



**Written Statement of
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**Before the
House Committee on the Judiciary
Over-Criminalization Task Force**

Re: "Defining the Problem and Scope of Over-criminalization and Over-federalization"

June 14, 2013

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Mr. Benjamin is the founding partner of the Richmond, Virginia firm Benjamin & DesPortes. He also serves as Special Counsel to the Virginia Senate Courts of Justice (Judiciary) Committee, and is a member of the Virginia Board of Forensic Science and the Virginia Indigent Defense Commission. He is the President of the National Association of Criminal Defense Lawyers, a Fellow of the American Board of Criminal Lawyers, and a Past President of the Virginia Association of Criminal Defense Lawyers. Mr. Benjamin was counsel in the landmark Virginia Supreme Court decision recognizing a constitutional right to forensic expert assistance at state expense for indigent defendants. In other cases, he argued through the trial courts and on appeal that Virginia's mandatory fee caps on compensation for court-appointed counsel deprived indigent defendants of conflict-free representation, and he led the litigation and legislative effort to abolish those caps.

At the request of the Virginia Supreme Court, Mr. Benjamin helped establish and chair an annual Advanced Indigent Defense Training Seminar to draw top lecturers from across the country to train Virginia's defenders at no cost. With his law partner, he won the non-DNA exoneration and release of a man serving a life sentence for a murder he did not commit, and he argued in the United States Supreme Court that a Richmond trespassing policy violated the free speech rights of public housing residents. He assisted the State Crime Commission in the creation of Virginia's Writs of Actual Innocence, and after determining that criminal defendants throughout Virginia were routinely losing their appellate rights because of attorney error, he helped draft the procedure that was enacted by the Virginia General Assembly to restore those rights. When biological evidence was discovered in twenty years of old case files stored in Virginia's crime laboratories, he helped persuade state political leadership to order statewide DNA testing. When the pace of that testing stalled, he worked to obtain the passage of two successive bills mandating effective notification of interested parties that this new evidence had been discovered. He is a recipient of the Virginia State Bar's Lewis F. Powell Pro Bono Award in recognition of his years of indigent defense and efforts toward indigent defense reform. And he is a frequent lecturer on criminal justice and defense issues.

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My name is Steve Benjamin, and I am the President of the National Association of Criminal Defense Lawyers (NACDL). On behalf of NACDL, I commend the House Judiciary Committee for establishing the Overcriminalization Task Force to review and propose possible solutions to our country's serious problem of overcriminalization. Because NACDL represents the national criminal defense bar in all of its diversity, both in membership and beliefs, it is meaningful that this Task Force represents a bipartisan effort to address the problem at hand. As a practitioner from the Commonwealth of Virginia, I am personally grateful for the leadership and support of two members from my own Congressional delegation, Judiciary Committee Chair Goodlatte and Task Force Ranking Member Scott, whose work on this critical issue demonstrates, yet again, that the danger of overcriminalization transcends any ideological divide.

NACDL is also grateful for the opportunity to share our expertise and perspective with the Task Force today. As the Task Force embarks on this important and unprecedented project, NACDL urges you to view the problem expansively. Overcriminalization in America has a direct impact on commerce, free enterprise, and innovation, but it is not solely a white collar problem. It embraces policies and practices that affect every person in society. Thus, NACDL urges the Task Force to take this opportunity to consider major systemic reform. This problem is not abstract or theoretical—at this very moment we are living with the consequences of a misguided public infatuation with the use of criminal law as a massive tool of social and economic control. That infatuation has left the United States with more prisoners than any other nation on earth, an estimated 65 million Americans marred by a criminal record, and billions of dollars unnecessarily diverted from core functions and responsibilities of government.¹

The dynamic between overcriminalization and overincarceration cannot be ignored. Each comes at substantial cost—whether directly through expenditures on courts, prosecutors, and prisons, or indirectly as a financial burden on our citizens, businesses, and economy created by the threat of the criminal sanction and the uncertainty such a threat creates. When combined, however, the costs of overcriminalization and overincarceration are a tremendous weight on our society as a whole. This weight is unsustainable morally, as well as financially. Therefore, the fundamental question that this Task Force must address is whether the federal criminal law should be an endlessly expansive universe, or whether it is time to return to the fundamental principle that the use of the criminal law is essentially a state function limited to addressing genuinely bad behavior.

¹ Michelle Natividad Rodriguez and Maurice Emsellem, *65 Million "Need Not Apply" The Case for Reforming Criminal Background Checks for Employment* (The National Employment Law Project) (March 2011) available at http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1 (last visited June 11, 2013).

I. Introduction

Overcriminalization should concern—if not frighten—each and every person in the United States. In 1998, the American Bar Association’s Task Force on the Federalization of Crime described the federal criminal law as being so large that there existed “no conveniently accessible, complete list of federal crimes.” As of 2003, over 4,000 offenses carried criminal penalties in the United States Code.² By 2008, that number had increased to over 4,450.³ In addition, it is estimated that there are at least 10,000, and possibly as many as 300,000, federal regulations that can be enforced criminally.⁴ Enforcement of this monstrous criminal code has resulted in a backlogged judiciary, overflowing prisons, and the incarceration of innocent individuals who plead guilty to avoid the draconian sentences that prosecutors often seek when individuals assert their right to trial. Enforcement of this inefficient and ineffective scheme is, of course, at tremendous taxpayer expense.

At its core, the problem the Task Force will explore is a criminal regime that is an affront to the most fundamental notions of fairness, with profound implications for the average person. In its current state, our criminal justice system too frequently prosecutes crimes and imposes sentences without ample justification. As Harvard Professor Herbert Wechsler put it, criminal law “governs the strongest force that we permit official agencies to bring to bear on individuals.”⁵ A governmental power without limits is a formula for abuse and injustice. 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. When Congress disregards these constitutional and prudential limits by resorting to unnecessary criminalization, and criminalization without adherence to fundamental principles, it is abusing our government’s greatest power.

The harm of overcriminalization does more than injure an individual defendant; it damages our criminal justice system and society as a whole. Although this harm is amplified by the Executive and Judicial branches, as discussed by NACDL’s joint report with the Heritage Foundation, “*Without Intent: How Congress Is Eroding the Criminal Intent Requirement in*

² John S. Baker, Jr., The Federalist Soc’y for Law & Pub. Policy Studies, *Measuring the Explosive Growth of Federal Crime Legislation* (2004), at 3, available at http://www.fed-soc.org/doclib/20070404_crimreportfinal.pdf (last visited June 11, 2013).

³ John S. 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/LegalIssues/lm26.cfm> (last visited June 11, 2013).

⁴ Task Force on Federalization of Criminal Law, Criminal Justice Section, Am. Bar Ass’n, *The Federalization of Criminal Law*, at 9 n.11, app. C (1998).

⁵ Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952).

Federal Law,” the problem originates through systematic failures in the legislative process.⁶ And, just as the problem begins with Congress, so must any meaningful reform. We simply cannot continue an unnecessary race to expand the criminal law or remain passive as it snowballs beyond control. The creation of this Task Force and the commencement of these hearings evidence recognition of this mandate and a commitment to reform.

II. Defining Overcriminalization: A Problem At Every Stage of the Criminal Process

The harm of overcriminalization exists at every stage of the criminal process. While it can take many forms, overcriminalization most frequently occurs through (i) the ambiguous criminalization of conduct without meaningful definition or limitation, (ii) the enactment of criminal statutes that lack a meaningful criminal intent (or *mens rea*) requirement, (iii) the imposition of vicarious liability for the acts of others with insufficient evidence of personal awareness or neglect, (iv) the expansion of criminal law into areas of the law traditionally reserved for regulatory and civil enforcement agencies, (v) the federalization of crimes traditionally reserved for state jurisdiction, (vi) the creation of mandatory minimum sentences that frequently bear no relation to the wrongfulness or harm of the underlying crime, and (vii) the adoption of duplicative and overlapping statutes. These problems are reflected in federal dockets across the nation.

A. Poor Legislative Draftsmanship

When tort or other civil laws are vague, unclear, or confusing, substantial consequences can result. But those consequences generally are monetary. When the criminal laws are vague, unclear, or confusing, the consequences are dire. Where Congress fails to speak clearly and to legislate criminal offenses with the necessary specificity, it creates governmental authority to deprive people of their physical freedom and personal liberty for conduct they neither could nor did know was a crime. This failure in simple draftsmanship endangers the freedom of well-meaning, law-abiding individuals, and it creates substantial uncertainty for the business community and an environment ripe for selective or misguided prosecution.

Consider, for example, the Foreign Corrupt Practices Act (FCPA) and the risk it poses for legitimate businesses and the people who work for them.⁷ The purpose of the FCPA—to deter and redress bribery and corruption worldwide—is laudable, but its overly broad language has created an enforcement climate where the statute means whatever the government says it means.

⁶ 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 June 11, 2013) (hereinafter “*Without Intent Report*”).

⁷ Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 *et seq.* (2013) (hereinafter “FCPA”).

Despite its more than 30-year history, published judicial decisions interpreting the FCPA are sparse, because enforcement has largely focused on corporations unwilling to undertake the life-or-death risk inherent in the defense of a felony criminal case. Further evidence of this point came last fall when, after significant pressure, the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) issued a 120-page guide on the government's interpretation of the FCPA.⁸ While this guidance is certainly helpful to companies and individuals seeking to comply with the current enforcement regimes, the manual sets forth untested legal theories. Because the statutory language does not provide all of the answers to the questions that its broad language permits, the enforcers of the law are left to "fill in the blanks." And because the document is not legally binding, it affords no reliable protection from prosecution even if a regulated person or entity acts in accordance with the Government's enforcement guidance. Such a state of affairs is not only bad for business and economic certainty, it is fundamentally unfair and in direct conflict with our constitutional principles of fair notice and due process.

Nearly every day another news story appears on the Computer Fraud and Abuse Act (CFAA), a statute that epitomizes the epidemic of overcriminalization and the risk it imposes on innocent individuals.⁹ Originally enacted in 1984, the CFAA addressed computer hacking as it existed prior to the commercialization of the internet. Since then, however, Congress has expanded the statute to criminalize conduct that the average internet-user engages in daily. Using an office computer to surf the web in violation of an employer's computer use policy, or using a false name or lying about one's age on a social networking site, are now federal offenses. Violating a non-compete clause in an employment contract, which under certain circumstances may appropriately result in civil liability, is now a federal crime. These examples may sound laughable, but such prosecutions are underway or have already taken place.¹⁰ Surely these are not an appropriate use of federal criminal power. Rather than direct its prosecutors to focus on cyber-attacks by foreign entities on our nation's critical infrastructure, DOJ is encouraging its prosecutors to haul in high school students and charge them with federal crimes for pranking the

⁸ U.S. Department of Justice Criminal Division and the U.S. Securities and Exchange Commission Enforcement Division, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (November 2012) available at <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> (last visited June 11, 2013).

⁹ The Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2013) (hereinafter "CFAA").

¹⁰ See *United States v. Drew*, 259 F.R.D. 449 (C.D.Cal. 2009) (prosecution under CFAA for violating MySpace's terms of service, which prohibited lying about identifying information, including age); see also *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010) (prosecution under CFAA for accessing personal information in Social Security Administration databases for nonbusiness reasons); *United States v. John*, 597 F.3d 263 (5th Cir. 2010) (prosecution under CFAA for using information, obtained with authorization, in an unauthorized manner); but see *U.S. v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (in prosecution for breach of confidentiality agreement court held that the phrase "exceeds authorized access," within the meaning of the Computer Fraud and Abuse Act, is limited to access restrictions, not use restrictions).

website of a rival school's football team—an actual example employed in DOJ's Computer Crimes Prosecution Manual.¹¹

B. The Absence of Meaningful Criminal Intent Requirements

Criminal offenses lacking meaningful culpable state-of-mind, or criminal intent, requirements inevitably lead to unjust prosecutions, convictions, and punishments. With rare exception, the government should not be allowed to wield its power against an accused person without having to prove that he or she acted with a wrongful intent. Absent a meaningful criminal intent requirement, a person's other legal and constitutional rights cannot protect him or her from unjust punishment for making honest mistakes or engaging in conduct that he or she had every reason to believe was legal. The presence of a strong criminal intent requirement in a criminal offense, applicable to all the material elements of that offense, is the proper and effective mechanism for preventing this type of injustice.

Despite the inherent effectiveness of a meaningful criminal intent requirement, a number of newly enacted criminal offenses frequently contain only a weak intent requirement, if they have one at all. In May, 2010, NACDL and the Heritage Foundation completed a study of the federal legislative process for non-violent criminal offenses introduced in the 109th Congress in 2005 and 2006.¹² 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.¹³ The study also documented the poor legislative draftsmanship discussed above, finding that “[n]ot only do a majority of enacted offenses fail to protect the innocent with adequate *mens rea* requirements, many of them are so vague, far-reaching, and imprecise that few lawyers, much less non-lawyers, could determine what specific conduct they prohibit and punish” and concluding, ultimately, that Congress is frequently enacting “fundamentally flawed” criminal offenses.¹⁴

As evidenced in the *Without Intent* Report, most new crimes only require general intent, i.e., “knowing” conduct, which federal courts usually interpret to merely mean conduct done consciously. The accused need not have known that he or she was violating the law or acting in a wrongful manner. In the case of traditional crimes, such as murder, rape, or robbery, general intent is sufficient because the conduct is in itself wrongful. However, when applied to conduct

¹¹ Department of Justice Office of Legal Education, *Prosecuting Computer Crimes* 39 available at <http://www.justice.gov/criminal/cybercrime/docs/ccmanual.pdf> (last visited June 11, 2013) (hereinafter “Computer Crimes Manual”).

¹² *Without Intent* Report, *supra* note 6 at X.

¹³ *Id.*

¹⁴ *Id.*

that is not inherently wrongful, such as certain paperwork violations, the “knowingly” requirement allows for punishment without any shred of evil intent, culpability, or sometimes even negligence.

These types of criminal provisions do not effectively deter criminal activity because they do not require the accused to have any notice of the law or the wrongful nature of his or her conduct. Yet, 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.¹⁵ This type of criminalization occurs alongside the enactment of criminal laws that, on their face, contain no intent requirements. Despite every intention to follow the law, even the most cautious person can be found guilty under such laws.

Similarly, through the imposition of vicarious liability for the acts of others, people can be prosecuted, convicted, and punished without any evidence of personal awareness or neglect. Under this theory of criminal liability, off-duty supervisors can be criminally punished for the accidental acts of their employees absent any knowledge, approval, or connection to said conduct¹⁶ and landowners can be convicted for moving sand onto their own property without a federal permit.¹⁷ Corporate criminal liability employs the doctrine of *respondeat superior*, which is identical to the standard used in civil tort law. This means that, as long as an employee is acting within the scope of his or her employment (as broadly defined), the corporation is deemed criminally liable for that employee’s actions, despite the corporation’s best efforts to deter such behavior.¹⁸ Regardless of compliance programs or employment manuals, or even strict instructions to the contrary, if an employee violates the law, then the corporation can be criminally punished.

¹⁵ 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 “knowingly” violating “any provision of [Chapter 16]” and, in that one clause, criminalizes *all* the conduct proscribed by any of the Lacey Act’s statutory provisions or corresponding regulations.

¹⁶ See *United States v. Hanousek*, 176 F.3d 1116, 1120-23 (9th Cir. 1999) (upholding conviction of an off-duty construction supervisor under the Clean Water Act when one of his employees accidentally ruptured an oil pipeline with a backhoe).

¹⁷ See *United States v. Rapanos*, 376 F.3d 629, 632-33, 640-44 (6th Cir. 2004) (affirming defendant’s conviction under the Clean Water Act due to classification of his property as federally protected “wetlands”).

¹⁸ See *New York Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494 (1909) (holding that, “in the interest of public policy,” corporations can be held criminally liable for the actions of their agents); see also *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972) (holding the corporation liable “for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent”).

C. Regulatory Criminalization: The Criminalization of Business and Economic Activity

Congress frequently delegates its criminal lawmaking authority by passing a statute that establishes a criminal penalty for the violation of any regulation, rule, or order promulgated by an Executive Branch agency or an official acting on behalf of such an agency. This form of overcriminalization is referred to as “regulatory criminalization,” and has a dramatic impact on business and economic activity. Because the lack of meaningful criminal intent requirements together with the application of vicarious criminal liability allow for criminal punishment absent blameworthiness, the ever-increasing expansion of the criminal code through regulatory criminalization is particularly problematic. The oversight of business behavior, questionable judgment calls, and compliance with complicated and extensive rules and regulations, is no longer reserved for civil and regulatory enforcement agencies, but is now under the jurisdiction of federal prosecutors.

The expansion of the criminal code through regulatory criminalization carries significant costs in addition to the risk that regular business activity could result in prison sentences. The thousands of criminal offenses in the United States Code are already spread over 49 different titles. Federal regulations, numbering anywhere from 10,000 to 300,000, are scattered throughout 200 volumes of the Federal Register. If a business hopes to stay on the right side of the law, it must expend significant resources to sift through this complicated network of regulations and, even then, the proper course of action may be unclear. Although large businesses may be able to hire experienced legal counsel to guide them through this network and establish strong compliance programs, the same cannot be said for many small businesses. Even where a business is able to afford such a safety net, the exorbitant cost is most likely passed onto the consumer, further burdening the economy. Such a system not only stifles innovation, but curbs the entrepreneurial spirit that should be the backbone of our economy.

Civil and regulatory agencies have diverse and effective tools at their disposal to prevent misconduct, order compliance, and impose monetary penalties to compensate injured parties or disgorge unlawful profits. Whereas the criminal process is executed at the taxpayer’s expense and often causes innocent employees to lose their jobs, civil and regulatory enforcement can minimize those costs and produce financial benefits without guaranteeing business failure, job losses, and possible prison terms.

D. The Overfederalization of Crime

Another equally disturbing congressional trend is the overfederalization of crime. Congress tends to respond to every crisis with a new federal crime. As former United States Supreme Court Chief Justice William H. Rehnquist said:

Over the last decade, Congress has contributed significantly to the rising caseload by continuing to federalize crimes already covered by state laws. . . . The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system.¹⁹

The federal criminal code is littered with offenses that have traditionally been the domain of state criminal law, and it is often the case that these offenses have attenuated connections to the powers of the federal government.

Aside from the obvious tension that is created by dual federal-state criminal prosecution authority, the negative impact on individual defendants is significant. The federal system has generally harsher punishments, stricter forfeiture rules, and fewer innovative programs for dealing with low-level offenders. Yet again, an individual defendant's experience in the criminal justice system ultimately turns not on his or her actual conduct or intent, but rather on the prosecutorial authority. Two people, who possess the same intent and commit identical conduct, may nevertheless receive significantly disparate treatment and punishment based solely on the federal government's decision to take the case of one and to leave the other for the state to prosecute.²⁰

Consider, for example, the federal prosecution of Carol Anne Bond for violating 18 U.S.C. § 229(a)(1), a statute designed to implement the United States' treaty obligations under the 1993 Chemical Weapons Convention.²¹ Carol Anne Bond is not a terrorist. Rather, she is a scorned wife who sought revenge against her best friend for cheating with Bond's husband. Bond obtained common household grade chemicals and applied them to surfaces of her former friend's property, intending to cause an uncomfortable rash. Instead of allowing local law enforcement to handle the matter as a physical assault or another state offense, federal prosecutors stepped in and prosecuted Bond for violating the Chemical Weapons Convention. Bond's conviction is pending before the U.S. Supreme Court. Regardless of the outcome, any sound justification for such a prosecution is undoubtedly lacking—is this really the proper domain of the federal government and an efficient use of federal resources? The overfederalization exemplified in the *Bond* case is, unfortunately, not unusual, and this Task

¹⁹ William H. Rehnquist, 1998 Year-End Report of the Federal Judiciary (Jan. 1, 1999), at 4-5. *See also e.g.*, *Rehnquist Blames Congress for Courts' Increased Workload*, Wash. Times, A6, (Jan. 1, 1999).

²⁰ *See* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 Am. U. L. Rev. 747, 764 (2005).

²¹ *Carol Anne Bond v. United States*, 581 F.3d 128 (3rd Cir. 2009), *cert. granted*, 131 S. Ct. 455 (2010) (No. 12-158, 2013 Term).

Force should explore the impact of overfederalization in the area of other crimes, such as carjacking, mortgage fraud, and drug offenses, to name just a few.

E. Disproportionate Sentences and Mandatory Minimums Render Blameworthiness and Harmfulness Irrelevant

The problems created by overcriminalization are exacerbated by sentences that fail to account for the individual circumstances of particular conduct. While a potential sentence of 30 years may serve to deter a person from intentionally violating the law, such a sentence can have no deterrent effect where a person had no intention to commit a wrong or had every reason to believe his or her conduct was lawful. Rather, the combination of such high sentences with broadly written criminal offenses that lack meaningful criminal intent requirements often results in the incarceration of innocent people. Few people would risk trial facing incarceration of 10 or 20 years when the plea offer is “only” 15 months. A genuine lack of blameworthiness is no match for this risk.

Further, mandatory minimum sentences often bear little or no relation to the wrongful nature or harm of the underlying crime. For example, a multi-year prison term imposed for possession of a single bullet without a firearm or corrupt motive is disproportionate to the blameworthiness of the accused.²² Mandatory minimums remove discretion from judges, who are best suited to assess a particular person’s culpability because they are the party closest to the facts and circumstances of the particular matter. Instead, mandatory minimums concentrate too much discretion in the hands of the charging prosecutors. Once charged, defendants facing mandatory minimums lose any significant ability to contest their culpability and frequently plead guilty to *some* of the charges in order to avoid imposition of the sentences associated with *all* of the charges.

The correlation between various forms of overcriminalization—mandatory minimums or disproportionately high Sentencing Guidelines, and weak or no criminal intent requirements—cannot be ignored. Under Section 924(c)(1)(A) of the Gun Control Act of 1968, the mandatory minimum sentence for possession of a firearm during a crime of violence or drug trafficking offense is five years.²³ However, that minimum increases to seven years if the gun is *brandished* and to ten years if the gun is *discharged*. If, for example, a particular defendant, charged under this statute, *accidentally* discharges the gun, then his sentence automatically increases to 10

²² See *United States v. Yirkovsky*, 259 F.3d 704, 707 n.4 (8th Cir. 2001) (reasoning that although a sentence of fifteen years for possessing a single bullet “is an extreme penalty under the facts as presented to this court,” “our hands are tied in this matter by the mandatory minimum sentence which Congress established”); see also *United States v. Yirkovsky*, 276 F.3d 384, 385 (8th Cir. 2001) (Arnold, J., dissenting from denial of rehearing en banc) (stating “that on its face the sentence is grossly disproportionate to the offense for which it was imposed”).

²³ 18 U.S.C. § 924(c)(1)(A) (2013).

years.²⁴ Due to the failure of Congress to include a criminal intent provision in this statute, a person who neither brandishes nor intentionally discharges a gun will have his sentence double automatically.

The crime of attempted illegal reentry further demonstrates the connection between mandatory minimums and criminal intent requirements. In order to be convicted of the crime of attempted illegal reentry, punishable by up to 20 years in prison,²⁵ the accused may or may not need the specific intent to attempt to reenter illegally; in most circuits, all that must be shown is evidence of general intent.²⁶ Therefore, a person's guilt and possible punishment of 20 years depends on the location of his conduct and not the conduct itself. Such variances, removed entirely from the accused's conduct and intent, do not deter criminal activity, fail to treat similarly situated persons the same, and are fundamentally contrary to our system of fairness and justice.

The same can be said for the all too frequently draconian U.S. Sentencing Guidelines that continue to recommend disproportionately high sentences across a broad spectrum of criminal offenses. NACDL has long deplored excessive sentences, especially as applied to non-violent offenders, particularly for offenses involving controlled substances. Increasingly, however, the Guidelines at §2B1.1 now regularly create unjust results in white collar cases due to the extraordinary weight placed on "loss" as a sentencing factor. These "loss" calculations frequently do not relate to actual culpability. The ambiguous concept of "loss," both in the Guidelines and in statutes, sometimes fails to account for the role an individual played in a particular scheme, an individual's specific culpability, or even whether the individual financially gained anything from the conduct. For example, the CFAA defines loss very broadly: "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service."²⁷ The DOJ's Computer Crimes Prosecution Manual outlines a variety of different ways to increase the "loss" in order to reach the statutory threshold of \$5,000 in loss, and encourages prosecutors to "think creatively about what sorts of harms in a particular

²⁴ *Dean v. United States*, 129 S.Ct. 1849 (2009).

²⁵ 8 U.S.C. § 1326(a)-(b) (2013).

²⁶ The Ninth and Eighth Circuits require evidence of specific intent. See *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1190 (9th Cir. 2000); see also *United States v. Kenyon*, 481 F.3d 1054, 1069 (8th Cir. 2007). The majority of circuits, however, hold that general intent is sufficient to be convicted of attempted illegal reentry. See *United States v. Reyes-Medina*, 53 F.3d 327 (1st Cir. 1995); *United States v. Rodriguez*, 416 F.3d 123, 125 (2nd Cir. 2005); *United States v. Morales-Palacios*, 369 F.3d 442, 449 (5th Cir. 2004); and *United States v. Peralt-Reyes*, 131 F.3d 956, 957 (11th Cir. 1997).

²⁷ 18 U.S.C. § 1030(e)(11).

situation meet this definition.”²⁸ Prosecutors are not, however, encouraged to consider the relationship between an individual’s actual culpability and the losses they are working so hard to compile.

III. The Legislative Branch Has Ceded Control of Its Criminal Lawmaking Authority

No matter which form it takes, overcriminalization results in the abuse of the criminal law and, increasingly, facilitates and encourages the executive branch, rather than the legislative branch, to define the criminal law. Not only are prosecutors given unlimited charging discretion with broad undefined laws at their disposal, but regulatory agencies are empowered to unilaterally enact massive criminal provisions with little oversight. As a result, the legislative branch has not only ceded control of the criminal law, but also the ability to limit the weighty economic, social, and individual costs of the entire criminal justice system. This abdication of Congress’ criminal lawmaking has some additional unintended consequences.

First, the poorly written laws and weak intent standards create an environment that is ripe for selective, and sometimes political, prosecution. Second, poorly drafted laws create too high of a risk to exercise the constitutional right to a trial. The right to have a neutral, third party review the evidence and facts is fundamental to the foundation of our criminal justice system. And, yet, even if an accused person has minimal culpability or a strong defense, when faced with a sentence of 20, 30, or more years, he or she will often forego the right to a trial. Unlimited discretion over charging decisions, along with the power of mandatory minimum sentences and disproportionately high Sentencing Guidelines, afford prosecutors the power to deter the accused from exercising their right to a fair trial. Lastly, overly broad laws combined with inadequate criminal intent requirements allow the criminal law to be improperly used as a tool to pursue civil claims. Both government and corporate entities resort to the threat of a criminal sanction to extract civil judgments and forfeitures, eliminate competitors, and improperly control behavior. Unfortunately, it is not uncommon for companies to provoke government criminal enforcement against each other to obtain corporate advantages and as a way to maintain control over the marketplace.

Our nation’s criminal justice system should not be used as a pawn between competing mega-corporations, as a career ladder for an ambitious prosecutor, as a political device, or as a blank canvas for unelected bureaucrats to expand their regulatory jurisdiction. It is the sacred and solemn duty of Members of Congress to create and define our nation’s laws in a careful and thoughtful manner to prevent such abuses.

²⁸ Computer Crimes Manual, *supra* note 11 at 43.

IV. The Costs of Overcriminalization

While one can attempt to calculate the expense of overcriminalization on the government, in terms of direct expenditures, the true cost of overcriminalization and overincarceration on society is beyond measure. The federal government's expenditure on DOJ and law enforcement significantly outpaces its spending on indigent defense, which is funded through the federal courts. For the 2013 fiscal year, the Judiciary's budget underwent a nearly \$350 million cut, and that cut was further aggravated by the March 1 sequester, which included a \$51 million shortfall for defender services.²⁹ The current and impending cuts to funding for federal indigent defense are precipitating a crisis in many jurisdictions, where defender layoffs, furloughs and office closures threaten the integrity of the federal criminal process. In contrast, the DOJ was federally funded \$26.7 billion dollars for its own operations and the Federal Bureau of Investigation, Bureau of Prisons, and law enforcement generally.³⁰ This is despite the fact that "[v]irtually all of the Judiciary's core functions are constitutionally and statutorily required," as Chief Justice Roberts wrote in his 2012 End of Year Report on the Judiciary, "[u]nlike executive branch agencies, the courts do not have discretionary programs they can eliminate or projects they can postpone."³¹ When considering these inequities in funding, it is important to note that the DOJ also earned over \$3 million in revenue from the fiscal year of 2012 through settlements, non-prosecution agreements, deferred prosecution agreements, and fines.³² At the same time this nation is celebrating the 50th anniversary of *Gideon v. Wainwright*, and its articulation of the Constitutional mandate that all accused persons have access to legal counsel, our indigent defense system is in crisis. The funding discrepancies between the prosecution and enforcement of crimes and the constitutionally mandated defense function certainly shed light on this contradiction.

²⁹ See Chief Judge William B. Traxler, Jr., *Statement on Impact of Sequestration on Judiciary, Defender Funding*, U.S. Courts, (Apr. 17, 2013), available at <http://news.uscourts.gov/statement-impact-sequestration-judiciary-defender-funding> (last visited June 11, 2013); see also David Harper, *Federal Budget Problems Straining Public Defenders' Operations*, Tulsa World, (June 10, 2013) available at http://www.tulsaworld.com/article.aspx/Federal_budget_problems_straining_public_defenders/20130610_11_A1_CUTLIN950590 (last visited June 11, 2013); *Judiciary Seeks Supplemental Funding*, (May 21, 2013) available at <http://news.uscourts.gov/judiciary-seeks-supplemental-funding> (last visited June 11, 2013).

³⁰ Compared with the FY 2012 enacted level, the FY 2013 Budget is essentially the same as FY 2012 in gross discretionary budget authority with an increase of 826 positions. *FY 2013 Budget Summary*, U.S. Dep't of Justice, available at <http://www.justice.gov/jmd/2014summary/pdf/fy14-bud-sum.pdf#bs> (last visited June 11, 2013).

³¹ See *Fiscal Year Funding and Cost Containment Initiatives*, U.S. Courts, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/annual-report-2012/fiscal-year-funding-cost-containment-initiatives.aspx> (last visited June 11, 2013).

³² *Section 1: Management's Discussion and Analysis* at I-3, U.S. Dep't of Justice, available at <http://www.justice.gov/ag/annualreports/pr2012/section1.pdf#section6> (last visited June 11, 2013).

These funding numbers do not, however, provide the full picture of the cost of overcriminalization and overincarceration. A criminalized economy is one that stifles innovation, free enterprise, and capitalism. Overcriminalization is in direct conflict with the free market values and entrepreneurial spirit that are the backbone of this nation's economic system. Worse, a criminalized society—one in which every individual's life has been or will be touched by the criminal justice system—is in direct conflict with the constitutional principles that built our democracy. We cannot continue down this path without putting our fundamental values at risk of obliteration.

V. Conclusion: Consider the Problem of Overcriminalization Broadly and Act Boldly

NACDL appreciates that this hearing is focused on understanding the problem of overcriminalization and that there will be future hearings dedicated to potential solutions. When considering those solutions, NACDL encourages the Task Force to consider the problem of overcriminalization broadly and to act boldly on solutions that will tackle this problem once and for all.

NACDL urges the Task Force to consider the recommendations outlined in the *Without Intent* Report. For example, the enactment of legislation that would apply a meaningful criminal intent requirement by default to laws lacking such a requirement would go a long way toward protecting innocent individuals; but your work should not end there.³³ Representation by overburdened, under-resourced defense attorneys results in wrongful convictions and enormous societal costs, including unnecessary incarceration and the expense of new trials. Yet, right now we see the funding for indigent defense under attack and, notwithstanding the sequestration, not one penny from the prosecutorial budget has been withheld.³⁴ Any reform must look to these funding inequities and begin to assess the impact of criminalization systemically and globally. New criminal penalties offer the illusion of not costing anything, but in reality they carry a tremendous price tag on many levels.

NACDL commends the efforts of this Task Force to address 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

³³ *Without Intent* Report, *supra* note 6 at 26-32 available at <http://www.nacdl.org/withoutintent>. The *Without Intent* Report recommendations are listed in the *Without Intent* Fact Sheet and the *Without Intent* Executive Summary available online at www.nacdl.org/withoutintent.

³⁴ Jordy Yager, *Holder: No furloughs at Justice Department*, The Hill, April 25, 2013, available at <http://thehill.com/homenews/administration/296053-holder-no-furloughs-at-justice-department> (discussing Congressional authorization of DOJ's "reprogramming" of \$313 million in funds to "help stave off automatic budget cuts known as sequestration, which would have forced the department to furlough 59,550 employees") (last visited June 11, 2013).

political spectrum have highlighted the problem of overcriminalization for several years. Hopefully, the creation of this Task Force is a reflection that the message of concern has been heard. NACDL is inspired by your willingness to tackle this problem and stand ready to assist the Task Force in every way possible.

Respectfully,

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