crime, the mail fraud statute is our Stradivarius, our Colt .45, our Louisville Slugger, our Cuisinart - and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law 'darling,' but we always come home to the virtues of 18 U.S.C. §1341, with its simplicity, adaptability, and comfortable familiarity.

Jed S. Rakoff, *The Federal Mail Fraud Statute* (Part I), 18 DUQ. L. REV. 771, 771-72 (1980); *see also* Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1, 1 (1998-1999).

[30] *See* William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1881 (2000).

[31] *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).

[32] 130 S. Ct. 2896 (2010).

[33] The case of *United States v. Regent Office Supply Co*, 421 F.2d 1174 (2d Cir. 1970) is an example of the courts trying to curb this excess piecemeal. In that case, agents of an office supplies company made false representations as part of their sales pitch to 'get by' the secretaries on the telephone and to get to the purchasing agent. There was no fraud regarding pricing or quality, and the customers received exactly what they paid for. The Second Circuit reversed the conviction, relying on the lack of evidence of fraudulent intent. The court held that the defendants intended to deceive their customers, but did not intend to defraud them. Circuit Judge Moore interpreted the mail fraud statute to require "evidence from which it may be inferred that some actual injury to the victim, however slight, is a reasonably probable result of the deceitful representations if they are successful." *Id.* at 1182.

In *Skilling*, the Court did not really clarify the confusion over the nexus among fraud, harm, and intent – at most, the decision narrowed it. Rather than strike "honest services" fraud as void for vagueness, the Court limited the statute's application to its "core": prosecuting "offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes."[34] The Court acknowledged, however, that such a result did not accommodate the "considerable disarray" over the statue's application regarding intent and harm related to "honest services" fraud.[35]

A survey of over 600 published decisions involving "honest services" fraud reveals that the vast majority "involved either allegations of a bribe or a kickback," or traditional mail/wire fraud.[36] This suggests the practical insignificance of *Skilling*'s limiting construction within many fraud cases. *Skilling*'s limiting construction also does nothing to address the other white-collar-crime statutes just as lacking when it comes to clear *mens rea* requirements, and quite capable of filling the void *Skilling* created for "honest services" fraud prosecutions – such as the Hobbs Act[37] or RICO.[38]

III. Prosecutorial Discretion and *Mens Rea*

Prosecutors, state and federal, understandably prefer the discretion to use criminal statues lacking a *mens rea* so that they can "get the bad guys." They justify the lack of *mens rea* by arguing that otherwise they may not be able to convict those "bad guys," while assuring us they will not use strict liability offenses against the innocent. Of course, under the American system of justice it is the role of the jury or judge to determine who has or has not committed the bad act – with a *mens rea.*

Consider the power of federal prosecutors under the federal Migratory Bird Treaty Act, which textually does not provide a *mens rea*.[39] The statute literally makes almost any contact with a migratory bird unlawful,[40] and lower federal courts disagree as to whether

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[34] *Supra* note 32 at 2930.
[35] *Supra* note 32 at 2929.
[36] Mark J. Stein & Joshua A. Levine, *Skilling: Is It Really a Game-Changer for Mail and Wire Fraud Cases?*, in SECURITIES AND LITIGATION ENFORCEMENT INSTITUTE 2010 at 938-39 (PLI Corp. Law & Practice, Course Handbook Ser. No. 23726, 2010).
[37] 18 U.S.C. § 1951 (no *mens rea* requirement in text).
[38] 18 U.S.C. §§ 1961-68.
[39] 16 U.S.C. §§ 701-12. The criminal prohibition lies in § 703:

> Unless and except as permitted by the regulations as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill . . . [or transport] any migratory bird, any part, nest, or egg of any such bird.

Id. at § 703.
[40] The U.S. Department of the Interior, through the U.S. Fish and Wildlife Service, possesses implementing authority for the Migratory Bird Act. *See* 16 U.S.C. § 701. The regulations are unhelpful in determining any definition of the Act's interaction with unintentional conduct. 50 C.F.R. § 10.12 defines the Act's "take" provision as to "pursue, hunt, shoot, wound, kill, trap, capture, or collect." Some of these activites clearly require intentional conduct, but some – such as shooting, wounding, or killing – do not.

the Act reaches unintentional conduct.[41] The U.S. District Court for the District of North Dakota has appropriately characterized the literal breadth of the Act:

> If the Migratory Bird Treaty Act . . .were read to prohibit any conduct that proximately results in the death of a migratory bird, then many everyday activities become unlawful — and subject to criminal sanctions — when they cause the death of pigeons, starlings and other common birds. For example, ordinary land uses which may cause bird deaths include cutting brush and trees, and planting and harvesting crops. In addition, many ordinary activities such as driving a vehicle, owning a building with windows, or owning a cat, inevitably cause migratory bird deaths.[42]

With such literal breadth and judicial disagreement over the Act's reach, the prospects for selective prosecution become quite serious. Recall the heroic actions of Captain Chesley Sullenberger when he landed his US Airways flight on the Hudson River. A flock of birds caused the aircraft engines to shut down. Yet, literally under the statute, Captain Sullenberger "killed" these migratory birds as he saved the passengers of U.S. Airways flight 1549 with a daring ditch in the Hudson River. Of course, no federal prosecutor would have prosecuted such heroic action. But that sensible outcome will only have the common sense of prosecutors to thank, not a law limited to targeting genuinely-criminal conduct. The prosecutors may intend only to use the Migratory Bird Act against "the bad guys," but how does one identify the "bad guys" under a statute having a criminal penalty, but no *mens rea*? Might some federal prosecutor use the statute against "bad" oil companies, but not against "good" alternative- energy corporations operating windmills?[43] By imposing strict criminal liability on broad swaths of every-day life, liberty's safeguard is left to prosecutorial good graces.

Innocent individuals must rely on Congress to represent and protect them by ensuring that a *mens rea* is required for criminal punishment. Large corporations are sometimes able to protect themselves by lobbying the Department of Justice, as the

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[41] There is no clarity, or consensus, among the circuits on the coverage of the "take" and "kill" prohibitions. The United States Court of Appeals for the Eighth Circuit reasons that "take" and "kill" cannot apply to unwitting conduct toward migratory birds, but refer instead to "physical conduct engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918." *See Newton County Wildlife Ass'n v. U.S. Dep't of Agriculture*, 113 F.3d 110, 115 (8th Cir. 1997). Still other circuits see the Act crafting a "strict liability" offense that criminalizes foreseeable, if unintended, acts against migratory birds. *See, e.g., United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010); *see also United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (affirming the conviction of a pesticide manufacturer for the death of migratory birds).

[42] *U.S. v. Brigham Oil & Gas*, 840 F. Supp. 2d 1202 (D.N.D. 2012).

[43] *See* William M. Welch, *Bird Deaths Present Problems at Wind Farms*, USA TODAY Sept. 25, 2009, *available at* http://www.usatoday.com/news/nation/environment/2009-09-21-wind-farms_N.htm.

business community has been able to some extent with The Foreign Corrupt Practices Act.[44]

Designed to prohibit bribery to foreign officials for any business advantage, the Act's breadth allows the federal government to hold businesses liable for actions by rogue agents. As former U.S. Attorney General Michael Mukasey and Jones Day partner James Dunlop note, this "adds unnecessary uncertainty and opens businesses to massive, largely unavoidable, liability, with few offsetting benefits."[45] The statue's broad language can transgress the intent of Congress. In discussing the example of Wal-Mart, Professor Mike Koehler has shown that Congress had no desire to apply the Act against "grease payments" to clerical employees, but that the backroom nature of FCPA enforcement makes that intent of questionable relevance.[46]

The reluctance of corporations to go to trial has minimized judicial review of the FCPA's use. As a result, the FCPA investigations have developed a "prosecutorial common law,"[47] allowing the Department of Justice to impose burdensome compliance costs without having to prove in court that criminal activity has actually occurred or is likely to occur. Companies spend millions to "comply" with requirements possessing an unknown reach. In recent remarks on the FCPA, former U.S. Attorney General Mukasey observed that, given how few FCPA cases actually see a court room, "there is a whole body of law being developed" in prosecutor's offices through negotiated FCPA settlements with major companies. Even if the settlements are reasonable, as Mukasey noted, they do not provide any clarity or consistency necessary to "demystify" what a

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[44] The Foreign Corrupt Practices Act of 1977 is codified, as amended, at 15 U.S.C. §§ 78dd-1, *et seq*. For a more extensive discussion on the "understanding" between the Justice Department and the business community over the Act's implementation, *see infra* note 48.

[45] The Hon. Michael B. Mukasey & James C. Dunlop, Can Someone Please Turn on the Lights? *Bringing Transparency to the Foreign Corrupt Practices Act*, 13 ENGAGE 1 (April 3, 2012) *available at* http://www.fed-soc.org/publications/detail/can-someone-please-turn-on-the-lights-bringing-transparency-to-the-foreign-corrupt-practices-act.

[46] *See* Mike Koehler, *Foreign Corrupt Practices Act Enforcement as Seen Through Wal-Mart's Potential Exposure*, 7 WHITE COLLAR CRIM. REP. (Sept. 2012) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145678. Koehler explains that "nonprosecution and deferred prosecution agreements are used to resolve nearly every instance of corporate FCPA scrutiny in the absence of meaningful judicial scrutiny," making it unlikely that Congress's intent recieves an appreciated incorporation. By reviewing cases where defendants have challenged the DOJ's application of the FCPA's anti-bribery provisons, however, Koehler explains the relevance of Congress's intent in narrowing the FCPA's scope. The theory that would likely be used against Wal-Mart – that the suspected payments were not "grease payments" but those to "obtain or retain business" – likely exceeds the Act's intent because payments outside foreign government procurement are used to increase company profitability, for example, and not to "obtain or retain business." When courts actually reviewed such a prosecutorial theory, as Koehler's findings show, Congress's intent manifested this distinction and vindicated defendants. Koehler's review of the facts underlying the Wal-Mart investigation reveals that the investigation likely revolves around such non-procurement payments, including payments for favorable inspections, permits, and licenses.

[47] *See Testimony of George J. Terwilliger III, Esq., House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security, Hearing on the Foreign Corrupt Practices Act*, June 14, 2011, *available at* http://judiciary.house.gov/hearings/pdf/Terwilliger06142011.pdf.

general person's responsibilities under the law are.[48] He noted that DOJ and the business community had reached an understanding on some aspects of the FCPA.[49] Such agreements, however, should not serve as the functional equivalent of legislation. It is the obligation of Congress to establish clear *mens rea* requirements for the FCPA and other statutes.

IV. Preserving *Mens Rea* and the Moral Legitimacy of Criminal Law

Given the tremendous number of federal crimes,[50] it is not possible to amend all the statutes lacking an adequate *mens rea*. Protecting the principle of *mens rea* in federal criminal law will require an interpretive rule that, like *Morissette*,[51] reads in a *mens rea* where one is not literally provided in the statutory language. Such an approach is consistent with the approach suggested by the Model Penal Code.[52] One or more proposals have suggested taking an analogous approach to federal criminal law.[53] Given

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[48] *See Remarks of the Hon. Michael Mukasey, The Foreign Corrupt Practices Act panel, the Federalist Society's National Lawyers Convention*, Nov. 20, 2012, video *available at* http://www.fed-soc.org/publications/detail/the-foreign-corrupt-practices-act-event-audiovideo.

[49] *See id.* Specifically, General Mukasey noted:

> The private business community, the Chamber, and others were very concerned about some of the general language in the statute, some of the anecdotal evidence from prosecutions that were brought, and, as a result, we had a series of meetings, we sat down, expressed views on both sides, and the very fact, I think, that the Justice Department agreed to come up with a guide that helps people through the statute that indicates what is at the fringe, what is at the center, is enormously useful . . .

Id. (beginning General Mukasey's remarks).

[50] *See generally* AM. BAR ASS'N TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIME (1998) (discussing the remarkable growth of federal criminal law since 1970).

[51] *See* 342 U.S. 246, 250-52 (1951).

[52] The Model Penal Code's (MPC) default provision desired to ensure a culpability element in all crimes. Many states adopting parts of the MPC did not include its default-*mens rea* provision. In part, this failure may have been due to the MPC's decision to codify particular mental states (purposely, knowingly, recklessly, and negligently) without mentioning the traditional, normative basis of *mens rea*. That is, state legislators may have viewed the default provisions as optional, rather than fundamental– as the drafters intended. The net effect was to caveat the impact the MPC had on preserving the foundations for *mens rea*, making it easier for legislatures to rationalize an offense without it. *See* John S. Baker, Jr., *Mens Rea and State Crimes: 50 Years Post-Promulgation of the Model Penal Code*, 92 CRIM. L. REP. (BNA) 248 (Nov. 28, 2012).

[53] *See, e.g.*, Brian W. Walsh and Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law, The Heritage Foundation and the National Association of Criminal Defense Lawyers*, 2010, at 27. The report identifies the following recommended initiatives:

> 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; and
> Draft every federal criminal offense with clarity and precision.

the differences terminology, the exact default language of the MPC would not work well in federal criminal law.[54]

Federal law could require federal prosecutions to prove a statutorily-specified mental state with respect to the elements of a criminal offense. It could do so without amending every statute carrying a criminal penalty. If a federal statute already contains a clear *mens rea* term, then the specified state of mind of the statute would control. As to other statutes carrying a criminal penalty, Congress could enact an interpretive statute requiring proof of a certain *mens rea*. While its language would have to be carefully crafted, such an interpretive statute would state its purpose is to require proof of a *mens rea* for a conviction.

Rules of construction, like the one suggested, aid operationally in protecting the principle of *mens rea*. Accordingly, as the Supreme Court noted in 2008, the judicial rule of lenity exists because "no citizen should be held accountable [to] a statute whose commands are uncertain, or subjected to punishment that is not clearly proscribed."[55] By crafting a legislative solution, the Congress would recognize, as James Madison said, that the law's legitimacy stems from it being "made by men of [the people's] own choice," understandably and accessibly, lest "no man, who knows what the law is today, can [only] guess what it will be tomorrow."[56]

Given the judicial rule of lenity, some may question whether Congress needs to create an interpretive rule for *mens rea* in federal criminal law. They may prefer to leave it to the federal courts to decide which statutes do and do not require a *mens rea*. First of all, federal courts often disagree, with some favoring the principle of *mens rea* and others eroding it. More importantly, separation of powers imposes on Congress not only the power, but also the responsibility to define criminal law. As Chief Justice Marshall wrote regarding the rule of "strict construction" of penal laws, "[the principle] is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department."[57]

CONCLUSION

The inclusion of *mens rea* as essential to the meaning of "crime" itself goes to the heart of the moral foundation of criminal law. As Professor John Coffee has explained:

> The factor that most distinguishes the criminal law is its operation as a system of moral education and socialization. The criminal law is obeyed not simply because there is a legal threat underlying it, but because the public perceives its norms to be legitimate and deserving of compliance. Far

[54] *See supra* note 51.
[55] *United States v. Santos*, 533 U.S. 507, 514 (2008).
[56] *See* THE FEDERALIST NO. 62, at 381 (Clinton Rossiter ed., 1961).
[57] *United States v. Wiltberger*, 18 U.S. 5 Wheat 76, 95 (1820).

> more than tort law, the criminal law is a system for public communication of values.[58]

A criminal act is a moral wrong, and, accordingly, conviction of a crime stigmatizes an individual. A system that is respectful of the integrity of criminal convictions is respectful of both victims and individuals suspected of wrongdoing. Just as we are appalled to learn through the work of the Innocence Project that a number of persons have been wrongly convicted and imprisoned when they were in fact innocent,[59] we should be equally appalled to learn that persons have been wrongly convicted because they were not morally guilty of a crime due to their lack of a *mens rea*.

The fundamental principle that ignorance of the law should not excuse a crime rests on the assumption that the law is knowable. For the common law crimes of murder, rape, robbery, and theft, ignorance of the law is not an excuse because these are morally wrong and are known to be wrong regardless of whether any court or legislature declares them to be wrong. Recall that the basis for the post-World War II War Crimes trials was that, despite the laws of Germany, any human being must know that it is wrong to imprison and kill innocent human beings. It is telling that Justice Jackson, who had been the chief prosecutor in the Nuremberg trials and previously the Attorney General, wrote the opinion in *Morissette*, drawing a clear line between guilt and innocence based on the fundamental principle of a *mens rea*. Defendants other than Morissette ought not to have to hope that their cases get to the Supreme Court and that the Court reads a *mens rea* into federal statutes not specifying one. It is the responsibility of Congress to provide the *mens rea* in the written law.

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[58] John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193-94 (1991) (citation omitted).
[59] *See* The Innocence Project, *DNA Exonerations Nationwide*, *available at* http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php.

Mr. SENSENBRENNER. Thank you, Dr. Baker.
Mr. Reimer.

TESTIMONY OF NORMAN L. REIMER, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. REIMER. Thank you, Chairman Sensenbrenner and Ranking Member Scott and Ranking Member Conyers and Members of the Task Force. Thank you for inviting me to address the critically important issue of intent requirements, or the lack thereof, in Federal criminal statutes.

The problem is a core aspect of the larger over-criminalization problem. But this is one which is uniquely within the power of Congress to fix.

At the outset, I note that this is one issue on which the most important ingredient for reform is already present; that is, impressive bipartisan consensus. The House Judiciary Committee has now been looking at over-criminalization for more than 3 years. NACDL has been privileged to work with you, specifically on intent problems in three different Congresses, and even with a shift in the majority.

So why is there a growing consensus around this issue? It is because we are looking at a problem that cannot be traced to any political party or philosophy, but rather is a byproduct of a growing reliance upon the criminal provisions as a panacea for every perceived problem in society. This problem transcends ideology. It is not about right or left, it is about right and wrong.

In speaking for the criminal defense bar, I am not here solely looking at the problem through the eyes of a practitioner, but rather through the eyes of the individual who is accused of a Federal crime, the eyes of the people, the people who become our clients, the members of our community who have to answer to these laws. While a part of this Task Force's mission is to look at whether we have too many criminal laws imposing penalties for far too many things that either should not be regulated, or if they are should not carry criminal punishment and the life-altering stigma of criminal convictions that go with that, that is not what we are here about today. Today is not about what you decide to make criminal, it is about how something is made criminal.

Reasonable people can disagree about what should be a crime, but not about how to make it a crime. To remain tethered to a moral anchor, when the government decides to criminalize, it has an obligation to do so with precision and clarity so that the individual, the average person can clearly understand what is illegal. That is why the question of how you define a crime is so critical.

This is a practical concern. When you look at a criminal provision, can you clearly see what is the test for whether it has been violated? What notice does the public have of exactly what conduct was prohibited? What is the mental state that makes the criminal act? And what, if anything, is it that a prosecutor has to prove? If these questions cannot be readily answered, then there is a problem.

Without a clear intent requirement, the individual will not realize when they are crossing the line. That is not fair, it is not effective. If people do not know that something is wrong, they will not

be deterred from doing it. And that is the whole purpose of creating the criminal law in the first place.

Now, you have heard from Professor Baker, and in both of our written testimonies you have had many examples of the problems. I am now going to offer a suggestion for how to fix it in four simple steps.

First, it is time to enact a default *mens rea* statute. I agree with Professor Baker that that is essential, a law that will establish a baseline intent for all elements of all offenses in which the state of mind is not spelled out in the statute. This should apply to all existing statutes and regulations, and certainly to all future laws. If there are to be any exceptions, they should be rare, specific, and absolutely necessary.

Two, and I know, Chairman Sensenbrenner, we will probably have some additional discussion about this, but we believe that the default *mens rea* should be willful conduct, which means, as it has been defined by the courts, a person must act with the knowledge that the conduct was unlawful. That is far from the highest standard of intent, but it is better than knowingly, which is vague and does not require proof of a bad purpose, and is subject to judicial tinkering.

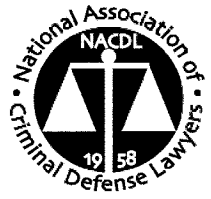
The public should not be left to the vicissitudes of different judges in different circuits to fashion instructions to save a statute. A person should not have to wait until the jury is instructed at the end of a prosecution to find out what state of mind made the act criminal.

Third, recognizing that there are some who believe that strict liability has a place in the criminal law, it should be limited to situations in which Congress has explicitly considered the ramifications and expressly opted for strict liability. Now, NACDL does not favor strict liability in the criminal law. We are just against it. We think it is wrong. We recognize there is a place for civil strict liability. But if you are going to do it, you should do it with precision.

Fourth and finally, and you have heard this before, and I will say it again, there should be sequential referral to the Judiciary Committee before any new criminal provision is enacted. Crimes should be reviewed by a Committee with the proper expertise to evaluate how those crimes are defined. We understand the challenges with this. But at a minimum, it seems to me this Committee could assign a Member to every bill that may be enacted to comb through it for criminal provisions and make sure that the intent requirements are clear and understandable.

I submit that these four steps will markedly improve how you make the law, and justice and fairness will be served. You know, we have come a very long way over these last few years on this issue. We have maintained a magnificent bipartisan cohesion on this issue. And I submit now it is time to act. Thank you.

[The prepared statement of Mr. Reimer follows:]



Written Statement of
Norman L. Reimer, Executive Director
National Association of Criminal Defense Lawyers

Before the
House Committee on the Judiciary
Over-Criminalization Task Force

Re: "*Mens Rea*: The Need for a Meaningful Intent Requirement in Federal Criminal Law"

July 19, 2013

NORMAN L. REIMER is the Executive Director of the National Association of Criminal Defense Lawyers (NACDL). NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense bar to ensure justice and due process for all and to advocate for rational and humane criminal justice policies. As Executive Director, Mr. Reimer leads a professional staff based in Washington, D.C. serving NACDL's approximately 10,000 direct members and 90 local, state and international affiliate organizations with up to 35,000 members.

Prior to assuming this position, Mr. Reimer practiced law for 28 years, most recently at Gould Reimer Walsh Goffin Cohn LLP. A criminal defense lawyer throughout his career, with expertise in trial and appellate advocacy in both state and federal jurisdictions, he is also a recognized leader of the organized bar, and a spokesperson on behalf of reform of the legal system. Mr. Reimer served as an Adjunct Professor of Law at New York Law School, where he taught Trial Practice from 1990 until 2004. He earned both his undergraduate and juris doctor degrees at New York University. Since joining NACDL, Mr. Reimer has overseen a significant expansion of the Association's educational programming and policy initiatives.

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I. Introduction

My name is Norman Reimer, and I am the Executive Director of the National Association of Criminal Defense Lawyers (NACDL). On behalf of NACDL, I commend the House Judiciary Committee for establishing this bipartisan Overcriminalization Task Force and for holding hearings on our country's serious addiction to overcriminalization. At the first hearing of the Task Force, there was unanimous agreement among the witnesses that the erosion of *mens rea* in federal criminal offenses is the most pressing aspect of the overcriminalization problem and that its restoration should be the top priority of this Task Force. As criminal defense lawyers, we are uniquely positioned not only to understand the necessity of an adequately protective *mens rea* requirement, but to witness the practical effects of its erosion each and every day. NACDL is especially grateful for this opportunity to share our expertise on this concept, which is of fundamental import to our entire criminal justice system, and to present our views, supported by others across the ideological divide, on why *mens rea* reform demands immediate action.

It is important to begin this discussion with some background on the topic of today's hearing. For anyone who has attended law school, *mens rea*, the Latin phrase for "guilty mind," is familiar and understood as integral to the realm of criminal law. For the general public, however, the concept of *mens rea* is more commonly understood and known as "criminal intent." These phrases are not identical in meaning, but for the sake of consistency and greater understanding, my testimony will use the phrase criminal intent, rather than *mens rea*, from this point forward.

II. Criminal Intent Requirements Are Fundamental to Constitutional Due Process

The greatest power that any civilized government routinely uses against its own citizens is the power to prosecute and punish under criminal law. This power necessarily distinguishes the criminal law from all other areas of law and makes it uniquely susceptible to abuse and capable of inflicting injustice. More than any other area of law, criminal law, because its prohibitions and commands are enforced by the power to punish, must be firmly grounded in fundamental principles of justice. Such principles are expressed in both substantive and procedural protections.

One such fundamental principle is embodied in the doctrine of fair notice, which is a critical component of the Constitution's due process protection. 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. In the words of the Supreme Court: "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."[1] Due process therefore demands that a criminal law give "fair warning of the conduct that it makes a crime."[2]

As a cornerstone of our criminal justice system since our nation's founding, this constitutionally-based principle of fair notice is embodied in the requirement that, with rare exceptions, the government must prove the defendant acted with criminal intent before subjecting her to criminal punishment. More specifically, no individual should be subjected to condemnation and prolonged deprivation of liberty, and all the serious, life-altering collateral consequences that follow, unless she intentionally engages in inherently wrongful conduct or acts with knowledge that her conduct is unlawful. It is only in such circumstances that a person is truly blameworthy and thus deserving of criminal punishment.

The criminal intent requirement is not just a legal concept—it is the fundamental anchor of the criminal justice system. The Supreme Court has described this principle "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."[3] The bedrock of Anglo-American criminal law for over six centuries, this principle has even deeper roots in English common law, Roman law, and canon law.[4] It is this essential nexus between a person's conduct and mental culpability that provides the moral underpinning for criminal law. Absent a meaningful criminal intent requirement, an individual's other legal and constitutional rights cannot adequately protect that individual from unjust prosecution and punishment for honest mistakes or engaging in conduct that they had no reason to know was wrongful.

For crimes involving the taking of property or battery committed against another person—such as murder, arson, rape, and robbery—the law properly affords the inference of criminal intent where the government proves that the conduct was committed voluntarily. With such crimes, the law assumes that the inherent wrongfulness of the act forecloses the possibility of punishing individuals who are not truly culpable. There are, however, hundreds of federal statutory offenses, and an estimate of tens of thousands of federal regulatory offenses, that criminalize conduct that is not inherently wrongful. Rather, such conduct is wrongful only because it is "*malum prohibitum*," or prohibited by law. Although there may be legitimate reasons for prohibiting such conduct, the acts themselves, independent of the prohibition, are not wrongful and therefore do not usually justify the inference that an individual intended to violate

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[1] *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)).
[2] *Id.* at 350.
[3] *Morissette v. United States*, 342 U.S. 246, 250 (1952).
[4] Brief of the National Association of Criminal Defense Lawyers *et al.* as *Amici Curiae* in Support of Petitioner at 18-22, *Shelton v. Sec'y Dept. of Corrections*, 802 F.Supp.2d 1289 (M.D. Fla. Jan. 28, 2011) (No. 6:07-cv-839-Orl-35KRS) (detailing the history and origins of the *mens rea* or guilty mind requirement in criminal law).

the law or knew her conduct was wrongful. This is why the criminal intent requirement is essential to a just system of criminal law; when the conduct is not inherently wrongful, fair notice is diminished or eliminated, and the burden to compensate for that deficiency should fall squarely on the criminal intent requirement.

In addition, an adequate criminal intent requirement serves the critical function of protecting those who are reasonably mistaken about or unaware of the law. As one travels along the continuum from pure inherently wrongful conduct, such as murder, towards merely prohibited conduct, such as bringing sand onto one's property 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 expectation to know, that her conduct was prohibited by law. Requiring proof of a guilty mind, not just a guilty act, is an essential component of a just system of criminal law.

Accordingly, 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."[5] Therefore, a proper and adequate criminal intent 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 criminal intent requirements that apply to homicide, or the killing of a human being. Even with the same bad act—a killing—different levels of criminal intent define different offenses, which carry different punishments. These distinctions not only help to assign appropriate levels of punishment, but also to protect those who committed prohibited conduct accidentally or inadvertently.

Moreover, the inclusion of criminal intent requirements in criminal offenses serves the broad purpose of deterrence in the criminal justice system while acting as a safety valve against criminal punishment for innocent actors. Black's Law Dictionary defines deterrence as "[t]he act or process of discouraging certain behavior, particularly by fear; esp., as a goal of criminal law, the prevention of criminal behavior by fear of punishment."[6] Deterrence of criminal conduct cannot be achieved in a system that punishes those who are not culpable. If a person is unaware of the prohibited nature of the conduct in which she is engaging, then the risk of criminal punishment simply cannot affect, let alone prevent, engagement in that conduct. This is especially the case with strict liability, which "is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future[.]"[7]

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[5] Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 713-14 (2005).
[6] Black's Law Dictionary (rev. 9th ed. 2009).
[7] Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 109.

Whether the offense is relatively straightforward like homicide or a more complicated regulatory prohibition, careful consideration must always be given to the fundamental principles of culpability and fair notice when defining the guilty mind and guilty act that constitute the crime. Furthermore, strict liability should only be employed in the criminal law after weighty deliberation. As the Supreme Court has recognized, "[a]ll are entitled to be informed as to what the State commands or forbids."[8] By its own terms, a criminal offense should prevent the conviction of an individual acting without intent to violate the law and 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 the government's greatest punishment or the extreme moral and societal censure such punishment carries.

III. The Decline of Criminal Intent In Federal Law

Despite representing organizations that span the ideological divide, all of the witnesses at the first Overcriminalization Task Force hearing agreed that ending the decline of and restoring criminal intent requirements in federal laws is of utmost concern. At its core, this agreement is an acknowledgment of the longstanding Congressional practice of enacting criminal laws with weak, or inadequate, criminal intent requirements. Whether this is a product of careless draftsmanship or political expediency, the result is always the same—the loss of due process for the average person. This troubling trend was well-documented in NACDL's ground-breaking joint report, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, released with the Heritage Foundation in May 2010 (hereinafter "*Without Intent* Report"), and can be seen in many pending and recently enacted laws.[9] With just a snapshot of this report's findings, and a brief review of a few of these laws, one can quickly uncover the serious implications that the erosion of criminal intent carries for individual defendants and the criminal justice system as a whole.

Despite the inherent effectiveness of a meaningful criminal intent requirement, many federal criminal offenses contain only a weak intent requirement, if they have one at all, and for those familiar with the federal criminal lawmaking process that number appears to be growing. In order to provide Congress and the public with concrete evidence of this problem, NACDL and the Heritage Foundation undertook a comprehensive study of the federal criminal lawmaking process of the 109th Congress (2005-06). Based on this study, the *Without Intent* Report sets forth troubling findings that truly demonstrate just how far federal criminal lawmaking has drifted from its doctrinal anchor in fair notice and due process.

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[8] *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

[9] 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 (last visited July 11, 2013) (hereinafter "*Without Intent* Report").

Specifically, the study revealed that offenses with inadequate criminal intent 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 criminal intent requirements, putting the innocent at risk of criminal prosecution.[10] The study also documented a pattern of poor legislative draftsmanship and found that "[n]ot only do a majority of enacted offenses fail to protect the innocent with adequate [criminal intent] 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" and concluded, ultimately, that Congress is frequently enacting "fundamentally flawed" criminal offenses.[11]

As evidenced in the *Without Intent* Report, omission of criminal intent requirements is no longer the rare exception to the rule and, where Congress does include a criminal intent requirement, it most often only requires general intent, i.e., "knowing" conduct, which federal courts usually interpret to merely mean conduct done consciously.[12] Further, Congress frequently turns hundreds, even thousands, of administrative and civil regulations into strict liability criminal offenses by enacting just one law that criminalizes "knowing violations" of said regulations[13] or provides blanket regulatory authority enforceable with criminal penalties.[14] The

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[10] *Id.*

[11] *Id.*

[12] 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.'" *Dixon v. United States*, 126 S. Ct. 2437, 2441 (2006) (quoting *Bryan v. United States*, 524 U.S. 184, 193 (1998)). Further, "[t]he term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law." *Bryan*, 524 U.S. at 192. In fact, 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 *Jewel* 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.").

Unfortunately, the federal courts have set forth varied definitions of the *mens rea* terms commonly used in federal offenses. Whereas "willfully" is considered a word of many meanings, the word "knowingly" is similarly situated; its precise definition varies from court to court and, sometimes, from statute to statute. While it can be said that, at a minimum, "knowingly" requires some voluntary conduct, whether and what it requires in addition to that ultimately varies by jurisdiction. Despite its definitional issues, from the perspective of protecting law-abiding citizens, NACDL believes that the term "willfully" is more protective, and more universally understood, than the term "knowingly." Federal courts have held that, at a minimum, "willfully" requires proof that a person acted with knowledge that her conduct was, in some general sense, unlawful. *See Bryan*, 524 U.S. at 191-92. The use of "willfully" in a statute, therefore, is a mechanism for separating those who act knowingly and with a bad purpose, from those who lack that bad purpose. This mechanism is critical both for protecting innocent actors who make every attempt to comply with the law as well as for punishing those who are truly culpable—individuals who engage in conduct knowing that it is unlawful. When an offense involves broad, vaguely defined conduct or complex rules and regulations, the term "knowingly" is inadequate to protect all innocent, law-abiding actors.

[13] For example, the Lacey Act makes it a federal crime to violate any foreign nation's laws or regulations governing fish and wildlife. 16 U.S.C. § 3371 *et seq.* (2013). Specifically, 16 U.S.C. § 3373(d) provides a criminal penalty for

consequence is that even the most cautious person, acting with the full intent to follow the law, can become ensnared by these criminal laws.

The *Without Intent* Report documented various examples, in addition to statistical data, to support and explain its findings. One such example was the Stolen Valor Act of 2005 (S. 1998), which was enacted into law by the 109th Congress.[15] Prior to its enactment, federal law criminalized the use of certain military emblems or badges in an act of deception. The Stolen Valor Act of 2005 expanded that prohibition to criminalize any false verbal or written claim that one had been awarded a decoration or service medal. Passed on a voice vote in the House and through unanimous consent in the Senate, the Stolen Valor Act of 2005 essentially made it a crime to lie or even mistakenly claim receipt of a military award. The Act made such claims criminal regardless of whether they were made in public, believed by the listener, caused any harm, or made with an intent to deceive—or any intent whatsoever—and, moreover, failed to contain any exceptions for artistic or satiric claims.

Describing the Act's reach as "sweeping," "limitless," and "without regard to whether the lie was made for the purpose of material gain," the Supreme Court recently struck it down as an unconstitutional abridgment of the First Amendment.[16] Congress quickly responded to the Court by enacting the Stolen Valor Act of 2013 (H.R. 258)—the principle difference being a new requirement that the fraudulent representation be made with the specific intent to "obtain money, property, or other tangible benefit."[17] Without endorsing the validity of this new version, or the overall wisdom of such criminalization, one cannot help but ask whether it should have taken a criminal prosecution, a defendant having to appeal his criminal conviction to the highest court of the land, that Court then throwing out his conviction, and Congress passing a revised version of the statute just to obtain an offense that included an intent requirement in its actual language? This kind of process is also certainly not an efficient use of taxpayer funded resources.

When confronted with the mere possibility that a particular criminal law is vague, the typical reaction of those supporting it is: "Don't worry; prosecutors will exercise their discretion wisely." That argument is made under the mistaken assumption that, even if the laws are too broad, too vague, and have inadequate criminal intent requirements, individuals can count on the

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"knowingly" violating "any provision of [Chapter 16]" and, in that one clause, criminalizes all the conduct proscribed by any of the Lacey Act's numerous statutory provisions or corresponding regulations.

[14] For example, Bobby Unser was prosecuted under 16 U.S.C. § 551, which sets forth broad and blanket regulatory authority enforceable with a criminal penalty. *See United States v. Unser*, 165 F.3d 755 (10th Cir. 1999).

[15] Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266.

[16] *United States v. Alvarez*, 567 U.S. ___, 132 S. Ct. 2537, 2547 (2012).

[17] Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat 448.

executive branch and its line prosecutors to use the laws wisely and in the interest of justice. The validity of that argument should be assessed in the context of prosecutions like *Brigham Oil*.[18]

In August 2011, the U.S. Attorney's Office in the District of North Dakota charged seven oil companies with a violation of the Migratory Bird Treaty Act for the illegal "taking" of migratory birds. The company that would eventually become the named defendant in a federal district court decision dismissing the charges was Brigham Oil & Gas, L.P. This company was charged with "taking" two mallards found dead near its lawful reserve pits, which are areas near gas and oil drilling operations that are used to contain drill cuttings and other byproducts of the drilling.[19]

The prosecutors based their case upon an extravagantly broad reading of the Migratory Bird Treaty Act with criminal penalties originally enacted by Congress in 1918 to codify the provisions of a 1916 treaty between the United States and Great Britain (for Canada). The treaty was intended to reach conduct directed at birds, such as hunting and poaching, and not acts or omissions that have the incidental or unintended effect of killing birds.[20] Nevertheless, the prosecutors asserted that the words "take" or "kill" in the Act encompass not only activity directly targeting birds, but also habitat modification and other consequences of lawful commercial activity.[21] In other words, in the absence of a clear description of the specific conduct that would constitute a violation of the Act, the prosecutors exercised their discretion to interpret a statute that had been on the books for nearly a century to include behavior that was never contemplated at the time of enactment.

When dismissing the charges, the district court noted that extending the Act in the manner proposed by these prosecutors would cause "absurd results," including the criminalization of cutting brush and trees, and planting and harvesting crops.[22] In fact, "many ordinary activities such as driving a vehicle, owning a building with windows, or owning a cat, inevitably cause migratory bird deaths."[23] Although the government recently decided not to appeal the dismissal, the mere fact that this case was prosecuted calls into question the prosecutorial restraint that is so frequently cited to rationalize the enactment of flawed criminal laws lacking in adequate criminal intent requirements.[24]

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[18] *United States v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202 (D.N.D. 2012).
[19] *Id.* The two other defendants on the motion to dismiss were Newfield Production Company and Continental Resources Inc. They were charged with "taking" four birds and one bird, respectively.
[20] *Id.* at 1208.
[21] *Id.* at 1211.
[22] *Id.* at 1212.
[23] *Id.*
[24] Although the primary injustice in this case came through a stretching of the statute to cover conduct never contemplated by Congress, the fact that the offense charged was a strict liability crime surely assisted in that poor

This critique should not be misunderstood as being anti-regulation. It is precisely because the sight of a dead bird encased in an oil slick is so sickening that it is imperative to rein in overly expansive criminalization and the resulting unbridled prosecutorial discretion. Emotional overreaction and criminal justice are a combustible mix. The case of *Brigham Oil* is just one example of how the criminal law can easily become untethered from its moral anchor when it is used as a tool for social or regulatory control. This is as true when the criminal law is used to prosecute controlled substance abusers as it is when it is used against companies whose lawful commercial activities unfortunately, but incidentally, kill birds. In the eyes of some prosecutors, both are "disliked" and "deserve" to be prosecuted. Common sense and the prudent exercise of prosecutorial discretion should have counseled restraint, but ultimately failed to do so.

Unfortunately, a quick review of two major pieces of recently enacted federal legislation demonstrates that Congress continues to enact overly broad, vague crimes, frequently without clear intent requirements, which encourage prosecutors to unilaterally define laws. For example, the Dodd-Frank Wall Street Reform & Consumer Protection Act of 2009, is 848 single-spaced pages in length and contains over two dozen criminal offenses—many lacking clear and adequate criminal intent requirements.[25] One provision in particular criminalizes the "reckless" disclosure of systematic risk determinations and carries a penalty of up to five years imprisonment and up to a $250,000 criminal fine.[26] And yet, a person can be convicted of this offense without the government needing to prove very much. The government need not prove that the defendant knew the disclosure was prohibited, nor that the defendant made the disclosure knowingly, or even that the defendant knew what she was disclosing—and certainly no requirement on the government to prove that the defendant acted with criminal intent.

The recent Violence Against Women Reauthorization Act, a perfectly laudable proposal to fund the investigation and prosecution of violent crimes against women, restitution, and civil redress, contains yet another iteration of this trend.[27] Buried near the end of its 400 pages is a new enhancement to the federal cyber-stalking statute, 18 U.S.C. § 2261A, which prohibits the use of the mail, any interactive computer service, or any facility of commerce, to "engage in a course of conduct that causes substantial emotional distress to [a] person or places [a] person in reasonable fear of the death of, or serious bodily injury to, [themselves, a member of their immediate family, or a spouse or intimate partner,]" if done with the intent to "kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress to a person in another State."[28]

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exercise of judgment. *See* 16 U.S.C. §§ 703 and 707(a). The inclusion of <u>any</u> sort of criminal intent requirement in the language of this particular offense could have gone a long way in foreclosing this prosecution.

[25] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376.

[26] Pub. L. No. 111-203, 124 Stat. 1446 codified at 12 U.S.C. § 5382(a)(1)(C).

[27] The Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat 54.

[28] 18 U.S.C. § 2261A(2) (2013).

Certainly some of the conduct covered by this statute warrants criminalization, but its reach is disturbingly broad and some of its key terminology is exceedingly vague and left undefined. What does it mean "to intimidate"? What does it mean to cause someone else emotional distress and under what circumstances is it "substantial"? Does this mean that whether an act is a federal crime is determined solely by the reaction of the person who reads or hears it? This offense is drafted in such a poor manner that it could result in a federal conviction—with up to five years imprisonment—for the emotionally immature college student who sends angry emails to a cheating boyfriend or the blogger who threatens to organize a protest against a public official in relation to a particular vote. What about the parents who text their children threatening to ground them for two weeks if they do not return home by curfew? When a criminal offense is written so vaguely, even if it includes some criminal intent requirements, it can and will be used in ways that Congress never intended and that contradict the fundamental principles underlying our criminal justice system. Prosecutorial discretion is never the solution to—or an excuse for—such poor criminal lawmaking.

Unfortunately, these examples only offer a tiny glimpse of the many dangerous offenses lurking in our ever-expanding federal criminal code. Historically, it was presumed that the law, and especially the criminal law, was "definite and knowable," even by the average person.[29] 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 inherently wrongful conduct, made this presumption both reasonable and just. With the enormous growth of federal criminal offenses, however, this presumption has become a trap for the unwary. As criminal law professor Joshua Dressler has explained:

> 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.[30]

Indeed, with over 4,450 federal statutory crimes and an estimate of 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. Average law-abiding individuals are at an even greater disadvantage.

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[29] Joshua Dressler, *Understanding Criminal Law* 166 (3d ed. 2001).
[30] *Id.* (internal citation omitted).

As the maze of federal criminal offenses continues to grow, the severe implications of the persistent erosion of criminal intent will only increase the injustice in our criminal system. The injury caused by this erosion is not limited to the individual; it infects our entire criminal justice system and disrupts the rule of law in society as a whole. When Congress fails to include adequate criminal intent requirements in its laws, it effectively abdicates its power and responsibility by providing prosecutors with unbridled discretion and inviting judges to engage in lawmaking from the bench. As citizens, we rely on our constitutional rights, the separation of powers among the three branches of government, and the division of power between the state and national governments, to check otherwise unrestrained government power. The failure to adhere to these constitutional and prudential limits is a true abuse of our government's greatest power and a considerable threat to the stability of our entire social system.

IV. Solutions

With nearly any problem, the most important step towards a solution is acknowledging the problem's existence and gaining an understanding of its root cause. Addressing the decline of criminal intent is no different—the solution can be derived almost entirely from the path that led to the problem. In this case, that path is the flawed federal criminal lawmaking process. Congress consistently fails to include criminal intent requirements in new and modified criminal offenses. While the cause of this failure is not entirely clear—it could be oversight, poor draftsmanship, or even deliberate Congressional reasoning—the solution is. Congress should carefully evaluate criminal intent requirements in all criminal lawmaking going forward. And, given the unique qualifications of the Judiciary Committees, which alone possess the special competence and expertise required to properly draft and design criminal laws, this evaluation should always include Judiciary Committee consideration prior to passage.[31] The Members of this Committee are far better suited to take on this critical role and to encourage other Members to always seek Judiciary Committee review of any bills containing new or modified criminal offenses.

But because an intention to do better is not enough to address the current situation, Congress should also enact statutory law establishing a default criminal intent requirement to be read into any criminal offense that lacks one. This requirement should be protective enough to

[31] This practice could be guaranteed by changing 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, this 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. The positive impact of such a practice was documented in the *Without Intent* Report, which found a statistically significant positive correlation between the strength of a *mens rea* provision and Judiciary Committee action on a bill containing such a provision. *See Without Intent* Report at 20-21.

prevent unfair prosecutions and the default rule should apply retroactively to all existing laws.[32] Enacting this default *mens rea* legislation will not only address the unintentional omission of criminal intent terminology, it will force all members of Congress to give careful consideration to criminal intent requirements when adding or modifying criminal offenses and to speak clearly and deliberately when seeking to enact strict liability criminal laws.

Although it is usually unwise to do so, Congress could draft the reform legislation to allow for the enactment of, or continuing existence of, certain strict liability offenses. Going forward, however, Congress would need to make it clear in the express language of any strict liability statute that it is the intentional will of Congress to create a strict liability offense and that the ramifications of dispensing with any intent requirements were expressly considered. Invocation of this exception should be a true rarity, as even the Supreme Court has cautioned against the imposition of strict liability in the criminal law and stated that all but minor penalties may be constitutionally impermissible without any intent requirement.[33] NACDL urges against the imposition of strict liability in the criminal law as a general matter. Where strict liability is deemed necessary, NACDL cautions this body to employ it only after weighty deliberation.

As the *Without Intent* Report and the enactment of the recent legislation discussed above demonstrate, even when Congress actually includes a criminal intent requirement in a new or modified criminal offense, the requirement is frequently weak and inadequate. Again, this problem undoubtedly stems from the flawed federal criminal lawmaking process that rarely affords, or encourages, the great deliberation needed for determining the proper criminal intent requirement for a particular offense and articulating it with sufficient precision and clarity. When drafting a criminal offense, one must carefully consider how the criminal intent requirement will actually operate when applied to the specific conduct being criminalized.

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[32] As previously stated, when evaluating criminal intent requirements, NACDL believes that the term "willfully" is preferable to the term "knowingly." *See supra* n. 12. Rather than rely on federal courts to apply a variety of definitions based on the jurisdiction of the offense, any statute enacting a default criminal intent requirement should clearly define any criminal intent terms that are used by, or contained in, the legislation.

[33] In *Morissette v. United States*, the Supreme Court held that, as a general matter, the penalties imposed for public welfare offenses for which the imposition of strict liability is permitted "commonly are relatively small, and conviction does not grave damage to an offender's reputation." 342 U.S. 246, 256 (1952). The Court was clear about why the imposition of strict liability in the criminal law is traditionally disfavored:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is 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. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Id. at 250-51 (citations omitted).

Merely relying on a standard criminal intent term located in the introductory language of a criminal offense will almost never produce a criminal offense that is both clear and adequately protective. Criminal offenses that provide the best protection against unjust convictions 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.

Enactment of default criminal intent legislation would be a significant step in the right direction, but it would not absolve lawmakers of their responsibility to draft with clarity and precision. The importance of sound legislative drafting simply cannot be overstated, for it is the drafting of the criminal offense that frequently determines whether a person, who acts without intent to violate the law and knowledge that their conduct is unlawful, will endure a life-altering prosecution and conviction, a deprivation of liberty, and the tremendous collateral consequences that follow.[34] Further, Members of Congress drafting criminal legislation must resist the temptation to bypass this arduous task by handing it off to unelected regulators to engage in criminalization by regulation. 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.

V. Conclusion

NACDL is grateful for the opportunity to share our expertise and perspective with the Task Force and commends the efforts of the Task Force to address the problem of overcriminalization and to work towards reform. The bipartisan approach to this problem, especially in the current political climate, is meaningful and important. As you know, NACDL and its partners from across the political spectrum have highlighted the problem of overcriminalization for several years. Deficient intent provisions are a core aspect of that problem. NACDL believes that the solutions outlined above constitute meaningful, important, and achievable remedial steps that will garner broad support. We continue to be inspired by your willingness to tackle this problem and stand ready to assist in every way possible.

Respectfully,
Norman L. Reimer
Executive Director, National Association of Criminal Defense Lawyers
1660 L Street N.W. 12th Fl., Washington, D.C. 20036
Phone: (202) 465-7623 Email: nreimer@nacdl.org

[34] For more information on the collateral consequences that flow from a criminal conviction, visit NACDL's Restoration of Rights Project at *www.nacdl.org/rightsrestoration/*.

Mr. SENSENBRENNER. Thank you, Mr. Reimer.

The Chair is going to withhold his questions to see how we go meeting up with the votes that will be called on the floor. So I will wait until the end. And I am also going to put all the Members on notice that so that everybody can have a chance, the 5-minute rule will be strictly enforced. To begin, the Chair will recognize the Chairman of the full Committee, Mr. Goodlatte of Virginia.

Mr. GOODLATTE. Well, thank you, Mr. Chairman. I very much appreciate you holding this hearing. And I want to thank both the witnesses for an excellent presentation and a good prescription for how this Committee should consider proceeding.

I noted in my opening statement, which is now enshrined in the record for all to memorialize, that the Supreme Court has stated that *mens rea* means the concurrence of an evil-meaning mind with an evil-doing hand. And that I think is something that we ought to strive to get to in as many circumstances as possible.

So, Mr. Reimer, you have already answered this question, and, Dr. Baker, let me ask you, would passing legislation establishing a default *mens rea* rule for all statutes, past and present, that do not currently contain one stop the expansion of Federal criminal law?

Mr. BAKER. Would it stop it? It would stop a lot of prosecutions.

Mr. GOODLATTE. And it would probably stop people from putting it in statutes that go into legislation that go to other Committees.

And, Mr. Reimer, you will be glad to know that we have a very concerted effort in this Committee to identify all bills that are moving through the Congress and insist that we assert our jurisdiction when it contains a criminal provision, and many other provisions that are the jurisdiction of this Committee, but particularly criminal provisions.

Dr. Baker's testimony notes that even in cases where a Federal statute includes the *mens rea* provision it may be a very weak one, such as knowing. Dr. Baker, do you agree with Mr. Reimer's prescription that it should always be a willful conduct standard?

Mr. BAKER. Yes and no. It depends on how you draft a statute. I can draft a statute that will accomplish the same purpose using a specific intent. I am using state law terms, not Model Penal Code, but common law terms. I can do it with either specific intent or general intent, say, in a battery statute.

It is not the *mens rea* by itself, it is in relationship to the actus reus, which includes not only the act, it includes the circumstances and the consequences. It is difficult to give a very simple answer to what you say. But given the complexity of Federal law and given that you are not going to redo and create a Federal Criminal Code, I would agree with Mr. Reimer that that as a practical matter is the best result.

Mr. GOODLATTE. Mr. Reimer, both of you discuss in your written testimony whether there is a workable one-size-fits-all *mens rea* requirement that can be applied to the entire Federal code. Would you care to expand on that further?

Mr. REIMER. Yeah. I think that, first of all, any draft legislation should have a provision that gives the Congress the option to define the intent in a particular statute how they see fit for that stat-

ute. The default would apply only where the Congress has not done that, or it would kick in if it is not in the statute itself.

So if you felt, for example, that you could define a distinction between knowingly and willfully, for a particular purpose you wanted to use knowingly, that would be fine. You could do that. We are just simply saying that if it is not there, or if the new law does not contain the provision, willfully adds the essential ingredient that the person knew that they were doing something that was unlawful.

And we have a footnote 12 in our testimony which talks about some of the key cases. Bryan is an interesting case because that is where we get the willful formulation from. And actually the willful formulation, which is the holding in the case, is not as strong as what the dissenting justices would have preferred. They would have preferred that you knew you were violating the specific statute.

I point that out only because those dissenting justices who did not get their way in that case were quite an interesting mix. It was the late Chief Justice Rehnquist, Justice Scalia, and Justice Ginsburg. But what the court gave us was at least that in a willful act you have to show that the person was violating a law.

Mr. GOODLATTE. Let me in my short remaining time ask Dr. Baker if he wants to add or dispute anything that Mr. Reimer just said.

Mr. BAKER. The difficulty with knowing, if you go back to the common law crimes like receipt of stolen goods, the reason why the intent on the act of receipt is insufficient is simply receiving goods that happened to be stolen should not be wrongful because you might not know it. Therefore, knowing was added as an additional element to the basic general intent.

The difficulty in Federal criminal law and in the Model Penal Code is the ambiguity about the word "knowing." And knowing can be, as it should be in state law, the equivalent of general intent. And general intent really refers to the intent to do the act. So if knowing means the intent to do the act, the difficulty is, if the act is not always itself wrong, the fact that you knew you were doing the act proves nothing. If you do not have——

Mr. GOODLATTE. So you agree with Mr. Reimer.

Mr. BAKER. I do.

Mr. GOODLATTE. My time has expired. Thank you, Mr. Chairman.

Mr. SENSENBRENNER. The gentleman's time really is expired.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you. And just following up on that, just writing a "knowing" into each section does not resolve that ambiguity.

Mr. BAKER. Not at all.

Mr. SCOTT. So how do we resolve——

Mr. BAKER. Because I know I came here this morning. So what does that tell me? All it means is that I was conscious of what I was doing.

Mr. SCOTT. Well, so how do we write statutes to solve the ambiguity?

Mr. BAKER. Very carefully. Legislative drafting is a difficult process.

Mr. SCOTT. Is intentional or reckless ignorance of the law an excuse? You did not know it was wrong because you did not try to find out it was wrong?

Mr. BAKER. There is a general principle that you have to know the law. But that principle derives from the common law where we had a few crimes that were basically called the Ten Commandment crimes, and people knew that murder, rape, robbery was wrong. They did not need a statute.

Today, when you have statutes that are malum prohibitum, and nobody would know what they are, you have to have a stronger *mens rea*. And that is why Mr. Reimer is urging the willfulness, because if you have willful then it makes it easier to hold a person liable because they actually knew that the act was wrong.

Mr. SCOTT. And so what happens when, with all the regulations and everything else, you did not know that it was illegal?

Mr. BAKER. Well, there is a duty on the part of the government to promulgate laws, and we do this in different ways. I mean at the state level if you rent a car and you drive it out of the airport there is usually a sign that says buckle your seatbelt, it is against the law. If you are in the securities industry, before you are going to work in that industry you are going to go through training that gives you a background in what is and is not required.

Mr. SCOTT. But do you have to prove that the defendant actually knew the law?

Mr. BAKER. Not as a general principle you don't. The difficulty is where there is good faith ignorance and the *mens rea* is not adequate. If you have a strong *mens rea*, like willful, then it is much more likely that the defendant will not be guilty of willful misconduct if they did not know what the law was.

Mr. SCOTT. Many of these problems occur because we allow a criminal prosecution for what is a regulatory violation, and essentially the regulators write the conduct, and that becomes the crime. Some of those really need to be criminal, some not. How do we decide which should be criminal and which should not?

Mr. BAKER. Well, the difficulty is that when Congress passes what is deemed to be a regulatory offense, somebody seems to throw in a criminal penalty. I use the TREAD Act a lot, which after——

Mr. SCOTT. The which?

Mr. BAKER. The TREAD Act. After the Ford Firestone fiasco, Congress—it was sponsored by Senator McCain and Representative Billy Tauzin. And it was to deal with product liability. But at the end they put on a criminal penalty, which was not used for several years. And what happens is things that start out as regulatory and the Justice Department does not criminalize them at first, after a while somebody says, well, why don't we criminalize things? And that is what happened basically with environmental enforcement under the Clinton administration in the 1990's.

Mr. SCOTT. There are some that need to be—you know, health and safety violations, where people are violating the regulations and endangering people, shouldn't they be criminal?

Mr. BAKER. You could distinguish between what is a violation and what is a true crime. The difficulty of a true crime is that when a person is convicted there is a stigma that goes along with

it. You could have a process, whether you want to call it criminal or noncriminal, where it is understood that the result is an offense that is not truly a criminal conviction.

Mr. SCOTT. Well, some you want to be criminal. I mean, if there are serious health and safety violations and you have some people violating those statutes, maybe you want it to be criminal.

Mr. BAKER. You may, but that is where you also have the *mens rea*. And one of the mentus rea that you could have would be recklessness. If people do something where they do not intend to do the wrong, but they are so careless that it rises to the level of recklessness, recklessness is a *mens rea*.

Mr. SCOTT. Mr. Reimer, when would you need strict liability? What kinds of cases would you want strict liability?

Mr. REIMER. Well, as I said, we do not think the criminal law should have strict liability offenses in it. First of all, the so-called public welfare exception, which was recognized in the *Morissette* case, in what, 1951, 1952, was a very different world. Very minor crimes did not carry the unbelievable, life-altering collateral consequences that people are scarred with nowadays. So, we do not think that they should be there. Certainly Congress could say in a certain situation, yes, we need it. And all we are saying then is be explicit that that is what you want.

I would like to, if I may, just to pick up on the question that you asked Professor Baker about these regulatory offenses and how strict liability actually operates. I know that everybody on this Committee, I am pretty sure everybody on this Task Force, is familiar with the Bobby Unser case. Bobby Unser testified at one of the hearings. So I just went back, because we have talked about that as a sort of a good example of an abuse, and if you look at the statute and the reg that made that a Federal crime, you really see what the problem is.

The statute, which is 16 U.S.C. 551, basically is a general provision that gives the Secretary of Agriculture the authority to make provisions for the protection of the national forest and to issue rules and regulations that carry a criminal penalty. That is the statute. That is it. And then the regulation does not say anything about it being a crime. It just says the following are prohibited at the national forest wilderness. And one of those is operating a motor vehicle without Federal authority.

Mr. SENSENBRENNER. The time of the gentleman has expired.

The gentleman from North Carolina, Mr. Holding.

Mr. HOLDING. Thank you.

I want to follow up on the line of questioning that my friend Mr. Scott has started regarding strict liability, and turn to you, Dr. Baker. In the orbit of Federal crimes there must be some that should be strict liability. And what would you say that they are?

Mr. BAKER. I, too, am against strict liability. I think, first of all, we need to define what crime is. You could have offenses that are not true crimes that are strict liability. Part of the problem is confusing things and calling things crimes that are not crimes. So if I run a stop sign, that is strict liability even if I did not see the stop sign. But that is not a crime. It is an offense.

And we could solve a lot of the problem by making that distinction. And you could punish it in various ways. But you do not call

it a crime, it does not carry the stigma, and people do not go to jail for it.

Mr. HOLDING. So that is the distinction between an offense and a crime, is whether you go to jail for it or not?

Mr. BAKER. Well, that is a long discussion. There are various historical definitions of what a crime is. The one that we are focusing on here is the element of actus reus and *mens rea* as being the common law definition of crime. As Justice Jackson says, it marks a mature legal system. Many countries in the world, especially in Asia, do not have *mens rea*. They just punish based on a bad act, even if it was a mistake. We are a mature legal system.

Mr. HOLDING. What about areas of the law, you know, we have talked a lot about migratory birds and so forth.

Mr. BAKER. That is a good one. No, I want to talk about that one.

Mr. HOLDING. All right. All right. I will give you a minute do that.

Mr. BAKER. How about that U.S. aircraft that Captain Sullenberger landed on the Hudson? He violated the Migratory Bird Act. He killed those birds. Now, nobody is going to prosecute him. But why isn't it that the Department of Interior's, what, the Wildlife Division, why have they not issued clear regulations to distinguish the guilty from the nonguilty? They have not. And they do not want to because they want the discretion to prosecute when they want to prosecute. And so are they going to prosecute bad oil companies but not prosecute good wind farms?

Mr. HOLDING. That is good. In some of the areas of strict liability I think you run into a situation where you were talking about the stockbroker who has had to go through all of the training to get the various series of licenses and so forth. So any violation of that becomes a strict liability because it is just assumed, presumed that they know the law.

Mr. BAKER. They have been given notice, they have been given notice.

Mr. HOLDING. Right. So is that a strict liability that you would——

Mr. BAKER. Well, they have got the notice, but still the question in that context, it might well amount de facto to recklessness. They have had the knowledge, they have taken an action. You still have the problem of *mens rea*. And it is still possible that you might end up convicting someone where there was no *mens rea*. But there is a high presumption that they have been trained, they ought to understand what is going on, and it is in all likelihood that they were reckless.

But still we are dealing with a regulation. The question is whether for a violation of a regulation you want to put it at the same high level of a felony. Do you want to make that level of stigma?

Mr. HOLDING. In the whole realm of Federal criminal law, you know, are there particular areas which are uniquely suited to Federal investigation and prosecution?

Mr. BAKER. Yes. In fact, you know, I speak a lot on over-federalization. And when I am debating a former assistant U.S. Attorney they always say, well, we only focus on four areas mainly—drugs, corruption, immigration, and gun laws. Well, certainly on immigration and drugs there is no question the Federal Govern-

ment has the authority. When it comes to public corruption, that is a different matter because there is a real question about the authority. When it comes to the gun laws, likewise.

But there are other areas that the Federal Government is not really devoting its resources. You know, after 9/11 Mueller said the FBI has got to get back to what it does best. The Federal Government has a lot it needs to do that the states cannot do.

I had my identity stolen recently. Okay. So I called and tried to get through to the FBI. One, I couldn't get through. But when they sent me to—I think it was the SEC or the Federal Trade Commission—they said call your local police. I said, wait a minute, my local police have no ability to deal with this issue. It seems like everybody's dealing with somebody else's issue. We need Federal law enforcement in the Internet issues, anything that is crossing state lines. No state is able to deal with these things. There is plenty for the Federal Government to do. The problem is much of what they are doing belongs to the state.

Mr. HOLDING. Thank you.

Mr. SENSENBRENNER. The gentleman from Michigan, Mr. Conyers, the Ranking Member of the full Committee.

Mr. CONYERS. Thank you.

I am trying to keep this down at a realistic as possible level. And I wanted to ask you, as the leader of many of the defense lawyers, Mr. Reimer, how does the *mens rea* problem relate to prosecutorial discretion when you have minority defendants in the criminal justice system that might be subject to discretion by the prosecutor that may or may not be fair to the defendant himself or herself?

Mr. REIMER. Well, it is a very timely question since we just 2 days ago released a report on disparity, which was done jointly with a number of groups, including the American Prosecutors Association. And so that is a problem in our criminal justice system in general.

But this issue of prosecutorial discretion, you mentioned the migratory bird case, and of course that is the classic example of trusting prosecutors to not push the envelope out of what the law was intended for. And of course there they pushed it ridiculously, and people were humiliated and spent a fortune, had their reputations damaged, ultimately were exonerated.

The problem with all of this is that nobody can afford to go to trial in this country anymore. Trials are essentially gone. So once you are charged you are in a terrible, terrible spot. The cost, the potential extreme trial penalty if you take the case to trial, it has tipped the balance to such an extent that the only way you have any protection is if you build into the law some clear aspect of intent.

And I want to talk about that just in terms of these questions about strict liability because we all know what we are thinking about. We want to make sure that the public is safe. The question I have is this. If there genuinely is no knowledge, no recklessness, no negligence, nothing, the person just received, for example, in the case of food, if you receive food that has adulterated products in it and you put it on the shelf, you really have no knowledge of that. It happened somewhere else. But you could be prosecuted under the laws.

And that is not really right. You have to save the criminal law for people who are knowingly doing something that is wrong. And if you do not do that, then it loses its value. It certainly does not, as I said in my statement, it does not deter anything. It does, if it is a corporate situation, the prospect of severe penalties, economic penalties will deter.

Mr. CONYERS. Well, you make me remember that in many criminal courts the defense lawyer may say to his client, look, you can take a plea, or look, if we go to trial they have already indicated they are going to throw the book at you. And that is why your statement about once you get into the trial you are in big trouble, whether you know it or not. And I would like to ask Dr. Baker to add to this discussion.

Mr. BAKER. I am happy to. I would like to distinguish that it is easier to endure a state trial, because unlike a few highly publicized ones that have gone a long time, you can afford to defend most state trials. And there is going to be a public defender there.

What you really cannot afford is to defend a Federal trial. I mean, you are talking hundreds of thousands and into the millions of dollars. Skilling, who took his case to the Supreme Court, got there because he had a $42 million bankroll to get there. It was an insurance policy. Ollie North, to get his case reversed, he spent $40 million. The numbers are just mind-boggling.

Mr. CONYERS. Well, *mens rea* is an issue that surrounds this discussion of really the fairness of trials. And, Mr. Chairman, I think that that kind of leads us into another very important area.

Mr. SENSENBRENNER. I thank you.

The gentleman's time has expired. The gentleman from Alabama, Mr. Bachus.

Mr. BACHUS. Thank you. I think one of the problems here is that I think most Members of Congress do not know the difference in civil and criminal. I mean they have no understanding there is a difference. I mean, we have thrown around the term strict liability and negligence. Well, those are civil. I mean, unless you are maybe a manslaughter case.

But, you know, so many of these statutes, and Dr. Reimer, you mentioned Dodd-Frank, where you disclose that there is a systemic risk determination, you know, not only does there not have to be any intent, but you do not even have to know about that there has been one. You do not even have to have notice that you are disclosing something. You do not even have to know that it even exists.

But that also, that statute also would appear to violate freedom of speech because you could say that a company was collapsing.

Mr. REIMER. Well, the provision, that is a very interesting one, because that one, it is called reckless disclosure of systematic risk, and it does have a reckless provision to it. The problem with that statute is it does not define exactly what it is—what disclosure was prohibited. It does not require that the disclosure was done knowingly. And you do not even have to know precisely what it is you are disclosing. So if you are properly communicating to somebody about this risk and someone else overhears it, have you recklessly disclosed the systematic risk?

But the thing about that statute which is so—you know, I talked about the situation with Unser, when you look at what the statute was you see what the problem is. Here is another example. This was a financial reform bill. And, you know, this was buried in there. And I do not think that if anyone had really thought about that—I understand what they are trying to get at. We do not want people disclosing information that can affect the markets. But you have got to be a little bit fairer to the people who are going to be subject to these prosecutions.

Mr. BACHUS. Yeah. But, you know, you would actually had—if you said specific intent, that it had been determined a specific intent, but you do not even have to know there is a statute.

Mr. REIMER. If it were willful, it would be a much different story, because then the person would be doing it with the intention to violate the law.

Mr. BACHUS. You know, prosecutorial discretion, you know, a lot of this prosecutors, in my opinion, should not even bring the case and then judges ought to throw the cases out.

Mr. REIMER. Well——

Mr. BACHUS. Why aren't they doing that?

Mr. REIMER. Well, I am not going to speak to why judges do not throw cases out. We probably have some judges here who could—former judges who could speak to that, but I will say this, okay, as I said, look, prosecutors do not have a difficult time getting convictions in Federal court. That is just a fact of life. But the other thing to remember is this: it should not be easy to convict somebody of a crime. It should be a difficult chore. It should be required to prove that they deserve to be punished. It is not asking for too much.

Mr. BACHUS. And punished criminally.

Mr. REIMER. And punished—if it is going to be criminal, yes.

Mr. BACHUS. Because, I mean, I think, you know, you are talking about fines and talking about traffic offenses.

Mr. REIMER. There are a lot of things we can do to deter conduct and to make people pay a penalty to be more vigilant, but if you want to brand somebody with what in this country has really become a permanent disability, and that is an issue that I hope maybe the Committee will take up as well, the whole problem of collateral consequences is just out of control, but if we are going to do that, it is not unreasonable to do it with precision and make prosecutors come into a court and prove it beyond a reasonable doubt.

Mr. BACHUS. Well——

Mr. SENSENBRENNER. The gentleman's time has expired.

Mr. BACHUS. Let me just ask about lenity, just——

Mr. REIMER. I am sorry?

Mr. BACHUS. Could len-—I think it is——

Mr. REIMER. The rule of lenity.

Mr. BACHUS. Lenity. These ambiguous statutes, you are supposed to construe them in the defendant's favor.

Mr. BAKER. Well, first of all, I do not favor the use of the term "lenity." The original term is strict construction. And as Chief Justice Marshall explained in the Wiltberger case, the reason why courts should strictly construe statutes is because it is the obliga-

tion of the Congress to write them clearly. What has happened is we have gone to the rule of lenity, and the Court has in many cases actually flipped it, and it is not lenity at all.

Mr. SENSENBRENNER. Okay. The gentleman's time now has expired. We are having blinking red lights here. The gentleman from New York, Mr. Nadler.

Mr. BACHUS. That is a traffic offense.

Mr. NADLER. Thank you. I thought I was going to have—I was not able to think up enough questions, but listening to you, I now have too many. I will try to get them in.

Mr. BAKER. I must not have been clear.

Mr. NADLER. When you said the Federal criminal court—the Federal criminal law is not coherent, and I understand what you meant by that, and I am thinking about it, it is obviously true. Do you think we should have a commission maybe or something and to try to rewrite the entire—the Federal criminal law, have a recodification of it to make it coherent and up-to-date?

Mr. BAKER. Well, actually I was on the Senate Judiciary Committee staff at the time that was attempted in the early 1980's, and a lot of people threw up their hands. The difficulty with a criminal code the way it was drafted, it assumed that there was a general police power in the Federal Government.

Mr. NADLER. Well, without that assumption, could we draft a somewhat different criminal code?

Mr. BAKER. I would hope, but it would not be an easy task, but I know Mr. Sensenbrenner has taken a stab at it.

Mr. NADLER. Thank you. And the second thing, Mr. Reimer, you said that, which is also obviously true, you cannot get a trial today because it costs you $40 million, or it is prohibitive. No one goes to trial, and therefore the prosecutor has the total, total leverage in any plea bargain arrangement because you have to take a plea, because unless you are a millionaire you cannot go to trial. That is essentially what you said?

Mr. REIMER. Well, that was Professor Baker who said that. And——

Mr. NADLER. Okay.

Mr. REIMER. And I would just—I would make this point. I think—well, why don't you complete your question and——

Mr. NADLER. My question is shouldn't we then try to do something about that? In other words, have the Federal Government pay for——

Mr. REIMER. Well——

Mr. NADLER [continuing]. Defense, not just if you are a pauper, but a middle class person who cannot afford it, or award total costs to some—total costs from the government if you are acquitted or whatever?

Mr. REIMER. Well, I represent what I like to call as the poor person's bar association. Most criminal lawyers in this country are small and solo practitioners. And while I appreciate the examples of Skilling and Colonel North and others like that, the fact is that most people cannot afford that kind of a defense and most people do not get that kind of a defense. We do have, hopefully if we can solve some of the problems that are lurking with respect to funding

the Federal indigent defense, to put a plug in for that, we have had up till now a very good Federal indigent defense system.

Mr. NADLER. Do you think it is possible for a middle class person who thinks he is innocent to actually go to trial?

Mr. REIMER. No. And it is not just—it is partly money, but it is much more than that, Representative Nadler. It is, in fact, the trial penalty. We have created a situation in this country where prosecutors are holding all of the cards, all of the discretion, and they routinely make people pay an extraordinary price for the simple act of going to trial.

Mr. NADLER. Is that because of mandatory minimums or something else?

Mr. REIMER. It is a combination of mandatory minimums, complete control over the charging function. And it is also a function of the difficulty of defending oneself with these kinds of vague laws, and judges who, quite frankly, and this is one of the big problems with knowingly, is when there is a vagary, it is the judges who then decide to bring in doctrines like willful blindness or conscious avoidance, and so all of these things are stacked up against you. And, frankly, it is because people cannot go to trial, because the cost economically and the cost in terms of lost years of their life is so extraordinary, that prosecutors are emboldened to bring charges. And you see this all the time. You see it certainly on the corporate side, you see that. The threat of a criminal prosecution is so Draconian, that you get these plea arrangements——

Mr. NADLER. Okay. Now, let me——

Mr. REIMER [continuing]. Deferrals and things like that.

Mr. NADLER. That gives us a wide range of problems to deal with. Let me sort of go to the other side.

Professor, you said that we should not have crimes from regulations, I think. And you also said that corporate—you really should not prosecute corporations, you can deter them by huge—excuse me. Let me rephrase that. You said that you can deter misconduct, corporate, large scale misconduct by fines.

Now, isn't it the case that large corporations can just regard even $50 million fines as a cost of doing business, and you really need criminal penalties is if you are going to deter if some of these cases?

Mr. BAKER. Well, I do not think I really said much about corporations here, although I have written on the issue. What has happened, and you could hold another hearing on this—the Sentencing Commission, which in 1992 decided to impose criminal penalties on organizations. What it thereby did was create the compliance industry, and the Justice Department went to corporations and said you might be able to get a lesser penalty if you are indicted and convicted if you go into compliance. And there has been a long debate and discussion about what the Department of Justice was doing on so-called white-collar crime, and people focused on the corporation, but the reality is that middle management in corporations do not really understand the situation. They think that the corporations are going to defend them, when, in fact, at least until recently, corporations were throwing their employees under the bus under the pressure of these compliance plans and other things, and that would take a long discussion. But, again, you can-

not jail a corporation. And if a corporation is really an organized crime entity, then you ought to destroy it. That is one thing. But the corporations we have destroyed through prosecution——

Mr. NADLER. You can prosecute the President.

Mr. BAKER. Well, the Anderson, Anderson——

Mr. SENSENBRENNER. The gentleman's time has expired. The gentleman from Idaho, Mr. Labrador.

Mr. LABRADOR. Thank you, Mr. Chairman.

Dr. Baker, in your written testimony, you stated that the fundamental principle that ignorance of the law should not excuse the crime rests on the assumption that the law is knowable. What steps should we take to make sure that the law is knowable. And I think it was Mr. Rime—is it Rimer?

Mr. REIMER. I say Reimer, but I never correct anyone who says Rimer.

Mr. LABRADOR. Reimer. Okay. That is fine. Mr. Reimer. I am Labrador, and people say it all sorts of different ways.

So I think Mr. Reimer said that it does not really deter anything to have these laws that are unknowable. Can both of you kind of address those issues?

Mr. BAKER. Well, the framers of the Constitution and the Federalists wrote that if you have too many laws, you do not have the rule of law, because nobody can know what the law is. We have got at least 4,500 Federal crimes, not counting a lot of the regulatory crimes.

The difficulty we are getting into is that literally everybody is a criminal. There is nobody that cannot—over 18 who cannot be indicted for something. And when that happens, then the stigma, the legitimate stigma of the criminal law does not attach. You want people to believe that being convicted is such a terrible thing that they never have would happen to them, but when innocent people are convicted, then—and anybody can be convicted, it is like the lottery or getting struck by lightning: you just figure, well, I hope I do not get struck by lightning. And if that is the situation, you do not have the same respect for the law. Too much in the way of law can undermine the rule of law.

Mr. LABRADOR. Okay. Mr. Reimer, can you comment on that a little bit?

Mr. REIMER. It was a judge who famously said you can indict a ham sandwich. Well, you should not be able to convict a ham sandwich, and that is really what this is all about. You certainly should not be able to convict a baloney sandwich.

And, you know, it really just comes down to fundamental fairness. If you do not know it is wrong and therefore you are not acting with any intent or even recklessness or even negligence, which you could put into a statute, then what do you get in return for having criminalized this person?

Mr. LABRADOR. You know, as a conservative, I—and I do not want to introduce politics necessarily, but it always amazes me that conservatives talk about how we do not want a strong Federal state, you know, we do not want a state control, we do not want all these things, but yet as I have watched Congress over the years, they continue to give the Federal Government more and more authority to take away people's rights and liberties. And I think there

is somehow we need to figure out here in Congress that—and I think there is something that maybe both parties can agree to, that we have given the Federal Government way too much control over people's lives, property and really the pursuit of happiness when you are making so many criminal laws.

Mr. REIMER. You know, the problem here really, you know, it really is not coming from either political party or any philosophy. The problem is that when something bad happens, it is really easy to say, I will pass a law, I will make it a crime. It looks like it does not cost anything. Of course it does, it is just not an actual direct cost. It is an indirect cost that comes about over many, many years and it just grows and grows and grows. I was appearing actually before a conference in Texas where a group of legislators were looking at how many regulatory offenses they had in Texas. And basically what had happened was each interest group had come in and said, well, you know, I need a law to protect this, protect that, and before you know it, you had, like, 400 laws in just a few sessions. So, the problem is that our legislators all over the country have not really taken the time to think about the significance of passing a criminal provision.

Mr. LABRADOR. Yeah. I have been thinking about the whole hearing, the maxim I have learned in law school that not every wrongful act has a legal remedy and not every wrongful act should definitely have a criminal penalty attached to it. There are some things that we should not do.

Now, one last question. Have either of you done any studies on what crimes should be only at the state level? Is there a report out there, anything that maybe would educate us on how we could, not just reform the Criminal Code, but just get rid of a bunch of the crimes that are in the Criminal Code?

Mr. BAKER. Well, I think whenever any of us write on this issue, it is against that background. The Constitution leaves general police power in the states, because if the Congress has a general police power, then we do not have a government of limited powers.

Mr. SENSENBRENNER. The gentleman's time has expired. The votes have been moved up to 10:15. And, you know, the Chair will note that he has restrained himself from asking questions, but I will not recognize anybody new after the bell rings for votes.

The gentleman from New York, Mr. Jeffries, is recognized.

Mr. JEFFRIES. Thank you, Mr. Chairman.

On the *mens rea* spectrum from, most severe to most lenient, seems that you have got, four possible categories: there is willfulness, then you have got recklessness, then you have got negligence, then you have got strict liability. And there appears to be at least a growing consensus amongst the witnesses, amongst the distinguished Members of the Task Force that we should be moving toward instances where willfulness or something more severe as it relates to *mens rea* is required in most instances, and that we should really limit, if not completely eliminate, strict liability as a *mens rea* requirement.

I am interested in your observations as to what circumstances would it be appropriate, if any, where we have got sort of these in between standards enshrined into Federal statute, either a recklessness statute—recklessness or negligence *mens rea* requirement.

Mr. BAKER. Well, again, you have got to relate it to the other elements of the statute. Even in the context of negligence, negligence de facto can end up being a strict liability and really simply a civil tort statute. So obviously where you—let me just take a simple example of burglary. Okay? Where when you enter a house or a building without authorization, that is a trespass. How do we distinguish a trespass from a burglary? We add a specific intent, with the intent to commit a felony therein, or a theft. Okay. What we are doing is out of all the possible intents that a person could have when they enter, we want to make sure we only criminalize the one that deserves criminality. So suppose somebody trespasses and they come into the house because it is raining. They are still guilty of a trespass, but it is not really burglary, because they were coming in to get out of the rain. It is still wrong, but trespass is not burglary. So by requiring a specific intent, you make sure that you have limited, the purpose of a specific intent is to limit the category of people and the actions that are deemed to be seriously criminal.

Mr. JEFFRIES. Okay. Mr. Reimer, in your testimony, you mentioned the recommendation of a default *mens rea* requirement as one of the ways in which to protect the liberties of people against the phenomenon of over-criminalization and aggressive prosecutorial discretion exercised in an inappropriate way.

Do you think it is also appropriate for us to think about building affirmative defenses into statutory law in any way, shape or form that will hopefully minimize or limit the abuse of prosecutorial discretion or create circumstances where one's ability to defend themselves at a trial is enhanced?

Mr. REIMER. That is a very difficult question to answer. It is a great question. It is difficult to answer. The problem with affirmative defenses are they are simply that. They are defenses and they shift the burden of proof to an accused person. They may be appropriate in certain circumstances. The law recognizes a number of them, but I would not recommend that as the solution to inadequate intent.

And I want to be clear about our proposal for a default statute. We are not saying that you should rely on the default in the first instance. If you are creating a new statute, Congress should decide what is the level of intent that is required under—as Professor Baker says, what is the wrong that is involved? Make your judgment. The default would kick in only if Congress has failed to do that or it would conceivably apply retrospectively.

Mr. JEFFRIES. Professor Baker, you mentioned good faith ignorance as sort of a situation that should countenance against possible prosecution of criminal liability. Could you elaborate?

Mr. BAKER. Well, as Mr. Reimer has said, if you have a willfulness or a strong *mens rea*, that protects against the problem of ignorance of the law. I know that Congress does not, and nobody wants to countenance the notion that ignorance of the law is a defense, but in order to maintain it, it is incumbent upon the Congress to ensure that there is a clear *mens rea* so that people cannot fall into the situation where in good faith they did not know.

Mr. JEFFRIES. Now, lastly, you mentioned the prosecutorial abuse of the mail fraud statute, or the aggressive interpretation.

Mr. BAKER. I was——

Mr. JEFFRIES. Could either of you comment——

Mr. BAKER. Sure. I was——

Mr. JEFFRIES [continuing]. As to whether we should address that specific situation?

Mr. BAKER. I had the pleasure of meeting the Justice Department on one of their expansions in the Fifth Circuit a few years ago. The difficulty is, and I will comment what he would not, when there is an indictment, Federal district judges do not want to be reversed. I do not care what party appointed them. They do not want to be reversed. In a criminal case, the safest way, when the defense argues that the government has gone beyond its power, to avoid getting reversed is to simply rule against the defendant. Then the chances are 95 percent that the defendant is going to plead guilty.

Mr. JEFFRIES. Thank you.

Mr. SENSENBRENNER. The gentleman's time has expired. The gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman.

And I know you have given us deference. Yes, it is tough to legislate, but I will submit to you what makes it really tough to legislate is the fact that there are, having been a former judge and chief justice, I can tell you that there are judges who are educated far beyond their biologically intellectual ability to assimilate information and come out with wisdom, and it creates real problems. So it should not be difficult for a legislature to say, you shall do something, and yet we have judges that say, well, now, that term "shall" is really ambiguous. Not if you have common sense, but places like the Ninth Circuit, that it is not common, it is just sense. But I know our Chairman had made a valiant effort at one point to try to reorganize the Federal circuit court system, and I still think we should have confined the Ninth Circuit to disputes that were arising within their building, but I want to just cut to the chase here. You know, a lot of great points have been made, and this is an area where there is true bipartisanship, because you do not want innocent people to be hurt by what we do here in Washington.

I have been hearing and I have read the information last night that was being proffered. Is it possible that we could draft a law that would be sufficient as one law to require *mens rea* and intent without having to go in and redo 5,000 criminal statutes? Do you think we need to go in and actually clean up every law, or could we be precise enough that we could affect every law to get the state of mind requirement in there?

Mr. REIMER. I think the proposal that we are suggesting will go a long way toward taking care of the existing statutes. I am not saying——

Mr. GOHMERT. But a long way is not——

Mr. REIMER. May not be perfect, Representative Gohmert. I am not going to sit here and say, well, it is an absolute perfect fix, but I think it would really take care of most of the situations that we have been talking about, and then, of course, going forward to make sure it does not continue to happen.

Mr. GOHMERT. And do you a comment, Mr. Baker, on that?

Mr. BAKER. No. I agree with that.

Mr. GOHMERT. With regard to the issue of regulations that can result in incarceration, do you think if we drafted a sufficiently specific law that in effect said no regulation that has not been approved specifically by Congress could require incarceration as part of the penalty? That would be adequate to cover some laws where we actually leave that much discretion to regulators?

Mr. REIMER. I have no capacity to say what this would mean for your workload, but, yes, I would love to see it if you would require that any reg that imposes a criminal penalty has to be approved by Congress. However, the Unser example I gave you is the classic problem. The statute gives the secretary of that department——

Mr. GOHMERT. Right.

Mr. REIMER [continuing]. The right to make regulations, and they are criminal. The regulation itself does not say it is a crime. It just says, thou shalt not use a motor vehicle in the forest.

Mr. GOHMERT. But so you think we could have one law that we passed that would take away any ability for, whether it is a secretary or——

Mr. REIMER. Yes.

Mr. GOHMERT [continuing]. A bureaucrat in a tiny cubical to be able to pass regulations that carry——

Mr. REIMER. The default we are proposing, which would apply to all laws and regulations, would mean that in that situation, you would have to—because it is silent as to intent, you would have to apply what we are suggesting should be a willful standard, which means that they would have to—they would have had to have proved that Bobby Unser drove that vehicle knowing that he was breaking the law.

Mr. GOHMERT. Okay. Thank you very much.

Thank you, Mr. Chairman.

Mr. SENSENBRENNER. Thank you very much. The only person who has not asked questions before the bell rang is the Chair, and the Chair is going to impose his rule that we are not going to recognize anybody after the bell rings on himself.

Are the Members to my right listening to this?

Mr. GOHMERT. I hear you.

Mr. SENSENBRENNER. Okay. The gentleman from Virginia has some UC requests.

Mr. SCOTT. Mr. Chairman, I ask unanimous consent that an outline from the Criminal Justice Policy Foundation be entered into the record.

Mr. SENSENBRENNER. Without objection, so ordered.

[The material referred to follows:]

Prepared Statement of Eric E. Sterling, President, The Criminal Justice Policy Foundation

SUMMARY OF RECOMMENDATIONS TO THE TASK FORCE

(1) **Assure that federal crimes are grounded in the text of the Constitution**. If the enumerated powers are inadequate to the needs of the government to carry out its responsibilities, the Constitution should be amended, but the meaning of its words should not be twisted or ignored.

(2) Review federal crimes to assure that they only punish misconduct that deserves the loss of liberty. **The moral authority of the government to deprive a citizen of his or her liberty exists only when a citizen's misconduct is wrongful.**

(3) **Commission a study of the actual cost to the American economy of overcriminalization and over-punishment.** 20 million Americans have a felony conviction, and about 65 million have a criminal record. Most companies consider convictions an influential factor in not extending a job offer. Without a paycheck there is no car loan, credit card, or home mortgage. Overcriminalization means the economic participation of tens of millions of Americans is severely stunted which hurts almost every company. Thus, as I comment on my blog, www.profitsunchained.com, every American investor is hurt by overcriminalization. The American auto industry shrank as America's prison population mushroomed from 250,000 to 2.3 million, and the number of Americans with criminal records rose. Fewer Americans could buy Fords, Chevrolets and Dodges, or other goods.

(4) Review federal crimes to assure that they all **have the proper *mens rea.***

(5) Study the problem of **excessive punishment.** Wasted punishment is extremely expensive and fails to deter crime effectively, as well as being manifestly unjust. For many federal offenses, the sentences need to be shorter.

(6) Enact a mechanism to end sentences upon rehabilitation, such as sealing conviction records 5 or 10 years after sentence completion. **The collateral consequences of a conviction should not be a life sentence**.

(7) **Scrutinize Justice Department case selection** practices and the supervision of prosecutors to identify overcriminalization in practice. Congress should stop DoJ's excessive focus on low-level cases revealed by U.S. Sentencing Commission studies of federal drug cases.

(8) **Revise the quantitative criteria for identifying high-level drug traffickers** in the Anti-Drug Abuse Act of 1986. The current triggers were a hastily drafted mistake.

PREPARED STATEMENT

Chairman Sensenbrenner, Representative Scott, and Members of the task force:

I congratulate you for convening this task force to discuss the serious problems of overcriminalization of behavior and the over-federalization of crime.

As assistant counsel to the House Committee on the Judiciary from 1979 to 1989, I began my career in Washington working on the Criminal Code Revision Act in the 96th Congress (H.R. 6915, 96th Cong. 2d Sess.). I have spent over thirty years of my legal career thinking about these problems and the appropriate scope of Congress's power to punish under Article I, Section 8 of the Constitution.

In the 97th through the 100th Congresses, on the staff of the Subcommittee on Crime under Chairman William J. Hughes (D-NJ), I was the attorney principally responsible for federal drug laws, gun control, pornography, organized crime, money laundering and other matters. My career on the Hill is best known for my role assisting the Crime Subcommittee develop the mandatory minimum drug sentences in August 1986 as part of the Anti-Drug Abuse Act of 1986 (P.L. 99—570, Sections 1002 and 1302).

In addition, over the past three decades I have taught courses in crime and criminal justice at American University and George Washington University, and lectured to academic, professional and civic audiences all over the country. I have served as President of the Criminal Justice Policy Foundation since 1989, working on projects to improve the nation's criminal justice system.

As you begin the work of this task force, I have the following eight recommendations:

First, the task force (or its successors) should undertake a review of all federal crimes to assure that they are grounded in the text of the Constitution and the scope of Congress's power to punish conduct. The Constitution gives limited powers to Congress in Article I, Section, 8, especially in the area of criminal law. If those enumerated powers do not provide the authority for the proposed crime, there is a strong argument that it should not be a federal crime at all. When misconduct threatens society or individuals in a new manner not prohibited by law, then perhaps a new crime is necessary, but it must be grounded on powers of Congress found in the text of the Constitution.

When the current federal law is inadequate to address the crime and to protect public safety, but there is no authority in the Constitution for Congress to act, then instead of twisting the meaning of the terms in the Constitution, the Constitution should be amended. The Constitution is in writing in order to preserve its meaning at the time its provisions were written.

Over the past 80 years, Congress has grounded many criminal laws, including, for example, the Controlled Substances Act, on the power in Article I, section 8,

> "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

When the Constitution was written and ratified, commerce simply meant trade. It was not a synonym for all economic activity or for the use of money. Unfortunately, for many decades Congress has relied on a meaning of the term "Commerce" that is far more broad than when the Constitution was written, and uses that broad reading of its commerce power to regulate a great deal of activity of the American people.

A way to understand the absurdity of this broad reading is to consider the many varieties of conduct that take place primarily within a state that are now being regulated by Congress as affecting interstate or foreign "Commerce," and imagine Congress claiming the power to regulate that conduct when it takes place in every "foreign Nation" because it affects "Commerce." The doctrine that marijuana use which takes place wholly in California is subject to federal regulation because it affects "Commerce" (asserted by the U.S. Supreme Court in *Gonzales* v. *Raich* 545 U.S. 1 (2005)) logically means that, under that clause of the Constitution, Congress also has the power to prohibit the use of marijuana within European states because the market for drugs there also affects the price and supply of drugs in the United States. There is nothing in the broad interpretation of the "Commerce" power that has extended federal power to purely intrastate activity that limits that power when that kind of activity takes place within a foreign nation. (Surely the distinction can't rely on the difference between "regulating Commerce with" and "regulating Commerce among.") If the nation needs Congress to regulate the economy, then the nation should revise the Constitution to provide Congress with such power. If the nation needs the federal government to prosecute use and sale of drugs that takes place wholly within a state, the nation should amend the Constitution to do so. "Overcriminalization" endangers liberty and undermines the federal system and the powers of the states when Congress declares conduct to be criminal when it has no power to do so in the Constitution.

Second, the task force (or its successors) should review federal crimes to assure that the law only punishes misconduct that deserves the loss of liberty. **The moral authority of the government to deprive a citizen of his or her liberty for violating a law exists only when a citizen's misconduct is wrongful.** Conduct is only wrongful when it hurts someone else—e.g., it is an assault, a theft, or the abridgement of a right—or is the failure to carry out an important duty, such as paying taxes. The authority to punish is not triggered because the conduct is simply immoral or offensive (even if in the view of a majority of the population). Conduct such as adultery, breach of contract, lying, cheating at cards or other games, plagiarism, etc. are wrong or immoral, but they are not wrongful in the narrow sense that those who do so deserve punishment by the government and the deprivation of the liberty of the offender. (I suggest you consider the analyses on these points of Douglas Husak, Professor of Philosophy and Law, Rutgers University in his book, Overcriminalization: The Limits of the Criminal Law (Oxford University Press, 2008)).

Third, the task force (or it successors) should **commission a study of the economic cost to the society of over-criminalization and over-punishment**. One team of sociologists has estimated that 20 million Americans have a felony convic-

tion.[1] Another study estimates that 65 million Americans have a criminal record.[2] These criminal records result in unemployment and underemployment, and devastate the earning capacity of an enormous fraction of the population. Because our economy is strongly consumer driven, that 20 million Americans cannot fully participate in the legitimate economy diminishes the sales and profits of a majority of American businesses.[3] No other nation punishes its people so extensively, and I suggest no other economy is paying such a high price for over-criminalization.

A January 2010 survey by the Society for Human Resource Management found that more than three-quarters of American companies consider a felony or misdemeanor conviction (even non-violent misdemeanors) an influential factor in not extending a job offer to an applicant.[4] This practice is self-defeating. When most companies won't hire tens of millions of Americans who would otherwise be qualified for a job, tens of millions of Americans can't get a paycheck. With no paycheck, tens of millions of Americans can't get a car loan, credit card, or home mortgage.

As I comment on my blog, www.profitsunchained.com, every American investor is being hurt by over-criminalization. Simply think about the consequences for the American auto industry as the size of the prison population steadily has grown from 250,000 to 2.3 million over 40 years. Now there are two million more Americans who are no longer in the market for a Ford, Chevrolet or Dodge than there were in the 1960s and 1970s.

The problem for the American economy is much larger. With tens of millions of felons and misdemeanants unable to find employment that pays them what they could earn but for "overcriminalization," their reduced income means there is reduced consumption of almost every good and service produced in America. A comprehensive Pew study found that ex-offender earnings are significantly reduced: Subsequent wages are approximately 11% lower, annual earnings are approximately 40% lower, and the total number of weeks worked is almost 20% fewer.[5] An ex-offender who cannot obtain a credit card can't buy from Amazon.com nor order tickets to a basketball game from Ticketmaster. Across the board, every American business suffers from reduced sales, and thus every American investor obtains a smaller return on investment. The entire American GDP is stunted.

No doubt you have heard the attack upon the private prison industry. A business whose growth model depends upon a continued increase in a supply of prisoners is dubious investment on many grounds. But whatever profits it makes because of overcriminalization are infinitesimal when measured against the losses endured by the whole American economy society due to over-punishment. The task force should not let a critique of the profits of the private prison industry distract it from the big economic picture: all over the country, American workers and investors are being hurt because about 65 million persons have criminal records that last a lifetime. These economic costs are doubly unnecessary because these life-long records are often the result of youthful misconduct that ought to have been forgiven and forgotten within a few years.

Fourth, the task force (or its successors) should review federal crimes to assure that all crimes have proper *mens rea*. Intrinsic in the problem of overcriminalization has been the failure of Congress (and state legislatures) to require the traditional element of criminal culpability be proven in all cases.

One possibility might be to enact a general rule to set forth minimum *mens rea* requirements to be proven for all federal offenses for which *mens rea* has not been specified for every element of the offense. Of course, a different degree of *mens rea* might be necessary based the variety of conduct, the variety of circumstances, and the variety of consequences that are elements of various offenses.

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[1] Sarah Shannon, Christopher Uggen, Melissa Thompson, Jason Schnittker, and Michael Massoglia, GROWTH INTHE U.S.EX-FELON AND EX-PRISONER POPULATION, 1948 TO2010, Population Association of America, Washington DC, 2011.

[2] Michele Natividad Rodriguez and Maurice Emsellem, 65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment, National Employment Law Project, March 2011. http://www.nelp.org/page/-/65__Million__Need__Not__Apply.pdf?nocdn=1.

[3] John Schmitt and Kris Warner, Ex-Offenders and the Labor Market, Center for Economic and Policy Research, November 2010. http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf.

[4] Society for Human Resource Management, Background Checking—Conducting Criminal Background Checks SHRM Poll, January 22, 2010. http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx.

[5] Bruce Western and Becky Pettit, Collateral Costs: Incarceration's Effect on Economic Mobility, Pew Charitable Trusts, 2010.

Fifth, the task force (or its successors) should recognize that an essential element of the problem of over-criminalization is that it "produces too much punishment."[6] This task force should reduce sentences and sentencing guidelines that are longer than necessary to meet the purposes of sentencing, and enable ex-offenders—after a period that evidences their rehabilitation—to no longer have to identify as ex-offenders. The task force should assure that most ex-offenders do not have a life-long record.

My experience as counsel to the House Judiciary Committee is that Congress sets punishments with the most serious criminals in mind to be appropriately punished. That makes sense, but the reality is that the overwhelming majority of criminals prosecuted by the Justice Department never approach that level. For example, when Congress created the mandatory minimum and maximum penalties for drug offenders in 1986, we expected the Justice Department would use these penalties for men like Pablo Escobar. Tragically for most federal drug offenders those minimum and maximum sentences are unjustly long. A classic example of this kind of wholesale miscarriage of justice is the case of former college student Clarence Aaron, who is still serving three terms of life imprisonment for a small role in a Mobile, Alabama crack conspiracy.[7] Punishments should be proportionate to culpability. Efforts to reform disproportionate sentences, such as the mandatory minimum sentences, have too often been challenged by exaggerations that any reduction in sentences is an excusing of conduct, even when the maximum sentence would remain 40 years or life.

Not only are these long sentences unjust, they are ineffective and wastefully expensive. For deterrence to be effective, quick punishment is required, not the threat of a potentially long sentence. This requires prison and jail cells be available for the large mass of offenders and puts a premium on apprehension, not long expensive incarceration. Prison overcrowding undermines the ability of the justice system to create effective deterrence.[8] Prison overcrowding has made it more expensive to operate the federal prisons. The per capita cost has risen from $19,571 in FY 2000 to $26,074 in FY 2011.[9]

Sixth, the task force (or its successors) should take action to assure that sentences come to an end. In our grammar, every sentence ends with a period. But in our criminal justice records, no sentence has a period, it lasts forever. It is a tragic instance of "overcriminalization" that every offense now carries what is effectively a life sentence. The Task Force should enact reforms to assure that rehabilitated ex-offenders are not subject to a "life sentence," and that collateral consequences terminate at some point after a nominal sentence has been served. Because every misdemeanor or felony is now, in effect, a "life sentence," we have seriously undermined the value and importance of rehabilitation. **The task force should enact mechanisms that provide that five or ten years after service of a sentence is completed, the criminal record is sealed and no longer overshadows a record of recovery and rehabilitation.**

Seventh, the task force (or its successors) should engage in searching oversight of the case selection practices of the Department of Justice. When the federal government prosecutes cases that have no genuine federal nexus, this is overcriminalization in a very practical sense. For example, in 2005, over 75% of crack offenders and 25% of powder cocaine offenders operated only at the neighborhood and local level, according to the United States Sentencing Commission.[10] Over 50% of offenders in both categories did not even rank above street dealers.[11] These are drug offenders who are properly punished by state authorities. These numbers also tell us that the Justice Department is misusing the statutes and disregarding Congressional intent that high level offenders be the focus of federal drug enforcement.[12]

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[6] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law,* Oxford University Press, 2008, p. 3.

[7] FoxNews.com, "Locked Up for Life," Dec. 4, 2008, http://www.foxnews.com/story/0,2933,461747,00.html.

[8] Mark A.R. Kleiman, *When Brute Force Fails: How to have less crime and less punishment,* Princeton University Press, 2010.

[9] Nathan James, The Federal Prison Population Buildup: Overview, Policy Changes, Issues and Options, Congressional Research Service, R42937, Jan. 22, 2013, p.2.

[10] U.S. Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy, May 2007, Figure 2–7, p. 22.

[11] U.S. Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy, May 2007, Figure 2–4, p. 19.

[12] H.Rept. 99–845, Part 1, to accompany H.R. 5394, Narcotics Penalties and Enforcement Act of 1986, enacted in P.L. 99–570, Title I, Subtitle A—Narcotics Penalties and Enforcement Act of 1986. ("The Committee strongly believes that the Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs." at pp. 11–12.)

The average weight of 41 federal crack cocaine cases was 3.1 grams in the District of New Hampshire in 2006.[13] Unless these offenders were actually murderers or intimidating witnesses, their federal prosecution for these tiny quantities of drugs was a waste of the energies of federal agents, the talents of federal prosecutors, the judgment of federal judges and space on precious federal prison beds. In 2006, over one-third of federal crack cases involved less than 25 grams, half the weight of a candy bar.[14] This is the waste of investigational and prosecutorial energy properly directed at international drug lords or criminal gangs that keep cocaine flowing to the crack houses. In FY 2012, the largest category of federal drug cases involved marijuana (6,992), far exceeding the number of heroin cases (2,192) and crack cocaine cases (3,511).[15]

Eighth, the task force (or its successors) should revise the criteria regarding whom to incarcerate and for how long. Congress wanted the Justice Department to focus on high level offenders by enacting the Anti-Drug Abuse Act of 1986[16] but Congress selected relatively small quantities to trigger the mandatory sentences.[17] For decades, everyone has understood that those quantities—selected in haste—were a mistake and are too low. These quantities enable prosecutors to force low-level offenders to testify against others in an attempt to obtain a departure from the mandatory sentence by providing "substantial assistance."[18] Even those sentences are terribly long. More importantly, only a tiny number of high-level traffickers are actually snared. The Justice Department almost never uses the king-pin statute, 21 U.S.C. 848, according to the U.S. Sentencing Commission.[19]

CONCLUSION

The limitations on federal government power in the Constitution mean that the federal criminal justice footprint should remain a relatively small part of the nation's criminal justice system. But the Acts of Congress are powerful examples for the legislatures of the 50 states. When Congress enacted mandatory drug sentences, many states followed. Similarly, the actions of this task force could have profound positive effects across the nation and our criminal justice system.

Overcriminalization has led to an enormous increase in the federal prison population. According to a 2013 Congressional Research Service Report, the federal prison population has risen almost 800% in 30 years, from 25,000 in 1980 to 219,000 in 2012.[20] Overall, the federal prison system is operating at 39% over capacity. **We do not need to spend $236 million in FY2014 to build more federal prisons on top of $8.5 billion for operations, as the Administration requested;**[21] we could let thousands of low-level, low-risk offenders out of federal prison.

The American population under correctional control has grown enormously. If this task force helps shrink the population subject to federal punishment, the effect on the total punished population may be small, but it could have a large indirect effect as state legislatures follow Congress's example.

The convening of this task force is one of the most positive developments in criminal justice policy in many years. I commend you for this undertaking. If there is any way that the Criminal Justice Policy Foundation can assist your work, do not hesitate to contact us.

Mr. SENSENBRENNER. I would like to thank both of the witnesses for their very useful testimony. I will get back to one of you or both of you with the hot idea that I have, which might be off the record,

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[13] U.S. Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy, May 2007, Table 5–2, p. 108.

[14] U.S. Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy, May 2007, Table 5–3, p. 112.

[15] U.S. Sentencing Commission, 2012 Sourcebook of Federal Sentencing Statistics, Table 33.

[16] H.Rept. 99–845, Part 1, see Note 11, *supra.*

[17] E.g., 100 g. of heroin, 500 g. of cocaine, 5 g. of cocaine base ("crack"), 10 g. of PCP (or 100 g of a mixture containing a detectable amount of PCP, 1 g. of LSD, 40 g. of fentanyl, 100 kg. of marihuana. (P.L. 99–570, 100 STAT. 3207–3; 21 U.S.C. 841(b)(1)(B)).

[18] P.L. 99–570, section 1007(a); 18 U.S.C. 3553(e).

[19] U.S. Sentencing Commission, 2012 Sourcebook of Federal Sentencing Statistics, Table 33. http://www.ussc.gov/Research__and__Statistics/Annual__Reports__and__Sourcebooks/2012/Table33.pdf.

[20] Nathan James, The Federal Prison Population Buildup: Overview, Policy Changes, Issues and Options, Congressional Research Service, R42937, Jan. 22, 2013.

[21] Department of Justice FY2014 Budget Request, Press Release, April 10, 2013. http://www.justice.gov/opa/pr/2013/April/13-ag-413.html.

because the bell has rung, and that might be just as good. So I thank everybody for their very useful participation. I think we got a lot of the issues out that we need to deal with. And without objection, the Task Force is adjourned.

[Whereupon, at 10:20 a.m., the Task Force was adjourned.]

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